



# Reasonable Accommodation in Federally Assisted Housing\*

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## I. Overview: Laws & Definitions

Over the past several decades, disability rights groups have fought to protect the rights of persons with disabilities to access all aspects of life fully, including employment, education, and housing. In 1988, Congress amended the Fair Housing Act (FHA) to prohibit discrimination that prevented people with disabilities from living in the communities of their choice.<sup>1</sup> The Fair Housing Amendments Act (FHAA) was intended as “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream.”<sup>2</sup>

In addition to adding disability as a protected class, the FHAA created three affirmative obligations for housing providers. The FHAA makes it unlawful:

- To refuse to permit reasonable physical modifications of certain premises;
- To refuse to make reasonable accommodations in housing rules and policies;
- To fail to include certain accessibility features in the design and construction of new multifamily dwellings<sup>3</sup>

These provisions require housing providers to make reasonable exceptions to neutral policies, practices or services, or to make certain reasonable physical modifications when necessary to provide a person with disabilities an equal opportunity to use and enjoy a dwelling.<sup>4</sup> A housing provider must grant a requested reasonable accommodation or modification if it is necessary to eliminate disability-related barriers to the full use and enjoyment of housing and it does not create an undue financial or administrative burden for the housing provider.<sup>5</sup>

This Outline addresses the critical role that reasonable accommodation, as required by federal and state laws, plays in advocacy on behalf of federally assisted housing applicants and residents with disabilities at every stage of the occupancy cycle and touches on other aspects of reasonable accommodation representation, including affirmative litigation and involvement in the HUD administrative and community planning process.

### A. Reasonable Accommodation Laws

Reasonable accommodation rules arise from a number of sources. In addition to the FHAA<sup>6</sup>, the Americans with Disabilities Act (ADA)<sup>7</sup> and the Rehabilitation Act of 1973<sup>8</sup> are federal laws that require reasonable accommodation for individuals with disabilities. Federally assisted housing is subject to all three federal laws, which are generally interpreted interchangeably by courts.<sup>9</sup> Private housing that receives no federal subsidies is subject to the FHAA and ADA. California has also enacted laws requiring reasonable accommodation, such as the Fair Employment and Housing Act (FEHA),<sup>10</sup> the Unruh Civil Rights Act,<sup>11</sup> and the California Persons with Disabilities Act (CPDA)<sup>12</sup>. The California laws are written to provide more expansive protections than federal laws.<sup>13</sup> HUD has also provided sub regulatory guidance to

public housing agencies (PHAs) and owners of federally assisted housing regarding these laws.<sup>14</sup> This Section provides a basic overview of these laws.

## 1. Federal Laws

### The Fair Housing Amendments Act (FHAA)<sup>15</sup>

The FHAA applies to all housing providers—private and public. The FHAA prohibits housing providers from discriminating against applicants or residents because of “handicaps,” which has the same legal meaning as “disability” in other federal legislation.<sup>16</sup> In addition, the FHAA makes it unlawful to refuse “to make reasonable accommodation in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”<sup>17</sup>

### Section 504 The Rehabilitation Act of 1973 (Section 504)<sup>18</sup>

Section 504 provides that no qualified individual with a disability shall “be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.”<sup>19</sup> This statute only applies to those housing providers receiving federal assistance, such as PHAs and owners of project-based Section 8.

### The Americans with Disabilities Act (ADA)<sup>20</sup>

The ADA was enacted in 1990 to extend Section 504’s application to non-federally assisted entities.<sup>21</sup> The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications.<sup>22</sup> Title II of the ADA applies to all programs, services and activities provided or made available by public entities, including PHAs that meet the statutory definition of public entity.<sup>23</sup> Title III of the ADA covers public and common use areas of housing developments when these public areas are, by their nature, open to the general public.<sup>24</sup> In California, any state-funded, operated, or administered agency must be in compliance with the ADA’s anti-discrimination provisions.<sup>25</sup>

### The Americans with Disabilities Act Amendments Act (ADAAA)

In 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA).<sup>26</sup> The ADAAA became effective on January 1, 2009, and does not apply retroactively.<sup>27</sup> The Act clarifies certain definitions under the ADA in response to Supreme Court decisions that had narrowed their scope,<sup>28</sup> including the definition of the term “disability.”<sup>29</sup> The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA.<sup>30</sup>

#### **Federal Regulations**

Section 504: 24 C.F.R. Part 8; FHAA: 24 CFR §100.204; ADA: 28 CFR §35.130(b)(7)

California’s FEHA prohibits discrimination on the basis of disability and stresses that the law is intended to “afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”<sup>31</sup> The Unruh Civil Rights Act prohibits discrimination on the basis of disability.<sup>32</sup> It also sets the FHAA as a floor regarding protection against discrimination. The California Disabled Persons Act (CDPA) specifically requires reasonable accommodation and modification in all housing accommodations offered for rent, lease, or compensation.<sup>33</sup>

<b>Summary of Federal and California Laws</b>	
<b>Law</b>	<b>Who is Covered</b>
Fair Housing Amendments Act (FHAA)	All housing except as exempted by 24 C.F.R. § 100.10
Americans With Disabilities Act (ADA)	State and local government funded entities (i.e. funded by a state housing finance agency, community development or redevelopment agency or housing authorities)
Section 504	Any entity receiving federal funds
California Fair Employment and Housing Act (FEHA)	All landlords, developers, banks, realtors, appraisers, brokerage services, etc.
California Unruh	All businesses of any kind
California Disabled Persons Act (CDPA)	All public accommodations

## **B. Definitions**

### **1. What is a Reasonable Accommodation?**

As discussed above, federal and California laws require housing providers to make reasonable accommodations and modifications for applicants and residents with disabilities. A reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling.<sup>34</sup> A reasonable modification is a physical change to the existing premises occupied or to be occupied by a resident or applicant that is necessary to afford the person full enjoyment of the premises because of his or her disability.<sup>35</sup>

### **2. What Qualifies as a Disability for the Purposes of Reasonable Accommodation?**

#### Federal Definition of Disability<sup>36</sup>

For the purpose of federal civil rights laws, a person with a disability is any person who: 1) has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such impairment; or 3) is regarded as having any such impairment.<sup>37</sup> Under federal

law, “the definition of disability . . . shall be construed in favor of broad coverage.”<sup>38</sup> Further, whether an impairment substantially limits a major life activity “shall be made without regard to the ameliorative effects of mitigating measures.”<sup>39</sup>

### California Definition of Disability<sup>40</sup>

The California definition of disability differs from the federal definition. Instead of requiring that the disability “substantially limit[] major life activities,” California law only requires that the tenant demonstrate that the disability limits major life activities. This difference means that California law protects a broader group of people than federal law.

As with the federal definition of disability, a person should not consider mitigating measures when determining the extent of the limitation on major life activities. The definition of major life activities should also be broadly construed.<sup>41</sup>

### Exceptions to the Definition of Disability

Both federal and California law exempt from coverage current users of illegal drugs.<sup>42</sup> The FHAA additionally exempts persons who pose a direct threat to the health and safety of others or who would cause substantial physical damage to the property of others.<sup>43</sup> California law also excludes from coverage people with sexual behavior disorders, compulsive gambling, kleptomania, and pyromania.<sup>44</sup>

#### *Drug Use*

People recovering from drug addiction are considered disabled and, therefore, protected by disability rights laws, unless those individuals are currently engaged in the illegal use of a controlled substance.<sup>45</sup> While the law does not define “current,” courts have found that recovering alcoholics and drug addicts are *not* current illegal users provided they remain drug free for time periods ranging from a few months to at least one year.<sup>46</sup> At least one court found that this time period is measured at the date when the alleged discriminatory housing acts occurred.<sup>47</sup> Additionally, an individual with a disability may include someone who is not currently engaging in the use of illegal drugs and who has successfully completed a drug rehabilitation program, is currently participating in such a program, or is mistakenly regarded as engaging in illegal drug use.<sup>48</sup>

#### *Direct Threat*

A direct threat must be objectively determined, not subjective and not based on fear, assumption, or stereotype.<sup>49</sup> Furthermore, the housing provider has an obligation to provide a reasonable accommodation that may help eliminate the threat.<sup>50</sup> If an accommodation that mitigates the threat can be made, then the individual’s tenancy must be protected.<sup>51</sup>

A number of courts have found that a housing provider violated its fair housing obligations when it refused to consider a reasonable accommodation that would mitigate a threat, even where

physical violence was involved.<sup>52</sup> In some cases, courts have held that a reasonable accommodation may be necessary where a person has pleaded to or been convicted of criminal activity that would threaten the health and safety of others.<sup>53</sup>

## II. How to Request a Reasonable Accommodation

HUD has provided a number of guidelines regarding the process of requesting a reasonable accommodation. These can be found in both HUD PIH Letter 2007-05<sup>54</sup> and the HUD/DOJ Joint Statement on Reasonable Accommodation.<sup>55</sup> There are a number of components to requesting a reasonable accommodation: initial requests, verification, and the interactive process.

### A. Initial Requests:

Once a tenant tells a housing provider that she has a disability and needs something changed in order to accommodate her disability, the provider is obligated to begin the reasonable accommodation process.<sup>56</sup> A request may be oral or written.<sup>57</sup> However, the better practice is to request the accommodation in writing, so that there is a clear record of the request.

Requests should include the following elements:

#### 1. Disability

The tenant must inform the housing provider that she has a disability and that its manifestations prevent her from complying with a lease term or prevent her from obtaining equal housing benefits.

The accommodation request need NOT state the name of the disability. A housing provider may not ask about the diagnosis, treatment, or the nature or extent of the disability.<sup>58</sup> Some clients may not want the name of their disability revealed for a number of reasons, including stigma and privacy. If the housing provider asks for verification of the disability, the person verifying the disability may simply state that the tenant has a disability that causes \_\_\_\_\_ symptoms that need to be accommodated by a change in \_\_\_\_\_ policy, as that change would help alleviate the barriers to tenant's ability to access or remain in the housing.

#### 2. Accommodation

The request should state specifically what accommodation the tenant is seeking. For example, this section might request a designated parking area, a cosigner for the lease, or that rent is accepted at a later date in the month.

#### 3. Nexus

This portion is vital. The letter must state how the accommodation is related to the person's disability and how it will help the tenant access or remain in the housing program.<sup>59</sup>

**Practice Tip:** Though housing authorities are required to respond promptly to a reasonable accommodation request, they often take months. In order to encourage a speedier process, an advocate should set a concrete time frame for the housing provider's response in the initial written request.

## **B. Verification**

The housing provider may want to verify the request. There are three possible verification scenarios:

1. If a person's disability is obvious or known, and the need for the requested accommodation is known, then the housing provider should not ask for any more information.<sup>60</sup>
2. If the disability is known or obvious, but the need is not, then the housing provider should ask only for information necessary to verify the need for the accommodation.<sup>61</sup>
3. If neither the disability nor the need for the accommodation is readily apparent, the housing provider may ask for verification of both the disability and the need for the accommodation.<sup>62</sup>

In some cases, the PHA should allow the individual to self-certify their disability. For example, an applicant/participant may provide proof of SSI (if younger than 65) or SSDI benefits in order to certify. A doctor or other medical professional, a peer support group, a non-medical service agency, or any reliable third party who is in a position to know about the individual's disability may provide verification of the disability and the need for the accommodation.<sup>63</sup> HUD sub regulatory guidance sets forth verifications for owners of federally assisted housing.<sup>64</sup>

**Practice Tip:** Though a range of people may verify the need for an accommodation, it is usually best to try to get a doctor's verification.

## **C. Interactive Process**

If a housing provider refuses a requested accommodation, HUD guidelines encourage the provider and tenant to engage in an "interactive process" to discuss alternative accommodations that can satisfy the tenant's needs without imposing an undue burden or fundamentally altering the provider's program.<sup>65</sup> While a number of courts view this interactive process as necessary, some dispute remains as to whether the FHAA actually *requires* providers and tenants to engage in such a process.<sup>66</sup> One court held that, even if the FHAA does require an interactive process, there is no liability for failure to engage in this process where a tenant fails to show the existence of a reasonable accommodation.<sup>67</sup> However, another court held that once a provider and tenant have engaged in an interactive process, attempts by the provider to short-circuit that process are actionable.<sup>68</sup>



## Section 504 Grievance Procedure

Under Section 504 of the Rehabilitation Act, federally assisted housing providers are required to create grievance procedures designed to address claims of discrimination against program participants with disabilities.<sup>69</sup> In practice, the grievance procedure is often used as the vehicle for interactive process; however, advocates should attempt to initiate the interactive process outside of the formal grievance procedure since the interactive process should be quicker and more flexible than the grievance procedure. Generally, advocates should only enter the grievance procedure if the housing provider has denied the accommodation request or the interactive process has reached an impasse.

