

Reasonable Accommodation in Criminal Activity Cases

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September 26, 2016

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HOUSING JUSTICE

National Housing Law Project



People with Disabilities and the Criminal Justice System

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- People with disabilities are overrepresented in the criminal justice system.
- Deinstitutionalization resulted in more people with mental health issues and other disabilities in jails and prisons.
- People in prison are 3x as likely to report experiencing a disability. People in jail are 4x as likely.*
- 1 in 5 prison inmates experiences serious mental illness.*

*Bureau of Justice Statistics

Reentry Issues for People with Disabilities

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- People exiting the criminal justice system face significant barriers to obtaining and maintaining housing.
- People with disabilities face unique barriers to housing access and occupancy.
- People with mental illness are twice as likely to have been homeless in the months prior to incarceration.*
- One-third of returning citizens expect to go to a homeless shelter upon release.

*Center for American Progress, Disabled Behind Bars, July 2016

What We'll Cover

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- Overview of law on reasonable accommodation
- Overview of law on admissions and evictions for criminal history
- Accommodations in the admissions process for disability-related criminal activity.
- Accommodation in the evictions process for disability-related criminal activity.

Reasonable Accommodation

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Reasonable Accommodation

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- If a tenant has an obstacle to obtaining or maintaining housing because of a disability, the tenant can **request a reasonable accommodation**. 42 U.S.C.A. §3604(f) ; 29 U.S.C.A. §794 ; 42 U.S.C.A. §§ 12131.
- 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. 42 U.S.C.A. §3604(f).

When Must a Housing Provider Grant a Request?

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When a **person with a disability** makes a request that is:

**NECESSARY + REASONABLE =
MUST GRANT ACCOMMODATION**

Necessary & Reasonable

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- Necessary to use and enjoy the dwelling—
Affirmatively enhances the tenant's quality of life by ameliorating the effects of the disability. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).
- Reasonable —
 - No **undue financial or administrative burden**
 - Can not **fundamentally alter** the nature of the program.
24 C.F.R. §8.11

Criminal Activity

Eligibility for Admission

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Eligibility Criteria

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Federal restrictions apply

Public housing

Section 8 voucher program

Section 8 moderate rehab

Project-based Section 8

Section 202

Section 811

Section 221(d)(3)

Section 236

NO federal restrictions

LIHTC

Shelter Plus Care

Supportive Housing Program

HOPWA

MUST Be Denied Admission

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- Subject to lifetime registration requirement under state sex offender registration law (42 USC 13663)
- Convicted of manufacturing or producing methamphetamine on premises of federally assisted housing (42 USC 1437n(f))
 - ONLY public housing, Section 8 voucher program, Section 8 moderate rehab
- Evicted from federally assisted housing for drug-related criminal activity within the previous three years (42 USC 13661(a))
 - UNLESS completed drug rehabilitation approved by the PHA

MAY Be Denied Admission

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- Drug-related criminal activity
- Violent criminal activity
- “Other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees” (42 USC 13661(c))

Limitations on Discretion

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- Mitigating circumstances
 - Public housing – PHA **MUST** consider the time, nature, and extent of the conduct, including the seriousness of the offense (24 CFR 960.203(d))
 - Voucher program and HUD-assisted housing – PHA or owner **MAY** consider mitigating circumstances (24 CFR 982.552(c)(2), 5.852)
- Admission policies must be consistent with fair housing provisions (24 CFR 960.202(c)(3), 982.552(c)(2)(v), 5.105)
 - Letter from HUD OGC
- Arrests alone cannot be the basis of an adverse action
 - HUD Notice PIH 2015-19/H 2015-10

Grounds for Termination

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Grounds for Termination

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Regulations address criminal activity

Public housing

Section 8 voucher program

Section 8 moderate rehab

Project-based Section 8

Section 202

Section 811

Section 221(d)(3)

Section 236

Regulations do not address criminal activity

LIHTC

Shelter Plus Care

Supportive Housing program

HOPWA

MUST Terminate

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- PHA or owner MUST terminate if household member convicted of manufacturing or producing methamphetamine on premises of federally assisted housing (42 USC 1437n(f))
- Public housing, voucher program (termination by PHA), Section 8 moderate rehab (24 CFR 966.4(l)(5)(i)(A), 982.553(b)(1)(iii), 882.518(c)(1)(ii))

