Fair Housing Information Sheet # 4
Using Reasonable Accommodations to Prevent Eviction

(Revised: December 11, 2003)

Suppose a tenant with a disability is being evicted because of behavior or characteristics related to the person's disability, such as damage caused by a wheelchair hitting walls where passages are narrow, or complaints from other tenants of aggressive or disturbing behavior by a tenant with mental illness. Although a landlord may not violate the Fair Housing Act (FHA) by initiating an eviction in such circumstances,[1] a landlord might violate the FHA by refusing to cease eviction proceedings in response to a reasonable accommodation request from the tenant.

If a tenant identifies a disability-related behavior or characteristic that is causing him or her to be noncompliant with a lease, and proposes a change in the tenant's behavior or the landlord's policies that would eliminate or reduce the impact of the lease violation, then a reasonable accommodation may protect the tenant against eviction.

The applicability of reasonable accommodations in the context of eviction

The reasonable accommodation mandate applies to the termination of a lease just as it does to the terms and conditions of a lease.[2] A housing provider cannot deny a housing opportunity because of characteristics or behavior related solely to the person's disability, 42 U.S.C. ' 3604(f)(1), and is required to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations are necessary to afford such a person equal opportunity to use and enjoy a dwelling." 42 U.S.C. ' 3604(f)(3)(B). In the context of eviction, this means that even when a tenant without a disability would legitimately be subject to eviction, a landlord cannot necessarily evict a tenant with a disability solely because of behavior related to the tenant's disability. If it is possible for a landlord to alter its policies and rules so that a tenant with a disability can remain in a unit, and is not unduly burdensome, the landlord must make the accommodation and preserve the tenancy.

The reasonable accommodation mandate of the FHA applies to any "dwelling," 42 U.S.C. §3602(b), regardless of whether it is federally subsidized or not. However, housing that has been developed with assistance from the U.S. Department of Housing and Urban Development (HUD) will also have an obligation under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, to provide such accommodations. While the substantive standard is the same under both statutes, a recipient of federal funds also risks having those funds terminated for failure to accommodate an applicant or resident with a disability. Landlords who have no connection to federal funds other than the acceptance of a Housing Choice Voucher (formerly known as a "Section 8" voucher) as partial payment of a tenant's rent is not subject to Section 504.[3] Similarly, most observers believe that properties developed under the Department of Treasury's Low Income Housing Tax Credit program are not subject to Section 504 unless they receive other federal financial assistance.

Public and subsidized housing regulations may also require such landlords to comply with a number of procedural protections prior to eviction,[4] but compliance with these is not a substitute for providing a reasonable accommodation when requested to do so. If applicable regulations require and informal or formal grievance hearing prior to termination, such hearings can be a useful point at which to request an accommodation. Even though failing to request an accommodation at a pre-eviction administrative hearing is not a bar to raising the issue in a court proceeding, advocates are cautioned that judges may not react kindly to such a last minute request.

Accommodations might take the form of a tenant agreeing to modify his or her own behavior, or might involve a landlord altering its policy or rules, and possibly even absorbing some cost. See, e.g., *Shapiro v. Cadman Towers*, 51 F.3d 328 (2d Cir. 1995), and *United States v. California Mobile Home park Management Co.*, 29 F.3d 1413 (9th Cir. 1993) ("California Mobile Home Park I") (overruled by *United States v. California Mobile Home Park Management Co.*, 107 F.3d 1374 (9th Cir. 1997). Using the example provided in the opening paragraph of this paper, the tenant who is disturbing other residents might request that the landlord cease eviction proceedings until the tenant has had an opportunity to secure services that will help him to interact with other people in a way that will not be threatening or frightening to them. The tenant might also ask that the landlord allow him to enter and exit the building through a rear

door that is normally reserved for staff, so that the tenant is able to avoid a high traffic entrance area where other tenants congregate and are likely to engage him in conversation that could lead to a confrontation. The tenant is taking steps to minimize the impact of the lease violations, and the landlord is altering its practices by allowing continued tenancy and accepting some modest administrative or financial cost.

A tenant can challenge an eviction on the grounds of a landlord's refusal to grant an accommodations by filing a lawsuit in federal district court, filing an administrative complaint with HUD or a state enforcement agency, or by raising the fair housing claim as an affirmative defense in an eviction action in state court. A landlord will be required to cease eviction proceedings at whatever stage they are in, even if made aware of the tenant's disability and need for an accommodation only after notice of the eviction was provided to the tenant, or after the eviction complaint was filed. See*Radecki v. Joura*, 114 F.3d 115 (8th Cir. 1997). Once a state court decides fair housing claims, a federal court may be precluded from reviewing the claims, so it may be preferable to file the fair housing claim in federal court and ask that the entire eviction proceeding be enjoined pending a decision on the fair housing claim.[5] However, the fast pace with which evictions often move may require that the fair housing claims be raised first as affirmative defenses in the eviction proceeding.