### III. Common Issues Arising in Federally Assisted Housing

Many of the reasonable accommodation issues for people living in privately owned housing and federally assisted housing overlap. For example, requests to allow service or emotional support animals or live-in-aides are common in either type of housing.<sup>70</sup> Other common reasonable accommodation requests include reserving an accessible parking space,<sup>71</sup> allowing for alternative rent payment dates,<sup>72</sup> extending the time needed to vacate an apartment,<sup>73</sup> providing accessible communication<sup>74</sup> and allowing for extra time and help removing clutter.<sup>75</sup> However, recipients of federal financial assistance must abide by additional obligations under Section 504 that are not imposed on housing providers solely covered by the FHAA.<sup>76</sup> Therefore, housing providers such as PHAs and private owners of federally assisted property are subject to Section 504, whereas private owners accepting Section 8 vouchers are not.<sup>77</sup>

Under Section 504, housing providers must:

- Make program accessible as a whole
- Pay for modifications
- Provide auxiliary aids and services necessary for effective communication with persons with disabilities;
- Develop a transition plan to ensure that structural changes are properly implemented to meet program accessibility requirements;
- Perform a self-evaluation of its program and policies to ensure that they do not discriminate based on disability.
- Operate its programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities.<sup>78</sup>

In addition to these specific obligations imposed by the law, applicants or residents of federally assisted housing can request reasonable accommodations to any policy or practice that imposes a barrier to the equal use and enjoyment of housing. A reasonable accommodation may be requested at any time: prior to application and admission, during occupancy, after termination or eviction, and even during litigation.<sup>79</sup> The Sections below will provide an overview of common accommodation requests made at all stages of the housing process.

#### A. Admission to the Program

The duty to provide reasonable accommodations to individuals applies as soon as the waitlist for a housing program first opens.<sup>80</sup> If the process by which the waitlist is filled is inaccessible to a person because of her disability, the housing provider must provide a reasonable accommodation that would allow her the opportunity to get on the waitlist.<sup>81</sup> Examples of such accommodations include reinstating an applicant to the waitlist, making the waitlist accessible, or meeting with the applicant at her home if her disability prevents her from coming to the housing authority or management office.<sup>82</sup>

Additionally, federally assisted housing providers must provide reasonable accommodations that would allow an applicant to meet the eligibility requirements of the program.<sup>83</sup> Further, housing providers may not erect barriers to buying or renting, such as requiring additional qualifications, because of a disability.<sup>84</sup> An finally, there is HUD guidance to PHAs and assisted owners about applicants' option to identify an individual or organization that may be contacted to provide services or special care to applicants selected for tenancy or to assist with resolving tenancy issues.<sup>85</sup>

## **1. Credit History**

A person with a disability may have a negative credit history as a result of his or her disability. While requests for a reasonable accommodation to ignore the credit history that is related to the disability have met with mixed success,<sup>86</sup> HUD recently issued a letter to PHAs urging them to consider disability as a mitigating circumstance in such situations.<sup>87</sup> This letter may help advocates and persons with disabilities succeed in such requests.

## **2. Criminal Background**

An applicant may ask for a reasonable accommodation to consider mitigating circumstances when his or her past criminal activity was related to or the direct result of his or her disability. A few cases have analyzed whether or not an applicant's request to gain admission to a housing unit despite a criminal record related to a disability can be granted as a reasonable accommodation. While some advocates have been successful in raising this accommodation informally, the cases ruling on this issue in the admissions context have trended negatively.<sup>88</sup> Tenants have had more success requesting accommodation of disability-related criminal behavior in the eviction context.<sup>89</sup>

## **3. Negative References**

In both Public Housing and the Voucher program, housing providers, including PHAs, "must, if requested by the applicant, consider whether any mitigating circumstances could be verified to explain and overcome any problematic behavior related to a tenancy."<sup>90</sup> An applicant for such housing and for other federally assisted housing may request that a housing provider disregard negative references as a reasonable accommodation when the applicant's previous behavior was disability-related.<sup>91</sup>

### **B. Locating a Unit (Voucher Program)**

## 1. Accessible Units

A housing authority should maintain a current list of accessible units.<sup>92</sup>

## 2. Payment Standard

Generally, a PHA may set its payment standard at 90–110% of the listed Fair Market Rent (FMR) for the area, as set by HUD.<sup>93</sup> However, a prospective tenant may have difficulty finding a unit that is both accessible and affordable. Recognizing this difficulty, HUD regulations require that a PHA increase the payment standard for a voucher holder if necessary as a reasonable accommodation.<sup>94</sup>

A housing authority may grant a request to increase the payment standard up to 110% of FMR without first requesting HUD approval.<sup>95</sup> The HUD Field Office Public Housing Director for a given region can approve an increase in the payment standard that falls between 110–120%. For increases above 120%, the housing authority must request a waiver from HUD headquarters.<sup>96</sup>

A tenant may request a waiver to the payment standard only after the family has located a unit.<sup>97</sup> This may prove to be a problem where the landlord will not hold a unit until the higher payment standard is approved, and the tenant cannot afford rent without assistance. Also, once HUD approves an exception payment standard, it will remain in effect until a still-higher exception payment standard is necessary and approved. In the past, HUD has sometimes only allowed the waiver to last for a year, or in other cases, families have had to re-verify the need each year.

In order to receive a HUD waiver on payment standards, the PHA should include:

1. A statement from a health care provider regarding the nature of the disabled person's disability/ies and the features of the unit (which may include its location) which meet that person's needs;
2. The contract rent and utility allowance for the unit;
3. A statement from the PHA that it has determined the rent for the unit is reasonable, and that the unit has the feature/s required to meet the needs of the person with disabilities as noted in the statement from the health care provider;
4. The household's monthly adjusted income;
5. The FMR for the unit size for which the family is eligible; and
6. The proposed effective date of the new lease or actual effective date of the lease renewal.<sup>98</sup>

Each quarter, HUD announces in the federal register when it has granted payment standard increases above 120%.<sup>99</sup> The explanation of why the HUD granted an increase in the payment standard above the standard 110 or 120% of the fair market rent include reasons, such as, to allow the tenant to remain in place, not have to move and maintain a healthy and independent life, to be close to medical facilities and those who provide assistance with daily living activities and due to a dearth of accessible units.<sup>100</sup>

HUD has waived the shared housing regulations to permit the use of the payment standard for a one-bedroom unit rather than the pro-rata portion of the payment standard for a three bedroom unit as a reasonable accommodation for the voucher participant with a disability.<sup>101</sup>

### **3. Extension of Voucher Search Time**

A PHA must allow a tenant to extend the time allotted to search for an apartment if necessary as a reasonable accommodation.<sup>102</sup> There is no time limit to the extension of voucher search time as a reasonable accommodation, but advocates should be cognizant that at some point, a PHA may find the length of the extension to be unreasonable if it is preventing that voucher from being used.<sup>103</sup>

### **4. Renting from a Relative or an Otherwise Ineligible Unit**

Generally, a Section 8 voucher holder cannot rent a unit from a relative<sup>104</sup> or use a voucher for a dorm room.<sup>105</sup> However, a PHA must approve such a unit if requested as a reasonable accommodation.<sup>106</sup>

### **5. Special Housing Types**

A PHA may restrict voucher usage for certain special housing types such as homeownership, single room occupancy housing, congregate housing, shared housing, group homes, cooperative housing, and space rentals for manufactured housing/mobile homes. However, the PHA must allow the use of any of these housing types if necessary to accommodate a person's disability.<sup>107</sup>

### **6. Accepting a Voucher as an Accommodation**

A growing number of cases have considered whether a landlord may be required to accept a Section 8 Voucher as a reasonable accommodation to a person's disability. This issue has been contentious where the requested accommodation helps alleviate the economic consequences of a disability that prevent the tenant from enjoying full and equal access to the housing.<sup>108</sup> However, recent victories demonstrate that courts are beginning to recognize that such economic effects of a person's disability may be relieved by a reasonable accommodation.<sup>109</sup>

### **7. Moving with Continued Voucher Assistance, including Portability**

PHAs may opt to limit the number of moves that a family may make within a year, require that a new applicant who is not a resident of the jurisdiction reside in the jurisdiction for a year before porting to the jurisdiction of another PHA or may deny a request to move because of a lack of funds. Despite these policies, the PHA is obligated to consider a request for reasonable accommodation for moves that are necessary for a disabled family to benefit from the program and must grant the request unless doing so would impose an undue financial and administrative

burden.<sup>110</sup> If the denial of the move was due to lack of funds, such determination is subject to an additional review by HUD.<sup>111</sup>

## 8. Housing Quality Standards

Voucher units must comply with Housing Quality Standards, which set forth a number of standards under key aspects of housing quality. One of the criteria includes a requirement of one window per bedroom and living room.<sup>112</sup> HUD has granted a waiver to this requirement when there was illumination from other rooms into the bedroom and other suitable housing was not available to accommodate the tenant's disabilities.<sup>113</sup>

## 9. Providing the Landlord Information Regarding Voucher Tenant's Current and Prior Address

HUD rules require a PHA to give the current owner the tenant's current and prior address as shown in the PHA records.<sup>114</sup> HUD has waived that requirement as a reasonable accommodation.<sup>115</sup>

### C. Occupancy (All Programs)

#### 1. Accessible Units

Owners of multifamily federally assisted housing built or substantially rehabilitated after July 18, 1988 are required to have a certain percentage of their units accessible to individuals with physical disabilities.<sup>116</sup> Families needing the features of the units are preferred for these units. *See also* discussion of transfer policies, *infra*.

#### 2. Unit Size

Federally assisted multifamily housing programs provide for specific unit size based on the number, gender, and relationship of family members. A person with a disability may request an exception to this policy, both to allow for a live-in aide as well as for other reasons relating to the participant's disability.<sup>117</sup> For example, if one of the family members is a child with autism who cannot share a room with a sibling, the family may request a reasonable accommodation. PHAs or owners may argue that this is an undue financial burden, but the relatively low cost of paying the difference for one family should not rise to such a level absent significant budget constraints and a large number of requests.<sup>118</sup>

There is a related standard regarding bedroom size for voucher tenants, which is generally referred to as the subsidy standard. A voucher family is eligible for subsidy related to bedroom size. The federal rule confused the issue by defining the acceptable housing quality standards as two persons per bedroom/living area.<sup>119</sup> The subsidy size that a family is eligible for varies by PHA, because the PHA sets the rules. For example some PHAs assume that most units have a living area and set a subsidy standard of two persons per bedroom regardless of the family composition. Others determine bedroom size by the age of the children, if they are of the

opposite sex, with families with older children of the opposite sex qualifying for a separate bedroom. Thus a family with a single mother and a 15 year old son and a 13 year old daughter could qualify for a two bedroom unit or a three bedroom unit depending upon the PHAs policy. If the children were both under five some PHAs might say that the family qualified for only a two bedroom. As with the project-based programs, a family may request a reasonable accommodation to request a larger sized bedroom size subsidy to accommodate, for example, a member with a disability, who needs a separate bedroom or for a live in aide or to accommodate equipment related to the individual(s) with the disability(ies).

### **3. Utility Allowance**

PHAs for public housing and the voucher program and owners of project based Section 8 are required to set a reasonable utility allowance for tenant paid utilities. If participants are responsible for paying some or all of the utility bills and a person's disability leads to utility costs greater than those allowed by the PHA or owner, they may request an increase in the utility allowance.<sup>120</sup> Such increases in utility allowances can be vital for a tenant who needs to use electrical equipment to assist with her disability (e.g. dialysis machines, heating/cooling systems, etc.).<sup>121</sup> Once the reasonable accommodation request has been made, the PHA or owner should approve it and the tenants must provide the PHA or owner with enough information to accurately adjust the utility allowance to provide for the accommodation.<sup>122</sup>

### **4. Live-in Aide**

A PHA or owner must approve a live-in aide as a reasonable accommodation.<sup>123</sup> In 2008, HUD issued a notice regarding when an extra bedroom should be provided for live-in aides in the Section 8 voucher program.<sup>124</sup> The notice *requires* PHAs administering Section 8 vouchers to provide an extra bedroom only for 24-hour live-in aides, not for intermittent or rotating caregivers even if those caregivers spend the night.<sup>125</sup> However, as with any other policy, advocates should still request a reasonable accommodation to that rule, especially for individuals who require 24-hour rotating caregivers.

There are situations in which a disabled individual may need live in assistance and a family member is income eligible to live in the housing and can fulfill the need. Many PHAs and owners are reluctant to add adult members to the tenant household. If applicable, the disabled individual ought to make a reasonable accommodation request to add the individual as a family member to the lease because as a resident the necessary care could be provided at sporadic times as need or for longer times than a non-family member would provide, etc.

### **5. Service and Emotional Support Animals**

A resident or applicant may request an exception to a housing provider's pet policy to accommodate the need for a service or emotional support animal.<sup>126</sup> Further, if a tenant requires a service or emotional support animal as a reasonable accommodation of her disability, the housing provider should not charge a pet deposit fee.<sup>127</sup>

### **6. Transfers**

A PHA or owner might institute a policy restricting requests to transfer to a different unit. For example, a housing provider may only allow transfers after a tenant has been living in the unit for one year. Such a policy must be waived if the tenant needs to transfer in order to accommodate her disability, and that tenant should receive priority over a new admission to the program.<sup>128</sup>

## 7. Medical Marijuana

As more states legalize use of marijuana for medical purposes, prospective tenants and housing providers have questioned these state laws' impact on admission to federally assisted housing. Under federal law, the use of medical marijuana remains a crime.<sup>129</sup> The Supreme Court has confirmed that Congress has the authority to regulate purely local uses of marijuana,<sup>130</sup> and that, under federal law, marijuana has no accepted medical applications.<sup>131</sup> In a 2009 memorandum, the Department of Justice reiterated its authority to enforce federal drug laws, but it also advised United States Attorneys that federal resources should not be focused on prosecuting medical marijuana users in compliance with state law.<sup>132</sup> Despite this apparent acceptance of state laws, patients using medical marijuana who live in federally subsidized housing continue to face many barriers, since PHAs and owners of federally assisted housing must comply with federal law.

On January 20, 2011, the Department of Housing and Urban Development (HUD) issued a memorandum addressing the question of whether Public Housing Authorities (PHAs) and owners of federally assisted housing could grant current or prospective residents a reasonable accommodation for the use of medical marijuana under either federal or state law.<sup>133</sup> Reaffirming an earlier memorandum, HUD emphasized that the Quality Housing and Work and Responsibility Act of 1998 (QHWRA) "requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a 'controlled substance' as the term is defined by the [Controlled Substance Act (CSA)]."<sup>134</sup> Because marijuana qualifies as a controlled substance under the CSA, PHAs and owners of federally assisted housing cannot admit users of medical marijuana into their programs. Although this leaves users of medical marijuana who need federal housing assistance with few options, HUD issued another memorandum that clarified that PHAs and owners may choose to deny assistance to individual medical marijuana users, rather than an entire household.<sup>135</sup>

The Kanovsky Memorandum made it clear that HUD interprets federal nondiscrimination laws to not require PHAs or owners to make reasonable accommodations for medical marijuana use. Under Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (ADA), discrimination is only prohibited against "individuals with a disability," and illegal drug users are categorically excluded from the definitions of "disability."<sup>136</sup> Because all forms of marijuana use are illegal under the CSA, medical marijuana patients have no protection under Section 504 and the ADA to receive accommodations for their marijuana use.<sup>137</sup>

## 8. Early Termination of Lease

A tenant may request early termination of the lease as a reasonable accommodation if there is a nexus between the need for early termination and the tenant's disability.<sup>138</sup> This accommodation is especially important for tenants receiving Section 8 Housing Choice Vouchers who need the landlord's approval for early lease termination in order to receive continued housing assistance.<sup>139</sup>

## **9. Rescission of Eviction/Termination Notice**

A tenant may request rescission of an eviction or termination notice as a reasonable accommodation when the eviction or termination is based on disability-related behavior.<sup>140</sup> The duty to provide this reasonable accommodation may extend to cases where the tenant is being evicted or terminated because of criminal conduct.<sup>141</sup>

Additionally, a tenant's right to due process may require PHAs to include language in the termination letter informing tenants in federally-assisted housing of their right to request a reasonable accommodation in connection with the termination decision.<sup>142</sup>

## **10. Adding a Disabled Family Member to the Household**

PHAs and owners are often reluctant to approve adding members to a tenant family. The tenant family may nevertheless request a reasonable accommodation to add the disabled member where such a move is necessitated because of the disability.<sup>143</sup>

# **IV. Failure to Provide the Accommodation**

## **A. Definition of Aggrieved Individual**

Any aggrieved person has standing under the Fair Housing Amendments Act. Aggrieved person is defined as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."<sup>144</sup> This includes a person denied a reasonable accommodation.

Because the FHAA makes it illegal to discriminate "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—(A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter,"<sup>145</sup> a person living with or intending to live with the person with disabilities may also sue. For example, in *Canady v. Prescott Canyon Estates Homeowners Assoc'n*, the court found in favor of parents who asserted that a homeowner's association violated the Fair Housing Act by refusing to allow their disabled son to move into their home, located in a senior community.<sup>146</sup> Such a ruling may be useful in cases where a housing authority or owner of federally assisted housing refuses to add a family member with disabilities to the family composition.

## **B. Prima Facie Case**



While many of the elements of a prima facie case are the same as elements required to request a reasonable accommodation, they will need to be laid out again for enforcement. A prima facie case that a housing provider has failed to provide a reasonable accommodation rests on four elements:<sup>147</sup>

**1. The aggrieved individual has a disability<sup>148</sup>**

One must demonstrate that the person requesting the accommodation actually has a disability, as defined by the law (remembering that the standard is easier to meet under California law than federal law).<sup>149</sup> However, to satisfy both the federal and California definitions of disability, it is important to demonstrate how the disability affects the individual's daily life.<sup>150</sup>

**2. The housing provider is aware or should reasonably be expected to know of the disability**

A housing provider must be aware of that a tenant or applicant has a disability in order to be required to provide a reasonable accommodation.<sup>151</sup> The tenant or applicant can satisfy this element by demonstrating that the housing provider was actually aware of his or her disability or that his or her disability was so obvious that the housing provider should reasonably be expected to have known of it.

**3. Accommodating the disability may be necessary to afford the plaintiff an equal opportunity to use and enjoy the housing**

A tenant must demonstrate that without accommodation, use and enjoyment of the person's dwelling is diminished.<sup>152</sup> At a minimum this requires a showing that the accommodation would result in an "affirmative enhancement" to the tenant's quality of life.<sup>153</sup> The affirmative enhancement alone is not sufficient to justify the accommodation, however, if the tenant fails to also demonstrate the link between his or her disability and the policy in place.<sup>154</sup>

**4. The housing provider has refused to grant the request**

The housing provider must actually refuse the accommodation request in order to present all the elements of a discrimination claim.<sup>155</sup> However, some courts will consider a request constructively denied if a housing provider unnecessarily delays its response to a reasonable accommodation request.<sup>156</sup>

**C. Reasonableness**

If the tenant or applicant establishes a prima facie case, and the requested accommodation is reasonable, then the failure to accommodate claim should be successful.<sup>157</sup> Accommodations that "involve substantial modifications to existing policies, or even the creation and implementation of new policies which are beneficial to the [tenant or applicant] with respect to the particular disability," may still be considered reasonable, "so long as making such accommodation is not

oppressive to the landlord.”<sup>158</sup> Under this standard, an accommodation will not be considered unfairly oppressive unless it causes an undue financial and administrative burden on the landlord or results in the fundamental alteration of the housing provided.<sup>159</sup>

Further, even in cases where the requested accommodation would ordinarily be considered unreasonable, the Supreme Court has held that plaintiffs are entitled to show that special circumstances exist which would make the accommodation “‘reasonable’ on the particular facts.”<sup>160</sup> Therefore, even when a requested accommodation would be oppressive for most landlords, a tenant or applicant is still entitled to show that special circumstances make the accommodation reasonable in her particular case.

### **1. Undue Burden**

An undue burden must be financial and administrative.<sup>161</sup> Determining whether an undue burden exists requires a case-by-case analysis.<sup>162</sup> This analysis can involve various factors including: the housing provider’s financial resources, the costs of the requested accommodation, the benefit to the tenant, and the availability of a less expensive accommodation.<sup>163</sup>

Courts have recognized that reasonable accommodations will often cause some amount of financial or other burden.<sup>164</sup> Some costs are small, such as when a tenant requests a waiver of a parking fee as a reasonable accommodation, and these are unlikely to be considered a financial burden.<sup>165</sup> Where the costs are higher, such as when a tenant requests the addition of an elevator where none existed before, they may cause a significant financial burden.<sup>166</sup>

### **2. Fundamentally Alter**

A housing provider does not have to grant a reasonable accommodation request if the request includes services or policies that would change the very nature of what the housing provider does. For example, an accommodation may be considered unreasonable if a tenant asks a landlord to provide daily transportation services when the building currently has no such service.<sup>167</sup> Conversely, one court found that allowing a financially eligible relative to rent an apartment for a disabled individual did not fundamentally alter the essential obligations of tenancy, even though the landlord did not ordinarily permit such rentals.<sup>168</sup>

## **V. Methods of Enforcement**

This section sets forth a brief description of the options available to an individual when she opts to challenge a denial of a reasonable accommodation. It is not intended to be an exhaustive list of options.<sup>169</sup>

### **A. HUD Complaint**<sup>170</sup>

An individual who has been a victim of discrimination on the basis of her disability can file a complaint with HUD.<sup>171</sup> A person may file a complaint with HUD within one year after the date of discrimination. HUD must decide whether or not to file a complaint within 100 days. HUD has a duty to conciliate, and if that fails, it may either proceed through an Administrative Law Judge (ALJ) or through the Justice Department in federal court. Remedies before an ALJ include compensatory damages, injunctive or equitable relief, and civil penalties in the public interest between \$16,000 and \$65,000.<sup>172</sup>

### **B. DFEH Complaint<sup>173</sup> (California)**

A person may also file a complaint with California's Department of Fair Employment and Housing within one year of the act of discrimination. DFEH will investigate the complaint and if it finds a violation will attempt formal conciliation. If conciliation fails, DFEH may recommend litigation, which may either be heard before the Fair Employment and Housing Commission or civil court. The FEHC may order remedies for out-of-pocket losses, injunctive relief, access to the housing previously denied, additional damages for emotional distress, and civil penalties up to \$10,000 for the first violation. In civil court, the same remedies are available, except that instead of civil penalties, a court may award unlimited punitive damages.

### **C. Writ of Mandate California (PHAs only)**

Another option to enforce reasonable accommodation policies is to bring a writ of mandate in California state court. A court may issue a writ of mandate to any "to any inferior tribunal, corporation, board, or person,"<sup>174</sup> such as a PHA, in order to compel the performance of an act which the law requires. This option does not allow for damages. It either compels performance, stays action, or requires the lower authority to show cause why it is not in compliance with the law in question. A writ must be filed within 90 days of the date the administrative decision becomes final.

### **D. Private Civil Suit**

An individual may opt to individually bring a case against the housing provider in either state or federal court, with punitive damages available. The filing deadline is two years from the date of the act of discrimination. This can be filed concurrently with a HUD/DFEH complaint and will be stayed while such a complaint is being investigated.<sup>175</sup>

### **E. Affirmative Defense to Unlawful Detainer**

Reasonable accommodation may be raised as a defense to an unlawful detainer, even if no prior request was made.<sup>176</sup> Moreover, the Model Lease for Subsidized Programs states that the landlord agrees to provide a reasonable accommodation to accommodate a tenant with disabilities, including changes to the unit and policies and procedures.<sup>177</sup>

## **VI. Affirmative Advocacy**

## **A. PHA Plans**

Housing authorities must submit an annual plan each year, with supporting documents, that states the PHA's policies regarding project based vouchers, the Section 8 voucher program, public housing, and Section 8 Moderate Rehabilitation housing.<sup>178</sup> There is no similar planning process for project-based Section 8. The Annual Plan, as well as the attachments to it, which include the Section 8 Administrative Plan and the Admissions and Continued Occupancy Policy (ACOP), articulate the PHA's policies, including those on reasonable accommodation.<sup>179</sup> Additionally, each PHA must certify that it is in compliance with Section 504 and fair housing laws.<sup>180</sup> Furthermore, the Annual Plan includes the Capital Fund Program Five Year Action Plan, which could include plans to make accessibility improvements.<sup>181</sup> This annual process provides an opportunity for advocates to comment on their local PHA's policies on reasonable accommodation, and to work toward implementing ones more advantageous to their clients.