Establishing the need for an accommodation in order to avoid eviction

In order to receive an accommodation as an alternative to eviction, the tenant must establish the link between the tenant's noncompliance with a lease and the tenant's disability. Where courts are skeptical of a tenant's claim that the need for an accommodation is related to the tenant's disability, they will not require the landlord to waive rules or alter policies. See, e.g., *Crossroads Apartments v. LeBoo*, FH-FL Rptr. & ¶18,100 (Rochester City Ct., NY 1990). See also*Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), in which the court describes the tenant's burden of showing that an animal "facilitate[s] a disabled individual's ability to function." Advocates are cautioned to marshal good evidence of the nexus between the disability and requested accommodation, or face dismissal of such claims or defenses. See, e.g.,*Grubbs v. Housing Authority of Joliet*, 1997 WL 281297 (N.D. Ill. May 20, 1997).

Once a tenant shows that a disability is the reason for noncompliance with a lease, the tenant must show that an accommodation will allow the tenant to remain compliant with the lease. For example, in an early case, *Citywide Associates v. Penfield*, 409 Mass. Super. Ct. 140, 564 N.E.2d 1003 (Mass. 1991), decided under Section 504 of the Rehabilitation Act but equally applicable under the Fair Housing Act, a trial court in Massachusetts ruled in favor of a tenant in an eviction action when the tenant was able to show that damage to her walls was caused because she hit them with sticks or threw water on them in order to drive away voices she hears (auditory hallucinations). One measure employed to eliminate this behavior was that she was given a "nerf" bat to use when striking the walls so that less damage would result.

In other cases, courts have required that landlords cease eviction proceedings even when no specific accommodation is requested, but when access to services may allow the tenant to alter behavior or pinpoint other types of accommodations that will allow the tenant to comply with a lease. In *Cobble Hill Apartments Co. v. McLaughlin*, 1999 Mass. App. Div. 166 (Mass. App. Div. 1999), the state appeals court vacated an order evicting a resident with severe migraine headaches, depression and post-traumatic stress disorder from a federally subsidized housing facility, remanding the case for determination whether the management company reasonably accommodated her disabilities as required by the Fair Housing Act. The court found that the management, although aware of the tenant's mental health problems and of the causal connection between her disability and her disruptive acts, limited its efforts to accommodate the tenant to two meetings with her and one offer to supply headphones for her television set to reduce the neighbor's noise complaints. The appeals court noted that "the fact that a tenant does not request a specific or suitable accommodation does not relieve a landlord from making one," particularly when the tenant is a person with a mental disability. Under these circumstances, the management failed to show that it attempted to reasonably accommodate the tenant prior to initiating eviction proceedings. This case imposes a high standard upon landlords to identify and implement a suitable reasonable accommodation, even when one is not proposed by the tenant herself.[6]The cases *Roe v. Housing Authority* and *Roe v. Sugar River Mills Assoc.*, described below under the "direct threat eviction" heading, also require the open-ended accommodation of an opportunity to access services.

Courts should allow a tenant to define what accommodation will allow continued tenancy, rather than allowing the landlord to define what accommodation is acceptable. In *Green v. Housing Authority*, 994 F. Supp. 1253 (D. Ore. 1998), which did not come before the court in the context of an eviction, but which should be equally applicable in the eviction context, the court held that a housing authority should have allowed a tenant to keep an assistive animal to meet needs related to the tenant's hearing impairment, rather than insisting that the tenant accept alternatives such as flashing lights for a smoke detector and a doorbell. Under this principle, landlords should not be allowed to insist

on a specific accommodation, such as a tenant's agreement to remain on a specific medication, if the tenant is able to propose an accommodation that meets the tenant's needs and allows the tenant to comply with lease provisions.

Defenses to the reasonable accommodation requirement

If the cost imposed upon a landlord in granting an accommodation is so great as to constitute an undue burden or cause a fundamental alteration in the provision of housing, a landlord is entitled to evict a tenant who violates lease provisions, even if the violations are related to the tenant's disability. In the Penfield case described above, the court engaged in a balancing of the tenant's interest in keeping her apartment and the cost to the landlord of the damage she inflicted upon her unit, and found that the cost to the landlord (about $520) was minimal compared to the tenant's interest in keeping her apartment.