PHAs must follow a federally mandated timeline when developing and submitting PHA plans. The plans must be submitted to HUD 75 days prior to the end of the PHA's fiscal year.<sup>182</sup> The PHA must give the public a 45-day notice of the public hearing on the plan.<sup>183</sup>

Each PHA is required to certify that the Annual Plans are available for review along with all required attachments and supporting documents at the main office of the PHA.<sup>184</sup> Advocates may contact their local PHA to obtain the plan, and the PHA should be able to provide the plan in alternative formats so that it is accessible to people with disabilities. The Annual Plan with attachments, but almost always without supporting documents, are posted on the HUD web site.<sup>185</sup> Some PHAs post their plans on their own web sites.

## **B. Section 8 Administrative Plan/Public Housing Admission and Continued Occupancy Plan (ACOP)**

The Section 8 Administrative Plan contains all of the discretionary policies of the PHA regarding the Housing Choice Voucher program and Project-based vouchers. The ACOP is the parallel document for public housing.<sup>186</sup> Both documents should include the housing authority's policies on reasonable accommodation.<sup>187</sup> Usually the PHA describes its policies both in a specific section on its fair housing duties, as well as throughout the plans. If no such policies exist, advocates should press for their inclusion in the plans. The Section 8 Administrative Plan and any amendments must be approved by the PHA Board of Commissioners.<sup>188</sup>

## **C. Tenant Selection Policies/Plan for Federally Assisted Housing**

Owners of HUD assisted housing that is subject to the HUD Handbook, 4350.3 must have a written tenant selection plan (TSP). Typically, HUD does not approve this plan. But if HUD becomes aware that the plan does not comply with applicable requirements, the owner must modify the plan.<sup>189</sup> Required topics for the TSP include policies to comply with Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act and other civil rights laws, and for unit transfers for medical reasons or based on the need for an accessible unit.<sup>190</sup> Recommended

topics include procedures for identifying applicant's needs for the accessible units, assignment of those units to individuals with physical disabilities that will be addressed by the features of the accessible units and for reasonable accommodation. The TSP is available to the public and applicants upon request.<sup>191</sup> Owners are urged to review the TSP annually. Advocates could request a copy of the TSP and review it to determine if it is consistent with the owner's obligations and work with the owner to have a TSP that is in compliance or report failures to HUD for follow up action.

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<sup>1</sup> H.R. REP. NO. 100-711, at 2179 (1988).

<sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C. § 3604(f)(3) (2012).

<sup>4</sup> *Id.* § 3604(f).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* §§ 3601, *et seq.*

<sup>7</sup> *Id.* §§ 12131, *et seq.*

<sup>8</sup> 29 U.S.C. § 794 (2012).

<sup>9</sup> *See, e.g.,* Oconomowoc Residential Progs. v. City of Milwaukee, 300 F.3d 775, 782–83 (7th Cir. 2002) (noting the substantive similarities between the FHAA and the ADA).

<sup>10</sup> CAL. GOV'T CODE §§ 12900, *et seq.* (West 2012).

<sup>11</sup> CAL. CIV. CODE §§ 51, *et seq.* (West 2012).

<sup>12</sup> *Id.* §§ 54, *et seq.*

<sup>13</sup> CAL. GOV'T CODE § 12955.6 (West 2012) (stating that the FEHA “may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law or other state laws”).

<sup>14</sup> *See generally*, HUD, HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-3, 2-39 (June 2009) [hereinafter HUD HANDBOOK 4350.3], available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_35639.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf) and HUD, Public Housing Occupancy Guidebook (June 2003) [hereinafter HUD, PHOG], available at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/rhiip/phguidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/phguidebook)

<sup>15</sup> 42 U.S.C. §§ 3601, *et seq.* (2012).

<sup>16</sup> *Id.* § 3602(h).

<sup>17</sup> *Id.* § 3604(f)(3)(B).

<sup>18</sup> 29 U.S.C. §§ 701 *et seq.* (2012).

<sup>19</sup> H.R. REP. NO. 100-711, at 18 (1988).

<sup>20</sup> 42 U.S.C. §§ 12131 *et seq.* (2012).

<sup>21</sup> The implementing regulations for the Americans with Disabilities Act Amendments Act (ADAAA), issued in 2010, exceed Section 504's requirements. *See* 28 C.F.R. pt. 35 (2012). HUD and other agencies must conform their Section 504 rules to the new ADAAA regulations.

<sup>22</sup> 42 U.S.C. § 12101 *et seq.*; *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (stating specifically that the ADA extends Section 504 coverage to state and local programs).

<sup>23</sup> *See* 42 U.S.C. § 12131(1) (defining public entity as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or State or local government; and the National Railroad Passenger Corporation, and any commuter authority).

<sup>24</sup> *See* DEP'T OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL, § III-1.2000 (1993), available at <http://www.ada.gov/taman3.html>.

<sup>25</sup> CAL. GOV'T CODE § 11135 (West 2012).

<sup>26</sup> The ADAAA amended sections 12101, 12102, 12111-12114, 12201 and 12210 of the ADA, and section 705 of the Rehabilitation Act. The ADAAA also enacted section 12103 and 12205a, and re-designated sections 12206-12213. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

<sup>27</sup> *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011); *Nyrop v. Indep. Sch. Dist. No. 11*, 616 F.3d 728, 734 n.4 (8th Cir. 2011); *Becerril v. Pima Cnty. Assessor's Office*, 587 F.3d 1162 (9th Cir. 2009); *Richardson v. Honda Mfg. of*

Ala., 635 F. Supp. 2d 1261, 1270–72 (N.D. Ala. 2009).

<sup>28</sup> The “Findings and Purposes” section of the Act state “the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” See ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 U.S.C. & 42 U.S.C.).

<sup>29</sup> The scope of the term “disability” under the ADA was significantly expanded. As part of this expansion, the ADAAA provides a non-exhaustive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Additionally, a major life activity includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. See 42 U.S.C. § 12102(2)(B) (West 2011).

As some lower courts held before the passage of the ADAAA that episodic or intermittent impairments, such as epilepsy or post-traumatic stress disorder are not covered by the law, the ADAAA specifically states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Additionally, in response to the Supreme Court’s ruling that mitigating measures were to be taken into account in determining whether a person was substantially limited in a major life activity, that ADAAA states that the determination of whether an impairment substantially limits a major life activity is to be made without considering mitigation measures (other than ordinary eyeglasses or contact lenses). See *id.* § 12102(4)(E).

The ADAAA provides that an individual can establish coverage under the “regarded as” having an impairment prong by showing that he or she was subjected to an action prohibited by the ADA based on actual or perceived impairment. Transitory and minor impairments are excluded from this coverage, and entities covered by the ADA have no duty to provide reasonable accommodation to individuals who fall solely under the “regarded as” definition. See *id.* § 12102(3).

<sup>30</sup> *Kinney v. Century Servs. Corp. II*, 2011 WL 3476569, at \*10 (S.D. Ind. Aug. 9, 2011) (finding that intermittent depression raises a genuine issue of fact as to whether plaintiff had a disability under ADAAA, even though depression did not impact work performance when it was inactive); *Gibbs v. ADS Alliance Data Sys., Inc.*, 2011 WL 3205779, at \*3 (D. Kan. July 28, 2011) (concluding that genuine issues of material fact existed as to whether plaintiff’s carpal tunnel syndrome constituted a disability within the meaning of the ADAAA); *Bess v. Cnty. of Cumberland*, 2011 WL 3055289, at \*7 (E.D.N.C. July 25, 2011) (holding that the complaint contained no allegations which demonstrate plaintiff’s stutter substantially limited major life activity, such as working or communicating, as required by the ADAAA); *Cohen v. CHLN, Inc.*, 2011 WL 2713737, at \*7–8 (E.D. Pa. July 13, 2011) (finding that a reasonable fact finder could conclude that debilitating back and leg pain qualified as a disability under the ADAAA); *Seim v. Three Eagles Commc’ns, Inc.*, 2011 WL 2149061, at \*3 (N.D. Iowa June 1, 2011) (applying ADAAA and concluding that a reasonable jury could find that Graves’ disease and the side effects of medications used to treat it substantially limited major life activities).

<sup>31</sup> CAL. GOV’T CODE § 12955.6. (West 2012).

<sup>32</sup> CAL. CIV. CODE § 51 (West 2012).

<sup>33</sup> *Id.* § 54.1(b)(3)(B).

<sup>34</sup> 42 U.S.C. § 3604(f)(3)(B) (2006).

<sup>35</sup> The FHAA requires that the reasonable modification be made at the expense of the requestor and also allows a landlord to condition permission for modification on the renter agreeing to restore the interior to their pre-modified condition. *Id.* § 3604(f)(3)(A). However, housing providers receiving federal financial assistance are required to pay for reasonable modifications under Section 504 unless providing the modification would create an undue financial and administrative burden. See JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE, REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT, at 16 (2008) available at [http://www.hud.gov/offices/ftheo/disabilities/reasonable\\_modifications\\_mar08.pdf](http://www.hud.gov/offices/ftheo/disabilities/reasonable_modifications_mar08.pdf). The rest of this Outline will focus on issues related to reasonable accommodation. For more information on reasonable modifications, see generally *id.*

<sup>36</sup> 29 U.S.C. § 705(20) (2006); 42 U.S.C. §§ 3602(h), 12102 (clarifying definition of disability); 24 C.F.R. §§ 8.3, 100.201 (2012); 28 C.F.R. 35.104 (2012).

<sup>37</sup> 42 U.S.C. § 3604(f) (FHAA); *Id.* § 12102 (ADA).

<sup>38</sup> *Id.* § 12102.

<sup>39</sup> *Id.*

<sup>40</sup> CAL. GOV'T CODE § 12926 (West 2012).

<sup>41</sup> *Id.* § 12926(l)(1)(B)(iii).

<sup>42</sup> 42 U.S.C. § 3602(h); CAL. GOV'T CODE § 12926(l)(6).

<sup>43</sup> 42 U.S.C. § 3604(f)(9).

<sup>44</sup> CAL. GOV'T CODE § 12926(l)(6).

<sup>45</sup> 42 U.S.C. § 3602(h) (FHAA); *id.* § 12210(b) (ADA); *Lakeside Resort Enter., LP v. Bd. of Supervisors of Palmyra*, 455 F.3d 154, 156 n.5 (3d Cir. 2006) (holding that “recovering alcoholics and drug addicts are handicapped, so long as they are not currently using illegal drugs”); *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339, 1346 (S.D. Fla. 2007) (holding that recovering alcoholics and drug addicts are “handicapped” under FHAA); *Pub. Hous. Agency of St. Paul v. Ewig*, 2008 WL 2106692, at \*1 (Minn. Ct. App. May 20, 2008) (overturning lower court’s finding of a violation of the FHA because tenant who had relapsed two weeks before PHA attempted to evict her was a current user of illegal substances and therefore, not disabled under the FHA).

<sup>46</sup> *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 920–23 (4th Cir. 1992); *see also Baustian v. Louisiana*, 910 F. Supp. 274, 276 (E.D. La. 1996) (holding that seven weeks’ abstinence not long enough to be considered stable under the ADA); *McDaniel v. Miss. Baptist Med. Ctr.*, 877 F. Supp. 321, 327–28 (S.D. Miss. 1995) (holding that legislative history of the ADA indicates that long-term abstinence is required to be considered drug free); *Wormley v. Arkla, Inc.*, 871 F. Supp. 1079, 1082–84 (E.D. Ark. 1994) (finding that relapse 4–5 months before termination qualified employee as current drug user under the ADA at the time of termination).

<sup>47</sup> *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 609 (D.N.J. 2000) (finding that “the benchmark date [for determining current drug use] is the date of the alleged discrimination or harassment which underlies the lawsuit”).

<sup>48</sup> 42 U.S.C. § 12210(b) (West Supp. 2009).

<sup>49</sup> *See Jennifer L. Dolak, Note, The FHAA’s Reasonable Accommodation & Direct Threat Provisions as Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment*, 36 IND. L. REV. 759, 762–67 (2003).

<sup>50</sup> 24 C.F.R. § 9.131(c) (2012) (stating that “[i]n determining whether an individual poses a direct threat to the health or safety of others, the agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk”); *Roe v. Hous. Auth. of Boulder*, 909 F. Supp. 814, 822–23 (D. Colo. 1995) (holding that before tenant could be lawfully evicted for direct threat caused by his disability, housing provider must demonstrate “no ‘reasonable accommodation’ will eliminate or acceptably minimize any risk [tenant] poses to other residents”); *Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636, 640 (D.N.H. 1993) (“assuming plaintiff is handicapped, the [FHAA] requires defendants to demonstrate that no ‘reasonable accommodation’ will eliminate or acceptably minimize the risk he poses to other residents . . . before they may lawfully evict him”); *Bos. Hous. Auth. v. Bridgewater*, 898 N.E.2d 848, 854 (Mass. 2009) (finding that “after a disabled tenant requests a reasonable accommodation and prior to terminating a lease, federally assisted housing authorities . . . must conduct an individualized, fact-specific, and objective inquiry into whether an accommodation can mitigate the risk to other tenants” when housing authority refused to consider reasonable accommodation request and attempted to terminate tenant for attacking another resident); JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE, REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT, at 4 (2004) [hereinafter JOINT STATEMENT], *available at* <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>.

<sup>51</sup> *See Cornwell & Taylor, LLP v. Moore*, 2000 WL 1887528 (Minn. Ct. App. Dec. 22, 2000) (unpublished) (affirmed trial court ruling that landlord has the burden to show that no reasonable accommodation will eliminate or acceptably minimize any risk that tenant poses on other residents); *see also Liam Garland, A New Framework for Evaluating the Fair Housing Amendments Act’s Direct Threat Cases*, 41 CLEARINGHOUSE REV. 594 (2007–2008). However, some courts have found that reasonable accommodation is not required under the law when a tenant’s disability causes criminal conduct. *See, e.g., Stoick v. McCorvey*, 2011 WL 3419939 (D. Minn. July 29, 2011) (waiver of policy rejecting application based on violent criminal history unreasonable when accommodation would fundamentally alter nature of the program by requiring PHA to disregard federal regulations mandating PHA to screen out applications who pose a direct threat to health and safety of others); *Evans v. UDR Inc.*, 644 F. Supp. 2d

675, 685 (E.D.N.C. 2009) (finding “where an individual suffers from a mental disability that is related to conduct that results in a criminal conviction, the causal connection between the mental disability and the criminal conviction is insufficient for the purposes of the FHA” to require reasonable accommodation).

<sup>52</sup> *Sinisgallo v. Islip Hous. Auth.*, 2012 WL 1888140 (E.D. N.Y. May 23, 2012) (temporarily enjoining eviction based on tenant’s likelihood of success on reasonable accommodation claim for a probationary period to demonstrate that changes in medication and mental health treatment would prevent tenant from further threatening safety of neighbors); *Super v. D’Amelia & Assocs., LLC*, 2010 WL 3926887 (D. Conn. Sept. 30, 2010) (denying motion to dismiss tenant’s claims under FHA and Section 504 when housing authority terminated voucher after tenant assaulted an employee without considering her request for reasonable accommodation which included her seeking mental health treatment); *Arnold Murray Construction, L.L.C. v. Hicks*, 621 N.W.2d 171 (S.D. 2001) (affirming eviction of tenant who harassed other tenants when landlord showed no reasonable accommodation could alleviate risks posed by tenant’s uncontrolled emotional outbursts); *see also infra* notes 140–142 (“Rescission of Eviction/Termination Notice”).

<sup>53</sup> *Hous. Auth. of Camden v. Williams*, 2011 WL 1261109 (N.J. Super. Ct. App. Div. Apr. 6, 2011) (remanding case to consider whether a reasonable accommodation would prevent eviction of a public housing tenant after she threatened a building security guard with a knife and pleaded guilty to terroristic threats); *see also infra* note 141.

<sup>54</sup> Non-discrimination and Accessibility for Persons with Disabilities, HUD PIH Letter 2007-05 (Sept. 21, 2007) (making permanent Notice on Non-discrimination and Accessibility for Persons with Disabilities, PIH 2006-13 (Mar. 8, 2006)); *available at* <http://nhlp.org/files/4.07-SPIHL.pdf>.

<sup>55</sup> JOINT STATEMENT, *supra* note 50.

<sup>56</sup> *Id.* at 10. *See Colon-Jimenez v. GR Mgmt. Corp.*, 218 F. App’x 2 (1st Cir. 2007) (finding no failure to accommodate because tenant told landlord transfer request was necessary due to conflicts with neighbors and did not mention disability-related need); *Wallace H. Campbell & Co. v. Md. Comm’n on Human Relations*, 33 A.3d 1042 (Md. Ct. Spec. App. 650) (finding no violation of FHAA because tenant never requested accommodation and owner’s mere knowledge of tenant’s disability did not satisfy requirement that tenant actually request accommodation); *Meadowland Apartments v. Schumacher*, 813 N.W.2d 618, 626 (S.D. 2012) (citing *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1122 (D.C. 2005)) (stating that “‘a landlord is only obligated to provide a reasonable accommodation’ to a tenant ‘if a request for the accommodation has been made’”).

<sup>57</sup> *Powers v. Kalamazoo Breakthrough Consumer Hous. Coop.*, 2009 WL 2922309, at \*7 (W.D. Mich. Sept. 9, 2009) (FHA does not require tenants to submit accommodation requests in writing); JOINT STATEMENT, *supra* note 50, at 10.

<sup>58</sup> 24 C.F.R. § 100.202(c) (2012); *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378 (D. Conn. 2009) (holding that defendant denied equal housing to applicant by inquiring into the nature of her disabilities beyond a threshold determination of whether she qualified as severely physically disabled); *Sec’y of HUD v. Williams*, 1991 WL 442796 (HUD ALJ Mar. 22, 1991) (finding violation of 42 U.S.C. § 3604(f) and 42 U.S.C. § 3617 when landlord called tenant at 6:00 a.m. to find out if tenant had been diagnosed with AIDS); HUD, PHOG, *supra* note 14, 19–20 (June 2003) [hereinafter HUD PUBLIC HOUSING GUIDEBOOK], *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_10760.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10760.pdf); JOINT STATEMENT, *supra* note 50, at 11–12.

<sup>59</sup> *See, e.g., Andover Hous. Auth. v. Shkolnik*, 820 N.E.2d 815 (Mass. 2005) (holding that tenant’s requested reasonable accommodation, delay or withdrawal of eviction action, would not permit the tenant to comply with lease provisions regarding excessive noise); *Landmark Props. v. Olivo*, 783 N.Y.S. 2d 745, 747 (App. Term 2004) (affirming order of eviction where tenant had not submitted clear evidence establishing that his dog was necessary to his enjoyment of his rental unit); PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 20.

<sup>60</sup> JOINT STATEMENT, *supra* note 50, at 12–13.

<sup>61</sup> *Id.* at 13.

<sup>62</sup> *Id.* at 13–14.

<sup>63</sup> *Powers v. Kalamazoo Breakthrough Consumer Hous. Coop.*, 2009 WL 2922309, at \*6 n.2 (W.D. Mich. Sept. 9, 2009) (stating that “courts have determined that a plaintiff’s testimony may be sufficient to establish a handicap under the FHA”); *Hansen v. Liberty Partners, LLC*, 2005 WL 3527162, at \*8 (M.D. Tenn. Dec. 22, 2005) (stating that expert testimony is not always required to establish disability).

<sup>64</sup> HUD HANDBOOK, 4350.3, *supra* note 14, § 2-31 F and Appendix 6-C Guidance about types of information to request when verifying eligibility and income, § R.



<sup>65</sup>JOINT STATEMENT, *supra* note 50, at 7.

<sup>66</sup> Compare *United States v. Hialeah Hous. Auth.*, 418 F. App'x 872, 877 (11th Cir. 2011) (stating that housing provider must request documentation or open a dialogue if it doubts necessity of requested accommodation), *Astralis Condo. Assoc. v. HUD*, 620 F.3d 62 (1st Cir. 2010) (failure to engage in interactive process by delaying response to request constituted denial of accommodation), *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996) (stating that “[i]f a landlord is skeptical of a tenant’s alleged disability or the landlord’s ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue”), *Hawn v. Shoreline Towers Phase I Condo. Assoc., Inc.*, 2009 WL 691378, at \*5 (N.D. Fla. Mar. 12, 2009) (when condominium owner refused board of directors’ request for additional documentation regarding requested accommodation, directors “cannot be held responsible” for failure to open dialogue), and *United States v. District of Columbia*, 538 F. Supp. 2d 211, 219 (D.D.C. 2008) (city had obligation to engage in dialogue before denying zoning accommodation request), with *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Twp. of Scotch Plains*, 284 F.3d 442, 456 (3d Cir. 2002) (stating that neither the Rehabilitation Act nor the FHAA impose an interactive process requirement on local land use authorities), and *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001) (stating that neither the FHAA nor HUD imposes an obligation on landlords or tenants to engage in an interactive process). See generally Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. ILL. L. REV. 761 (2007).

<sup>67</sup> *Huberty v. Wash. Cnty. Hous. & Redev. Auth.*, 374 F. Supp. 2d 768 (D. Minn. 2005).

<sup>68</sup> *Astralis*, 620 F.3d at 69.

<sup>69</sup> 24 C.F.R. § 8.53 (2012).

<sup>70</sup> See *infra* notes 124–125 (“Live-in Aide”) and notes 126–127 (“Service and Emotional Support Animals”).

<sup>71</sup> Sec’y of HUD v. *Dedham Hous. Auth.*, 1992 WL 406535 (HUD ALJ Feb. 4, 1992) (violation of FHAA when housing provider refused tenant’s request for a reserved parking space to accommodate his mobility impairment).

<sup>72</sup> See *Connie Y. Chung, Management Company Agrees to Change Rent Due Date for Disabled Resident*, 37 HOUS. L. BULL. 137 (Aug. 2007).

<sup>73</sup> See, e.g., *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 801 (N.D. Ill. 1997) (denying motion to dismiss failure to accommodate claim when landlord refused tenant’s request to postpone eviction proceeding until she was released from the hospital).

<sup>74</sup> See, e.g., *Williams v. Rhea*, 2012 U.S. Dist. LEXIS 99244 (E.D.N.Y. July 17, 2012) (denying PHA’s motion to dismiss claims that PHA violated ADA and FHAA by failing to provide Section 8 materials and notices in a format accessible to tenant with visual impairment).

<sup>75</sup> *Rutland Court Owners, Inc. v. Taylor*, 997 A.2d 706 (D.C. 2010) (after cooperative board attempted to evict resident for failing to adequately clean and exterminate his apartment following bedbug infestation, court concluded request for more time to clean was sufficient to notify the board of need for accommodation); *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109 (D.C. 2005) (reversing trial court decision barring tenant’s reasonable accommodation defense when landlord refused to stay eviction action for unsanitary condition of apartment after Adult Protective Services agreed to assist tenant with cleaning the unit while action was pending); *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249 (Minn. Ct. App. 1986) (refusing eviction of tenant for maintaining conditions approaching fire hazard without first making reasonable accommodation to help alleviate them); *Lebanon Cnty. Hous. Auth. v. Landeck*, 967 A.2d 1009 (Pa. Super. Ct. 2009) (holding trial court should have considered evidence related to tenant’s reasonable accommodation request to PHA seeking stay of eviction process for poor housekeeping).

<sup>76</sup> Federal financial assistance includes any assistance provided or otherwise made available by HUD through any arrangement in the form of: “(a) funds; (b) services of federal personnel; or (c) real or personal property or any interest in or use of such property, including: (1) transfers or leases of the property for less than fair market value or for reduced consideration; and proceeds from a subsequent transfer or lease of the property if the Federal share of its fair market value is not returned to the Federal Government.” 24 C.F.R. § 8.3 (2012).

<sup>77</sup> Although regulations regarding the fair housing obligations of Low Income Housing Tax Credit (LIHTC) recipients have yet to be issued, HUD, the Justice Department, and the Treasury Department have issued a Memorandum of Understanding recognizing that LIHTC properties are subject to the Fair Housing Act. See Memorandum from Lawrence H. Summers, Sec’y of Treasury, Andrew Cuomo, Sec’y of HUD, & Janet Reno, Attorney Gen. (Aug. 11, 2000), available at <http://www.justice.gov/crt/about/hce/mou.php>. Further, many LIHTC properties receive additional federal funds that qualify as federal financial assistance otherwise subject to Section

504. Additionally, housing advocates can argue that tax credits qualify as federal financial assistance that subject the recipient to Section 504. *See, e.g.*, Letter from Philip Tegeler, Poverty & Race Research Action Council, et al. to Michael S. Barr, Assistant Sec’y for Fin. Insts., Domestic Fin., Dep’t of Treasury, Re *Title VI, Section 504, and Title VIII Regulations and Guidance at the Department of Treasury and the IRS, with Particular Attention to the Low Income Housing Tax Credit* (Oct. 26, 2010), available at [http://prrac.org/pdf/civil\\_rights\\_letter\\_to\\_Michael\\_Barr\\_10-26-10.pdf](http://prrac.org/pdf/civil_rights_letter_to_Michael_Barr_10-26-10.pdf).