The analysis of cost varies based on individual facts and the court that is deciding a case. In *Woodside Village v. Hertzmark*, FH-FL Rptr. & ¶18,129 (Conn. Super. Ct. 1993), a tenant with an assistance animal was unable to comply with rules regarding appropriate maintenance for the dog. The court allowed the landlord to evict the tenant for violation of the maintenance rules, on the grounds that forcing the landlord to assume the tenant's responsibility for maintenance amounted to a fundamental alteration of the landlord's provision of services to the tenant.

Exemptions from protection under the Fair Housing Act

The requirement that a landlord accommodate a tenant by not proceeding with an eviction does not mean that a tenant will be allowed to continue violating lease provisions, except in situations like the assistive animal case where the accommodation is a waiver of the applicable rule. Therefore, a tenant should be as specific as possible in describing what services will be helpful to address the non-compliance with a lease.

If the lease violation is related to current illegal drug use, a landlord will not be required to keep a tenant even if the tenant commits to enrolling in a drug treatment program. *Peabody Properties v. Sherman*, 638 N.E.2d 906 (Mass. 1994). People who are engaged in the current use of illegal drugs are not protected under the Fair Housing Act, 42 U.S.C. ' 3602(h).

Courts are also unlikely to require landlords to make accommodations that are related to a tenant's lack of income and consequent inability to pay rent. Drawing upon recent caselaw regarding requests for accommodation to allow admission to housing, specifically *Salute v. Stratford Greens*, 136 F.3d 193 (2d Cir. 1998) and *Schanz v. Village Apartments*, it is unlikely that courts will require landlords to waive any portion of late rent payments or even accept some type of payment plan to allow tenants with disabilities to continue residing in an apartment despite missed rent payments.[7] Despite showing a clear relationship between the lack of income and disability, the courts in Salute and Schanz refused to require accommodations that would allow the prospective tenants to overcome income-related barriers to housing. Court are likely to react similarly in the context of eviction C recognizing the link between lack of income and disability, but refusing to draw the necessary correlation between nonpayment of rent and disability.[8]

"Direct threat" evictions

Another explicit exemption from protection under the Fair Housing Act is any tenant "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. ' 3604(f)(9). Nevertheless, courts have interpreted the accommodation mandate to apply to evictions even in instances in which a tenant has engaged in behavior that constitutes a "direct threat." In two federal district court cases with written opinions, courts have held that landlords must show that "no reasonable accommodation will eliminate or acceptably minimize the risk [a tenant] poses to other residents" before proceeding with an eviction. *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636, 640 (D.N.H. 1993). See also, Roe v. Housing Authority, 909 F. Supp. 814 (D.Colo. 1995).

In *Sugar River Mills*, a tenant threatened another tenant with physical violence, using obscene and threatening language. The tenant was convicted for disorderly conduct related to the incident, and the landlord filed for an eviction based on the incident and the conviction. The tenant denied that he acted in a manner that was threatening, and also claimed that the outbursts were caused by his mental illness. The court relied upon legislative history and the Supreme Court case *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), to determine that the

landlord was required to make some effort to accommodate the tenant before it could proceed with an eviction. *Arline* was an employment case in which the Court held that an employee with tuberculosis was qualified for protection under the Section 504 of the Rehabilitation Act, despite the inherent risk that tuberculosis can spread and constitute a direct threat to the health of other people. The legislative history of the Fair Housing Act cites to *Arline* for the proposition that "if a reasonable accommodation could eliminate the risk [posed by a tenant whose tenancy may constitute a direct threat], entities covered under this Act are required to engage in such accommodation." H.R. Rep. No. 711, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 2173, at 2190. The court in *Sugar River Mills* drew upon this legislative history and caselaw under Section 504 to find that even when a tenant's behavior may constitute a direct threat, a landlord is required to make accommodations in an effort to eliminate the risk before denying the tenant a housing opportunity because of behavior related to the disability.

In a subsequent case, *Roe v. Housing Authority*, 909 F. Supp. 814 (D.Colo. 1995), a court required a landlord to cease eviction proceedings and make an accommodation to allow the continued tenancy of a man who hit another tenant and engaged in other behavior that would clearly constitute legitimate grounds for terminating a tenancy. The tenant had a mental disability and a hearing impairment, and claimed that his behavior was caused by the disabilities and could be easily controlled and accommodated. The court enjoined the housing authority from proceeding with an eviction action filed in state court, and ordered that the housing provider allow an opportunity for accommodation before it could proceed with the eviction.

More recently, a number of state courts have dealt with the issue of direct threat in the context of evictions. Almost uniformly, their analysis has included a broader sweep than that implied in the Roe cases, above. In *Wirtz Realty Corp. v. Freund*, 721 N.E.2d 589 (Ill. App. 1999), appeal denied without opinion, 729 N.E.2d 505 (Ill. 2000), an appellate court upheld the eviction of an elderly couple whose mentally ill son engaged in mildly threatening behavior to other tenants over a period of years. While insisting that it was defining the threat in terms of objective evidence of the son's recent behavior, the evidence it credited rested primarily on the subjective concerns of other residents. Similarly, in *Arnold Murray Construction v. Hicks*, 621 N.W.2d 171 (S.D. 2001), the South Dakota Supreme Court affirmed an eviction proceeding against an elderly tenant whose brain injury caused him to suffer from slurred speech and uncontrollable outbursts, among other symptoms. The court held that reported instances of nudity in front of other neighbors, inappropriate staring and a repeated failure to shut a security door adjacent to the parking lot constituted a direct threat to the health and safety of other residents. See also *Stout v. Kokomo Manor Apartments*, 677 N.E.2d 1060 (Ind. App. 1997)(teenager's alleged sexual molestation of another child made him a direct threat). But see *Cornwell and Taylor v. Moore*, 2000 WL 1887528 (Minn. App. Dec. 22, 2000)(landlord failed to show that no reasonable accommodation was possible for tenant with a mental illness who, while off psychotropic medications, engaged in threatening behavior). As the cases above indicate, an accommodation request can be made at any time, even in the eviction proceeding itself. It is now clearly established in most states that courts must consider defenses and counterclaims under the Fair Housing Act as part and parcel of the eviction proceeding itself. See, e.g., *Josephinium Associates v. Kahli*, 45P.3d 627 (Wash. App. 2002); *Newell v. Rolling Hills Apartments*, 134 F.Supp.2d 1026, 1038 (N.D.Iowa 2001) (collecting and summarizing cases; holding defense applies in Iowa); *Ansonia Acquisition I. LLC v. Francis*, 1999 WL 1076142, *5, 26 Conn. L. Rptr. 363 (Conn.Super.1999); *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 235, 661 N.E.2d 782 (1995); Mascaro v. Hudson, 496 So.2d 428, 429 (La.App.1986); *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn.1982); *Marine Park Assocs. v. Johnson*, 1 Ill.App.3d 464, 274 N.E.2d 645 (1971); *Abstract Inv. Co. v. Hutchinson*, 204 Cal.App.2d 242, 248, 22 Cal.Rptr. 309 (1962). See also *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171 (S.D.2001); *Malibu Inv. Co. v. Sparks*, 996 P.2d 1043 (Utah 2000); *Boulder Meadows v. Saville*, 2 P.3d 131 (Colo.App.2000); *Hous. Auth. of City of Bangor v. Maheux*, 748 A.2d 474, 476 (Me.2000); *City Wide Assocs. v. Penfield*, 409 Mass. 140, 564 N.E.2d 1003 (1991); *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249 (Minn.App.1986). But see *Lake in the Woods Apartment v. Carson*, 651 S.W.2d 556, 558 (Mo.App.1983).

Notes

[1.] It is discriminatory for a landlord to selectively or more harshly enforce rules because of a tenant's disability.

[2.] Fair Housing Information Sheet #1 of this series discusses the applicability of the Fair Housing Act to the terms or conditions of departure from a unit.

[3.] 24 C.F.R. §8.3 (definition of "Recipient.")

[4.] See, e.g., 24 C.F.R. §966.55 et seq. (public housing); 24 C.F.R. Part 247 (privately owned, federally subsidized properties).

[5] Fair Housing Information Sheet #1 of this series discusses preclusion of federal court review of state court decisions on the same matter.

[6] While such a standard has become the norm in the employment context, it has not routinely been imposed in the landlord-tenant setting. In fact, courts have generally rejected accommodations imposed by landlords that fail to consider the input of the tenant for whom an accommodation is required. See Green v. Housing Authority of Clackamas County<D>, 994 F.Supp. 1253 (D. Ore. 1998)

[7] But see Giebeler v. M & B Associates, 343 F.3d 1143 (9th Cir. 2003)(recognizing that poverty and disability may be so linked that accommodations such as co-signers may be necessary to afford equal housing opportunity to people with disabilities).

[8] Courts are also likely to find that excusing a rent payment or accepting late payments constitutes an undue burden or fundamental alteration and is, therefore, not a required accommodation.

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For more information, contact the Bazelon Center for Mental Health Law, 1101 15th Street, N.W., Suite 1212 Washington, D.C. 20005-5002. E-mail: mallen@relmanlaw.com.