<sup>78</sup> Memorandum from Sara Pratt, Deputy Assistant Sec’y for Enforcement and Programs, HUD Fair Hous. & Equal Opportunity, to FHEO Reg’l & Field Office Dirs., *Guidance for FHEO Staff in Assisting Persons with Disabilities Transitioning from Institutions* (Aug. 11, 2011); available at <http://portal.hud.gov/hudportal/documents/huddoc?id=disabilitiestransitioning.pdf>. HUD has posted additional information on Section 504 duties at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/disabilities/sect504](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504). In addition to these general duties, HUD’s implementing regulations impose more specific requirements. *See* 24 C.F.R. § 8.3 (2012).

<sup>79</sup> *See* JOINT STATEMENT, *supra* note 50, at 10; *see also* Radecki v. Joura, 114 F.3d 115 (8th Cir. 1997) (finding that landlord may be required to halt eviction even if accommodation request was not made until the eviction proceedings); Douglas v. Kriegsfeld, 884 A.2d 1109, 1121 (D.C. 2005) (explaining the “general rule under the Fair Housing Act [is] that a reasonable accommodation defense will be timely until the proverbial last minute”); Hous. Auth. of Bangor v. Maheux, 748 A.2d 474, 476 (Me. 2000) (until writ is issued, landlord remains under obligation to provide reasonable accommodation); Schuett Inv. Co. v. Anderson, 386 N.W.2d 249 (Minn. Ct. App. 1986) (landlord ordered not to evict tenant who failed to cure during cure period when tenant requested accommodation and violation was causally related to tenant’s disability); Lebanon Cnty. Hous. Auth. v. Landeck, 967 A.2d 1009 (Pa. Super. Ct. 2009) (overturning trial court ruling that refused to hear evidence of tenant’s reasonable accommodation request where tenant was depressed and missed two scheduled housing inspections, after which housing authority served notice to quit).

<sup>80</sup> *Id.* § 982.204(c)(2); *see also* United States v. Lorantffy Care Ctr., 999 F. Supp. 1037, 1045 (N.D. Ohio 1998) (recognizing that “decisionmakers can discriminate against applicants long before they reach the point of deciding whether to accept an application”).

<sup>81</sup> *See* HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 39–40; HUD, HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 4-11 (Apr. 2001) [hereinafter HUD VOUCHER GUIDEBOOK], available at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/forms/guidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook).

<sup>82</sup> 24 C.F.R. § 982.204(c)(2) (2012); HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 39–40 (providing a detailed list of possible reasonable accommodation to waiting list procedures); HUD VOUCHER GUIDEBOOK, *supra* note 81, at 4-6.

<sup>83</sup> HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 58–59; HUD HANDBOOK 4350.3, *supra* note 14.

<sup>84</sup> Binns v. City of Marietta Hous. Assistance Program, 2010 WL 1138453, at \*8 (N.D. Ga. Mar. 22, 2010) (denying PHA’s motion for summary judgment on disability discrimination and retaliation claims when tenant’s application was rejected after she was “subjected to an onerous fingerprinting process and was required to have family members unnecessarily attend certain meetings”); Laflamme v. New Horizons, Inc., 605 F. Supp. 2d 378, 391–92 (D. Conn. 2009) (holding that defendant denied equal housing to applicant by inquiring into the nature of her disabilities beyond a threshold determination of whether she qualified as severely physically disabled). Note that reasonable accommodation laws do not require that a PHA create an admissions preference for a person with a disability. *See* Castro v. Bayonne Hous. Auth., 2010 WL 4853477, at \*6 (D.N.J. Nov. 22, 2010) (finding that tenant was not entitled to be placed at top of voucher waiting list as reasonable accommodation).

<sup>85</sup> Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Person or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing, H 2009-13 and PIH 2009-36 (Sept. 15, 2009) (implementing § 644 of 42 U.S.C. § 13604 and transmitting form HUD 92006).

<sup>86</sup> Sutton v. Piper, 344 F. App’x 101, 102-03 (6th Cir. 2009) (no duty to accommodate when “[a] review of [the plaintiff]’s credit report confirm[ed] that his poor credit history resulted from his own financial mismanagement and not his disability”).

<sup>87</sup> Letter from Sandra Henriquez, Assistant Sec’y. for Public Hous., to all PHAs, *Consideration of Extenuating Circumstances When Screening Applicants with Disabilities* (Jan. 27, 2011), available at <http://www.nhlp.org/files/2.%20HUD01272011%20Extenuating%20Circumstances%20Memo.pdf>.

<sup>88</sup> *Stoick v. McCorvey*, 2011 WL 3419939 (D. Minn. July 29, 2011) (waiver of policy rejecting application based on violent criminal history unreasonable when accommodation would fundamentally alter nature of the program by requiring PHA to disregard federal regulations mandating PHA to screen out applications who pose a direct threat to health and safety of others); *Evans v. UDR, INC.*, 644 F. Supp. 2d 675, 685 (N.D.N.C. 2009) (“where an individual suffers from a mental disability that is related to conduct that results in a criminal conviction, the causal connection between the mental disability and criminal conviction is insufficient for the purposes of the FHA to require a landlord to attempt an accommodation from a criminal history rental policy”).

<sup>89</sup> *See supra* notes 49–53 and accompanying text (“Direct Threat”) and *infra* notes 140–142 (“Rescission of Eviction/Termination Notice”).

<sup>90</sup> PIH Letter L-2007-05, Reinstatement of Notice PIH 2006-13 (HA), Nondiscrimination and Accessibility for Persons with Disabilities (permanently extending PIH 2006-13 (HA), Nondiscrimination and Accessibility for Persons with Disabilities), ¶ I.C.5; Non-Discrimination and Accessibility for Persons with Disabilities, PIH 2010-2 (HA) (Jan. 5, 2010); *see also* HUD HANDBOOK 4350.3, *supra* note 14, § 4-7.E.6 and 4-28.B; *see also* Sherry Trafford, *Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities*, 33 CLEARINGHOUSE REV. 131 (July/Aug. 1999).

In public housing and other HUD assisted housing, the rejection notice should advise them of the right to seek a reasonable accommodation. HUD, PHOG, *supra* note 14, § 4.9 (June 2003) (rejection notice should include statement opportunity for person with disabilities to request reasonable accommodation); *see also* HUD HANDBOOK, 4350.3, *supra* note 14, § 2-38 (strongly recommends for federally assisted housing that all written notices to applicants and tenants provide notice of the right to a reasonable accommodation) and § 4-9.C.2.c (regarding notices of eviction).

<sup>91</sup> *See, e.g.*, *Sec’y of HUD v. Flowers*, 2001 WL 56377 (HUD ALJ Jan. 22, 2001) (default judgment against Section 8 landlord who refused to engage in interactive process after rejecting application for tenancy based on negative landlord reference when tenant’s alleged behavior at previous residence resulted from improper treatment of his mental health disability).

<sup>92</sup> 24 C.F.R. § 8.28(a)(3) (2012); *see also* *Gaither v. Hous. Auth. of New Haven*, 2007 WL 3378533, at \*1 (D. Conn. Nov. 2, 2007) (ordering PHA to provide plaintiff with a list of accessible residential units). *But see* *Taylor v. Hous. Auth. of New Haven*, 267 F.R.D. 36, 46 (D. Conn. 2010) (right to list of accessible units is not privately enforceable).

<sup>93</sup> 24 C.F.R. § 982.503(b)(1)(i) (2012).

<sup>94</sup> *Id.* § 982.505(d); *see also* *Spieth v. Bucks Cnty. Hous. Auth.*, 594 F. Supp. 2d 584, 593-94 (E.D. Pa. 2009) (accommodation unnecessary when plaintiff failed to show causal link between denial of increased payment standard and her inability to enjoy or use a dwelling).

<sup>95</sup> Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation, PIH 2008-13 (HA) (Mar. 10, 2008), *extended by* PIH 2011-19 (HA), PIH 2010-11 (HA) [hereinafter PIH 2008-13]; HUD VOUCHER GUIDEBOOK, *supra* note 81, at 7-9; *see also* NHLP, *HUD’s New Guidance on Voucher Payment Standards for People with Disabilities*, 38 HOUS. L. BULL. 91 (Apr.–May 2008).

<sup>96</sup> PIH 2008-13, *supra* note 95; *see also* *Liberty Res., Inc. v. Phila. Hous. Auth.*, 528 F. Supp. 2d 553, 559 (E.D. Pa. 2007).

<sup>97</sup> PIH 2008-13, *supra* note 95.

<sup>98</sup> *Id.*

<sup>99</sup> *See, e.g.*, Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2011, 77 Fed. Reg. 14,817, 14,826 (Mar. 13, 2012); Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2011, 76 Fed. Reg. 78,675, 78,683–78,684 (Dec. 19, 2011); Notice of Regulator Waiver Requests Granted for the Second Quarter of Calendar Year 2011, 76 Fed. Reg. 59,719, 59,728–29 (Sept. 27, 2011); Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2011, 76 Fed. Reg. 37,360, 37,370 (June 27, 2011); *see also* Anthony Ha, *HUD Regulatory Waivers: Summary of Recent Waivers Regarding Voucher and Other Programs*, 35 HOUS. L. BULL. 238, 239 (2005); *see also* Antonia Konkoly, *HUD Regulatory Waivers Benefit Individual Participants and Public Housing Authorities*, 38 HOUS. L. BULL. 139, 140–41 (2008); Jason Lee, *HUD Regulatory Waivers Benefit Individual Participants and Public Housing Authorities*, 37 HOUS. L. BULL. 115, 116–17 (2007) and NHLP, *HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers*, 33 Hous. L. Bull. 309, 320 (2003).

<sup>100</sup> *Id.*

<sup>101</sup> Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2004, 70 Fed. Reg. 2218, 2240 (Jan. 12, 2005).

<sup>102</sup> 24 C.F.R. §§ 982.303(b)(2), 8.28(a)(4) (2012); Housing Choice Voucher Family Moves with Continued Assistance, PIH Notice 2012-42 (Oct. 2, 2012) 5; *Burgess v. Alameda Hous. Auth.*, 98 F. App'x 603, 605–06 (9th Cir. 2004) (reversing district court's dismissal of plaintiff's claim against PHA for failure to reasonably accommodate her disability by granting voucher extension).

<sup>103</sup> 24 C.F.R. 982.303(b)(2); *Augusta v. Cmty. Dev. Corp. of Long Island, Inc.*, 2008 WL 5378386, at \*6 (E.D.N.Y. Dec. 23, 2008) (granting PHA's motion for summary judgment on tenant's claim that he was entitled to a hearing after PHA terminated voucher upon expiration of extension); *Miller v. Mulligan*, 900 N.Y.S.2d 381 (Super. Ct. App. Div. 2010) (affirming administrative decision to terminate voucher upon expiration of extension); HUD VOUCHER GUIDEBOOK, *supra* note 81, at 5-44 ,8-12.

<sup>104</sup> 24 C.F.R. § 982.306(d) (2012).

<sup>105</sup> *Id.* § 982.532(a)(4).

<sup>106</sup> *Id.* § 982.306(d) and HUD VOUCHER GUIDEBOOK, *supra* note 81, at 8-15, 8-19 (renting from a relative); and Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2002, 68 Fed. Reg. 4558, 4575 (Jan. 29, 2003) (using a voucher for a dorm unit).

<sup>107</sup> HUD VOUCHER GUIDEBOOK, *supra* note 81, at 3-5, 17-1.

<sup>108</sup> *Compare Feeland v. Sisao, LLC*, 2008 WL 906746, at \*5 (E.D.N.Y. Apr. 1, 2008) (denying motion to dismiss complaint under the FHAA because “plaintiff [had] alleged sufficient facts in support of a plausible claim that acceptance of the Section 8 voucher was a reasonable accommodation of her disability), *Bell v. Tower Mgmt. Servs.*, 2010 WL 2346651 (N.J. Super. Ct. App. Div. June 11, 2010) (reversing and remanding dismissal of complaint alleging failure to reasonably accommodate when landlord refused to waive minimum income requirement and allow tenant to pay rent with government subsidy she received because of her disability), *with Riccardo v. Cassidy*, 2011 WL 940301, at \*3 (N.D.N.Y. Mar. 16, 2011) (quoting *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 301 (2d Cir. 1998)) (“Economic discrimination—such as the refusal to accept Section 8 tenants—is not cognizable as a failure to make reasonable accommodations”); *Hevner v. Vill. E. Towers, Inc.*, 2011 WL 666340, at \*2 (S.D.N.Y. Feb. 7, 2011) (tenant failed to establish that reduced maintenance fees to alleviate financial strain caused by her depression would be an accommodation of disability rather than an accommodation of economic status), *Sabi v. Sterling*, 107 Cal. Rptr. 3d 805 (Cal. Ct. App. 2010) (finding that California law did not require landlord to grant accommodation request for acceptance of Section 8 Voucher), *Edwards v. Hopkins Plaza Ltd. P'Ship*, 783 N.W.2d 171, 181 (Minn. Ct. App. 2010) (finding that accommodation request for owner to accept Section 8 Voucher was not reasonable because it would fundamentally alter the provider's plan to discontinue participation in the Section 8 program).

<sup>109</sup> *See, e.g., Feeland*, 2008 WL 906746, at \*5; *Bell*, 2010 WL 2346651; *see also* Abram B. Gregory, *Being Reasonable Under the Fair Housing Amendments Act: Allowing Changes in Rent-Admission Policies to Accommodate the Disabled Renter's Economic Status*, 80 IND. L.J. 905 (2005); Zachary Hedling, *Acceptance of Voucher May Be Required as a Reasonable Accommodation*, 38 HOUS. L. BULL. 144 (July 2008).

<sup>110</sup> PIH 2012-42, *supra* note 102, ¶ 3.

<sup>111</sup> *Id.*

<sup>112</sup> 24 C.F.R. § 983.401(f)(2) (2012).

<sup>113</sup> Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2004, 69 Fed. Reg. 62,992, 63,004 (Oct. 28, 2004).

<sup>114</sup> 24 C.F.R. § 982.307(b) (2012).

<sup>115</sup> Notice of Regulatory Waiver Requests Granted, 64 Fed. Reg. 44,088, 44,090 (Aug. 12, 1999).

<sup>116</sup> HUD HANDBOOK 4350.3, *supra* note 14, § 2-35.

<sup>117</sup> *Id.* § 3-23E.4.c.

<sup>118</sup> HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 64; HUD HANDBOOK 4350.3, *supra* note 14, at 3-68 to 3-69.

<sup>119</sup> 24 C.F.R. § 982.401(d)(2) (2012).

<sup>120</sup> *Id.* § 965.508; *Amone v. Aveiro*, 226 F.R.D. 677 (D. Haw. 2005) (granting motion for class certification for claims against PHA for failing to notify tenants that they may be entitled to increased utility allowance for disability-related usage and failing to establish and implement procedures to determine what increased allowances would be), *final settlement approved*, 2007 WL 2479291 (D. Haw. Aug. 27, 2007).

<sup>121</sup> See, e.g., *Giles v. Hous. Auth.*, No. 89-107 (E.D. Ky. May 3, 1990), 24 Clearinghouse Rev. 257 (No. 45,074, July 1990) (settlement providing for an electrical allowance for air conditioning where head of household is elderly or member has medically documented need for air conditioning)

<sup>122</sup> HUD VOUCHER GUIDEBOOK, *supra* note 81, at 18-8 to 18-9; HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 172.

<sup>123</sup> 24 C.F.R. § 982.316(a); see also HUD PUBLIC HOUSING GUIDEBOOK, *supra* note 58, at 64–65, 194–95.

<sup>124</sup> Over Subsidization in the Housing Choice Voucher Program, PIH 2008-20 (HA) (Apr. 16, 2008) [hereinafter PIH 2008-20], *extended and revised by* PIH 2009-22 (HA) (July 21, 2009) & PIH 2010-51 (HA) (Dec. 30, 2010); see also *Blanchard v. Dakota Cnty. Cmty. Dev. Agency*, 2009 WL 2151188, at \*3 (Minn. Ct. App. July 21, 2009) (applying PIH 2008-20 to tenant’s reasonable accommodation request for a live-in aide).

<sup>125</sup> PIH 2008-20, *supra* note 124.

<sup>126</sup> See, e.g., *Overlook Mutual Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009); *Echeverria v. Krystie Manor, LP*, 2009 WL 857629 (E.D.N.Y. Mar. 30, 2009) (denying housing provider’s motion for summary judgment on applicant’s FHAA claim when application was denied after tenant requested exception to pet policy for her service animal); *Janush v. Charities Hous. Dev.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000) (refusing to dismiss former tenant’s reasonable accommodation claim regarding possession of two birds and two cats in face of no-pet policy); *Auburn Woods I Homeowners Assoc. v. Fair Emp’t & Hous. Comm’n*, 18 Cal. Rptr. 3d 669 (Cal. Ct. App. 2004) (homeowners’ association violated California FEHA by refusing tenant’s reasonable accommodation request for an emotional support animal); *State ex rel. Henderson v. Des Moines Mun. Hous. Agency*, *State ex rel. Henderson v. Des Moines Mun. Hous. Agency*, 2010 WL 4484005 (Iowa Ct. App. Nov. 10, 2010) (reversing directed verdict for PHA upon finding that state had presented substantial evidence that request for emotional support animal was reasonable); *Sec’y of HUD v. Riverbay Corp.*, 2012 WL 1655364 (HUD ALJ May 7, 2012) (violation of FHAA when landlord attempted to evict tenant for violation of pet policy after tenant requested emotional support animal); *Sec’y of HUD v. Dutra*, 1996 WL 657590 (HUD ALJ Nov. 12, 1996) (violation of FHAA when landlord attempted to evict tenant for violation of pet policy after tenant requested emotional support animal); see also 24 C.F.R. pt. 5, subpt. C (2012) (Pet Ownership for the Elderly or Persons with Disabilities); Memorandum from Sara K. Pratt, Deputy Assistant Sec’y for Enforcement & Programs, HUD, to FEHO Reg’l Dirs., *Re New ADA Regulations and Assistance Animals as Reasonable Accommodations under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973* (Feb. 17, 2011) (stating that definition of “service animal” in ADA regulations, which excludes emotional support animals in places of public accommodation, does not apply to reasonable accommodation requests under either the FHA or Section 504); Christopher C. Ligatti, *No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act*, 35 T. MARSHALL L. REV. 139 (2010). *But see* *Assenberg v. Anacortes Hous. Auth.*, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (holding that PHA had not violated its reasonable accommodation duty under the FHAA where it sought eviction of tenant who failed to keep companion snakes caged when PHA staff were present or when being transported), *aff’d*, 268 F. App’x 643 (9th Cir. 2008); *Sec’y of HUD v. Blue Meadows Ltd. P’ship*, 2000 WL 898733 (HUD ALJ July 5, 2000) (finding no violation when landlord denied application because tenant failed to provide requested information regarding necessity of service animal).

<sup>127</sup> *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028 (D.N.D. 2011) (denying landlord’s motion for summary judgment on reasonable accommodation claim for waiver of pet deposit for emotional support animals); *Sec’y of HUD v. Carter*, 2011 WL 7064545 (HUD ALJ Dec. 13, 2011) (consent decree ordering landlords to undergo mandatory education and training and adopt non-discrimination policies after they refused to waive \$150 pet deposit for tenant’s emotional support animal); see also 24 C.F.R. § 960.705 (stating that regulations authorizing PHA to charge pet deposit in public housing does not apply to animals “necessary as a reasonable accommodation to assist, support or provide service to persons with disabilities”); JOINT STATEMENT, *supra* note 50, at 9 (“the housing provider may not require the applicant to pay a fee or security deposit as a condition of allowing the applicant to keep [an] assistance animal”). *But see id.* at 9–10 (“if a tenant’s assistance animal causes damage to the . . . unit or the common areas of the dwelling, the housing provider may charge the tenant for the cost of repairing the damage”).

<sup>128</sup> HUD, PHOG, *supra* note 14, at 106–07; HUD HANDBOOK 4350.3, *supra* note 14, at 7-28; see also *Distler v. El-Ad Reserve at Lake Pointe, L.L.C.*, 2011 WL 3715091 (M.D. Fla. Aug. 24, 2011) (denying landlord’s motion for summary judgment on failure to accommodate claim when landlord refused tenant’s request to move from second floor to ground floor unit); NHLP, *Historic Settlement Reach Regarding Unit Transfers for People with Disabilities*,

41 HOUS. L. BULL. 37, 55 (Mar. 2011).

<sup>129</sup> Marijuana is classified as a Schedule 1 substance under the Controlled Substances Act (CSA). 21 U.S.C. § 801 *et seq.*

<sup>130</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) (Congress has Commerce Clause authority to regulate local use of medical marijuana).

<sup>131</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (holding that the medical necessity defense is unavailable under the Controlled Substances Act).

<sup>132</sup> Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys, Re *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

<sup>133</sup> Memorandum from Helen R. Kanovsky, Gen. Counsel, HUD, to John Trasviña, Assistant Sec'y for Fair Hous. & Equal Opportunity, HUD, David Stevens, Assistant Sec'y for Hous./Fed. Hous. Comm'r, HUD, Sandra B. Henriquez, Assistant Sec'y for Public and Indian Hous., HUD, Re *Medical Use of Marijuana and Reasonable Accommodation in Federal and Public Assisted Housing* (Jan. 20, 2011) [hereinafter Kanovsky Memorandum], available at [http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm\(012011\).pdf](http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf).

<sup>134</sup> *Id.* at 3.

<sup>135</sup> Memorandum from Sandra B. Henriquez, Assistant Sec'y for Public & Indian Hous., HUD, to All Field Offices & Public Hous. Agencies, Re *Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs* (Feb. 10, 2011), available at <http://www.nhlp.org/files/4.%20Medical%20Marijuana%20Memo%20to%20FOs%20and%20PHAs.pdf.pdf>.

<sup>136</sup> Kanovsky Memorandum, *supra* note 133, at 4–5.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *Rodriguez v. Morgan*, 2012 WL 253867 (C.D. Cal. Jan. 26, 2012) (finding FHAA violation when landlord failed to respond to tenant's reasonable accommodation request for early lease termination); *Samuelson v. Mid-Atlantic Realty Co., Inc.*, 947 F. Supp. 756 (D. Del. 1996) (denying landlord's motion to dismiss complaint alleging FHA violation for denial of tenant's request for early lease termination).

<sup>139</sup> See 24 C.F.R. § 982.314 (2012) (Move with continued tenant-based assistance).

<sup>140</sup> See, e.g., *Sinisgallo v. Islip Hous. Auth.*, 2012 WL 1888140 (E.D.N.Y. May 23, 2012) (temporarily enjoining eviction based on tenant's likelihood of success on reasonable accommodation claim for a probationary period to demonstrate that changes in medication and mental health treatment would prevent tenant from further threatening safety of neighbors); *Super v. D'Amelia & Assocs., LLC*, 2010 WL 3926887 (D. Conn. Sept. 30, 2010) (denying motion to dismiss tenant's claims under FHA and Section 504 when housing authority terminated voucher after tenant assaulted an employee without considering her request for reasonable accommodation which included her seeking mental health treatment); *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109 (D.C. 2005) (tenant allowed to raise failure to provide reasonable accommodation of her mental impairment as affirmative defense to landlord's action for possession based on tenant's alleged failure to maintain the apartment in a safe and sanitary condition, despite owner's claims that request came too late, conditions posed a direct threat, and alleged insufficiency of evidence concerning disability); see also *supra* notes 49–53 and accompanying text (“Direct Threat”). But see *Minneapolis Public Hous. Auth. v. Demming*, 1995 WL 265061 (Minn. Ct. App. May 9, 1995) (affirming eviction judgment where tenant's criminal conduct was not causally related to his disability); *Sycamore Ridge Apartments v. L.M.G.*, 2012 WL 2138131 (N.J. Super. Ct. App. Div. June 14, 2012) (rescission of termination notice unreasonable when no evidence that tenant's behavior would change).

<sup>141</sup> See, e.g., *Cornwell & Taylor LLP v. Moore*, 2000 WL 1887528, at \*2–4 (Minn. Ct. App. Dec. 22, 2000) (finding landlord had duty to consider tenant's request for reasonable accommodation made after landlord attempted to evict tenant when he was arrested for attacking his wife while in a delusional state).

<sup>142</sup> See *Price v. Rochester Hous. Auth.*, 2006 WL 2827165, at \*9 (W.D.N.Y. Sept. 29, 2006) (finding that “due process requires [the PHA] to include language in termination letters issued to participants in the Shelter Plus Care Program notifying them of the right to request a reasonable accommodation of any disability in connection with the termination decision”).

<sup>143</sup> See discussion in IV, *infra*. regarding adding a disabled member to the family and discussion in III.C.3 regarding adding a family member who may provide live-in-aide assistance.

<sup>144</sup> 42 U.S.C. § 3602(i) (2006); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (analyzing standing challenge under FHA). But see *In re A.R. v. N.Y.C. Hous. Auth.*, 2010 WL 3909348 (N.Y. Sup. Ct. Oct. 1, 2010) (holding

that the brother of a public housing tenant with mental disabilities had no standing to bring a claim on behalf of his brother because he had not suffered a personal injury nor was he the tenant's legal representative.)

<sup>145</sup> 42 U.S.C. § 3604(f)(1) (2006).

<sup>146</sup> 60 P.3d 231 (Ariz. Ct. App. 2002).

<sup>147</sup> *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997).

<sup>148</sup> The FHA defines disability as: “(1) [A] physical or mental impairment which substantially limits one or more of a person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.” *See* 42 U.S.C.A. §§ 3602(h)(1)–(3) (2006).

<sup>149</sup> *See supra* notes 36–39 and accompanying text (“Federal Definition of Disability”) and *supra* notes 40–41 and accompanying text (“California Definition of Disability”).

<sup>150</sup> A tenant who does not have a disability as defined under federal or state law is not entitled to reasonable accommodation. *See, e.g., Sun Harbor Homeowner's Assoc., Inc. v. Bonura*, 37 Fla. L. Weekly D1398 (Dist. Ct. App. 2012) (rejecting reasonable accommodation claim because resident did not prove that her depression and anxiety substantially limited a major life activity); *Scott Cnty. Hous. & Redev. Auth. v. Phongsavat*, 2008 WL 4552386 (Minn. Ct. App. Oct. 14, 2008) (rejecting reasonable accommodation defense where tenant failed to show that migraines significantly restricted major life activity).

<sup>151</sup> *See Hawn v. Shoreline Towers Phase I. Condo. Ass'n*, 2009 WL 691378 (N.D. Fla. Mar. 12, 2009) (denying tenants FHA claim where he failed to demonstrate that condominium association knew of his disability).

<sup>152</sup> *Giebeler v. M & B Assoc.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (“Imposition of burdensome policies, . . . can interfere with disabled persons' right to use and enjoyment of their dwellings, thus necessitating accommodation”); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1381 (9th Cir. 1997) (holding that plaintiff failed to demonstrate that the landlord's refusal to pay for a caregiver's parking would diminish the care she received); *Scoggins v. Lee's Crossing Homeowners Assoc.*, 2011 WL 4578409 (E.D. Va. Sept. 29, 2011) (granting homeowners association's motion for summary judgment because resident failed to demonstrate that requested accommodations were necessary).

<sup>153</sup> *Dadian v. Village of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001) (instructing that determining whether an accommodation is necessary requires a “showing that the desired accommodation will affirmatively enhance disabled plaintiff's quality of life by ameliorating the effects of the disability”); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (stating that the concept of necessity requires a minimum showing that accommodation affirmatively enhances tenant's life by ameliorating effects of the disability).

<sup>154</sup> *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003) (denying request for an accommodation where plaintiffs did not demonstrate that reasonable accommodation was linked to their patients' care, but rather a preference to bypass associated costs of city building requirements); *Matarese v. Archstone Pentagon City*, 761 F. Supp. 2d 346, 364–65 (E.D. Va. 2011) (granting summary judgment to housing provider because tenant failed to produce expert evidence on the relationship between the tenant's disability and the requested accommodation, and whether the proposed accommodation would be effective was “not within the knowledge of a layperson”); *Sec'y of HUD v. Housing Auth. of Reno*, 2002 WL 1425272 (HUD ALJ June 19, 2002) (granting summary judgment to PHA after finding that Section 8 voucher holder's request for increased medical expense deduction for cost of restaurant meals because he was unable to cook would be an accommodation of his financial circumstances rather than his disability).

<sup>155</sup> *Overlook Mutual Homes, Inc. v. Spencer*, 415 F. App'x 617 (6th Cir. 2011) (granting judgment as a matter of law to landlord because tenants did not demonstrate that landlord had denied the reasonable accommodation request); *DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006) (finding that condominium owners association did not deny request for reasonable accommodation and thus could not have violated the FHAA); *see also United States v. WHPC-DWR, LLC*, 2012 WL 2498836, at \*4 (7th Cir. June 29, 2012) (finding landlord did not deny tenant's request for accessible parking space because tenant was free to park in closer space on a first-come, first-served basis under landlord's existing parking policy).

<sup>156</sup> *Compare Bhogaita v. Altamonte Heights Conde. Assoc.*, 2012 WL 10511, at \*4 (M.D. Fla. Jan. 3, 2012) (finding that condominium association's “intrusive request for more—and largely irrelevant—information” after tenant requested reasonable accommodation amounted to constructive denial of request), *with Scoggins v. Lee's Crossing Homeowners Assoc.*, 2011 WL 4578409, at \*5 (E.D. Va. Sept. 29, 2011) (granting summary judgment for homeowners association after finding that homeowners association's request for more information after resident asked for reasonable accommodation did not amount to constructive denial of accommodation).

<sup>157</sup> See 42 U.S.C. § 3604(f)(3)(B) (2006).

<sup>158</sup> Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1998*, 14 N.Y.L. SCH. J. HUM. RTS. 435, 447 (1998).

<sup>159</sup> *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1222, 1224 (11th Cir. 2008) (requested zoning variance in an area that would undermine city's goal of creating stable, single-family neighborhoods constitutes a fundamental alteration; however, similar variance in areas surrounded by multifamily dwellings with high turnover rates could be reasonable); *Giebeler v. M & B Assoc.*, 343 F.3d 1143 (9th Cir. 2003) (requested exemption to no-cosigner rule did not create undue burden when accommodation "would not require [landlord] to accept less rent [and] would not otherwise alter the essential obligations of tenancy"); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 446 (3d Cir. 2002) (requested zoning variance unreasonable "largely because of the problems with traffic safety and emergency vehicle access" that proposed elderly care facility was likely to cause).

<sup>160</sup> *U.S. Airways v. Barnett*, 535 U.S. 391, 405 (2002).

<sup>161</sup> 24 C.F.R. §§ 8.11, 8.33 (2012).

<sup>162</sup> JOINT STATEMENT, *supra* note 50, at 7.

<sup>163</sup> *Id.*; see also *Solberg v. Majerle Mgmt.*, 879 A.2d 1015, 1024 (Md. Ct. App. 2005) (finding an undue burden where request would have required landlord to make significant changes to his personal life and daily activities and would have prevented him from inspecting tenant's unit).

<sup>164</sup> *McGary v. Portland*, 386 F.3d 1259, 1263 (9th Cir. 2004) (holding that city interfered with the use and enjoyment of plaintiff's home by refusing to accommodate plaintiff's need for additional time to comply with trash-nuisance ordinance, thereby charging him for its nuisance abatement activities); *Giebeler v. M & B Assoc.*, 343 F.3d 1143 (9th Cir. 2003) (holding that landlord interfered with the use and enjoyment of plaintiff's prospective home by refusing to accommodate its policy forbidding co-signers on the lease); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994) (holding that mobile home park owner, under duty to provide reasonable accommodation imposed by the FHAA, may have to incur reasonable financial costs); *Mejia v. Comonfort*, 2010 WL 5818288, at \*6 (C.D. Cal. Nov. 15, 2010) (finding that some costs related to accommodation are allocated to the landlord).

<sup>165</sup> See *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003) (finding that granting an exception to zoning codes so a group of people can live as a single family is reasonable where cost is minimal and traffic congestion and noise concerns negligible); *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011) (finding that granting an accommodation for non-specially trained assistance animals imposes no undue financial or administrative burden).

<sup>166</sup> *Congdon v. Strine*, 854 F. Supp. 355, 363 (E.D. Pa. 1994) (finding the installation of a new elevator at a cost of \$65,000 was an undue financial burden); see also *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 446 (3d Cir. 2002) (requested zoning variance unreasonable "largely because of the problems with traffic safety and emergency vehicle access" that proposed elderly care facility was likely to cause); *Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597, 604-05 (4th Cir. 1997) (finding that requested zoning variance to expand group home would create an undue burden because proposed expansion would exacerbate existing parking congestion). *But see Davis v. Lane Mgmt.*, 524 F. Supp. 2d 1375 (S.D. Fla. 2007) (awarding damages to quadriplegic plaintiff whose landlord refused to fix elevators in an apartment complex for a seven-month period during which the tenant was forced to crawl up stairs to his unit).

<sup>167</sup> See *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1223 (11th Cir. 2008) (finding that request to waive occupancy turnover rule for halfway house would fundamentally alter zoning scheme intended to create pockets of stable, single-family neighborhoods); *Estate of Stoick v. McCorvey*, 2011 WL 3419939, at \*7 (D. Minn. July 29, 2011) (finding that request to waive criminal history of potential tenant fundamentally altered the nature of landlord's policy to protect the health and safety of its tenants); *Williams v. New York City Hous. Auth.*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 3038544 (E.D.N.Y. 2012) (finding that NYCHA's failure to allow a son who was never on the lease to succeed to his deceased mother's tenancy would have violated NYCHA tenant selection policy, consent order and federal law); see also examples provided in HUD HANDBOOK, 4350.3, *supra* note 14, § 2-43.

<sup>168</sup> *Giebeler v. M&B Assoc.*, 343 F.3d 1143, 1157-59 (9th Cir. 2003); see also *Smith v. Brown*, 2010 WL 3120203, at \*3 (W.D. Wash. 2010) (finding that granting an exception to covenant restricting "business or commercial activity" in residential area will not alter residential character of area since several neighbors engage in commercial activity at their homes); *Utah Labor Comm'n v. Paradise Town*, 660 F. Supp. 2d 1256, 1259 (D. Utah 2009) (finding



that granting conditional use permit exception to single family zoning requirement would not fundamentally alter nature of zoning plan).

<sup>169</sup> For further resources, see JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 3:1:3:46 (2011); *Housing Complaint Process*, CAL. DEP'T OF FAIR EMP'T & HOUS., [http://www.dfeh.ca.gov/Complaints\\_hCompProc.htm](http://www.dfeh.ca.gov/Complaints_hCompProc.htm) (last visited July 26, 2012) [hereinafter DFEH Complaint Process]; *Housing Discrimination*, HUD, OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, <http://www.hud.gov/complaints/housediscrim.cfm> (last visited Aug. 3, 2012).

<sup>170</sup> 42 U.S.C. § 3610 (2006).

<sup>171</sup> *Id.*

<sup>172</sup> 24 C.F.R. § 180.671 (2012); see also JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 3:6 (2011).

<sup>173</sup> DFEH Complaint Process, *supra* note 169.

<sup>174</sup> CAL. CIV. CODE §§ 1084–1097 (West 2012).

<sup>175</sup> See DFEH Complaint Process, *supra* note 169.

<sup>176</sup> *Douglas v. Kriegsfield*, 884 A.2d 1109, 1121 (D.C. 2005) (explaining the “general rule under the Fair Housing Act [is] that a reasonable accommodation defense will be timely until the proverbial last minute”).

<sup>177</sup> HUD HANDBOOK 4350.3, *supra* note 14, Form HUD 90105a, ¶ 12 (This model lease is not used for public housing or the voucher program).

<sup>178</sup> See 42 U.S.C.A. § 1437c-1(b) (West 2011).

<sup>179</sup> *Id.*

<sup>180</sup> PHA Certifications of Compliance with the PHA Plans and Related Regulations, form HUD 50077 (4/2008) available at [www.hudclips.gov](http://www.hudclips.gov).

<sup>181</sup> Form HUD 50075.2 (4/2008) and 24 C.F.R. § 90510(k) (2012).

<sup>182</sup> 24 C.F.R. § 903.23(b)(2) (2012). A PHA’s fiscal year is stated on each of the PHA’s Annual Plans, which are available at <http://www.hud.gov/offices/pih/pha/index.cfm>.

<sup>183</sup> 24 C.F.R. § 903.17(b).

<sup>184</sup> *Id.* §§ 903.17(b)(1), 903.23(e).

<sup>185</sup> See *Public Housing Agency (PHA) Plans*, HUD, OFFICE OF PUBLIC & INDIAN HOUS., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/pha](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha) (last visited Aug. 3, 2012).

<sup>186</sup> 24 C.F.R. § 960.202(a).

<sup>187</sup> VOUCHER GUIDEBOOK, *supra* note 50, 3-3; HUD, PHOG, *supra* note 14, § 1.3.

<sup>188</sup> 42 U.S.C.A. § 1437c-1(g) (West 2011).

<sup>189</sup> HUD HANDBOOK 4350.3, *supra* note 14, § 4-4.

<sup>190</sup> *Id.* at Figure 4-2.

<sup>191</sup> HUD HANDBOOK 4350.3, *supra* note 14, §4-4A and F.