MAY Terminate – Drug-Related Criminal Activity

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- PHA or owner MAY terminate assistance for drug-related criminal activity
- Public housing (24 CFR 966.4(l)(5)(i)(B))
 - On or off the premises by tenant, household member or guest
 - On the premises by person under the tenant's control
- Voucher program (eviction by landlord), Section 8 moderate rehab, multifamily (24 CFR 982.310(c), 882.511(a)(2), 882.518(c)(1)(i), 5.858)
 - On or near the premises by tenant, household member or guest
 - On the premises by person under the tenant's control
- Voucher program (termination by PHA) (24 CFR 982.551(l), 982.553(b)(1)(iii), 982.552(b)(2))
 - Household member engaged in drug-related criminal activity
 - Evicted for serious lease violation

MAY Terminate – Violent Criminal Activity

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- PHA or owner MAY terminate for violent criminal activity
- Voucher program (eviction by landlord) (24 CFR 982.310(c)(2)(i)(C))
 - On or near the premises by a tenant, household member, or guest
 - On the premises by person under the tenant's control
- Voucher program (termination by PHA) (24 CFR 982.551(l), 982.553(b)(2))
 - Household member engaged in violent criminal activity

MAY Terminate – Other Criminal Activity

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- PHA or owner MAY terminate assistance for criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, (including staff living on the premises) or by persons living in the immediate vicinity of the premises

MAY Terminate – Other Criminal Activity

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- Public housing, voucher program (eviction by landlord), multifamily (24 CFR 966.4(l)(5)(ii)(A) , 982.310(c)(2)(i)(A)-(B), 5.859)
 - Household member, guest, person under tenant's control
- Section 8 moderate rehab, voucher program (termination by PHA) (24 CFR 882.518(c)(2)(i), 982.553(b)(2), 982.551(l))
 - Household member

MAY Terminate

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- **Mitigating circumstances**
 - PHA or owner may consider all relevant circumstances (24 CFR 966.4(l)(5)(vii)(B), 982.310(h)(1), 982.552(c)(2), 5.852)
- **Termination policies must be consistent with fair housing provisions** (24 CFR 966.4(l)(5)(vii)(F), 982.552(c)(2)(v), 5.105)

Reasonable Accommodation and Admissions

Evan

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Evan's application for a Project-Based Section 8 unit was denied due to his prior criminal activity. Evan has several convictions on his record including for assault and indecent exposure. Evan experiences severe depression and substance dependence. Evan alleges that all of his prior criminal activity is related to alcohol and drug abuse.

Current Illegal User of a Controlled Substance

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- The **only** exception to the definition of disability:
- A **current** illegal user of a controlled substance is not disabled for the purposes of reasonable accommodation. However, an individual with a disability can include someone who has successfully completed a drug rehabilitation program, is currently in such a program, or is mistakenly regarded as engaging in illegal drug use. 42 U.S.C. § 12210(b).

Former Substance Abuse

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- Explain to provider that substance abuse is a disability.
 - “Nothing . . . Shall be construed to exclude as an individual with handicaps an individual who – (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (III) is erroneously regarded as engaging in such use, but is not engaging in such use.” – 29 U.S.C. §705(20)(C)(i)

Denial of Admission – Issues

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- Look-back period- When did the criminal activity occur? Evidence of disability at that time?
- Did the owner consider mitigating circumstances?
 - Disability (although also independent grounds for RA)
 - Nature and severity of crime
- Legal status of individuals in recovery from substance abuse under the FHAA, Section 504, and ADA

Denial of Admissions - Issues

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- Process – Did the owner notify applicant of right to review of denial or right to request reasonable accommodation?
- Nexus – causal link between disability and incident

Cases

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- *Evans v. UDR, Inc.*, 644 F. Supp.2d 675, 677 (E.D.N.C 2009)
- *Estate of Stoick v. McCorvey*, CIV. 10-1030 DSD/AJB, 2011 WL 3419939
- *Rosenthal v. Hershman*, 4:05CV1024 CDP, 2005 WL 3348931 (E.D. Mo. Dec. 7, 2005) (credit history)

Termination/Eviction

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Example

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- Teresa Tenant lived in the same public housing unit for 14 years. She has been living with severe anxiety, depression, and bipolar disorder, for which she receives treatment.
- In 2014, a new property manager, Marty Manager, was assigned to Teresa's building. For about a year, Marty called Teresa names and harassed her.
- In 2015, Marty and Teresa had an altercation. She became very upset and hit Marty with a shovel. Marty had several injuries requiring 38 stitches. Teresa was arrested.

Example, Cont'd

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- The housing authority issued an eviction notice to Teresa pursuant to its policy that strictly prohibits any violent criminal activity on the premises.
- Teresa asks the housing authority for a reasonable accommodation that would rescind the eviction.

Issues

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- Is rescinding the eviction an accommodation, or merely a second chance?
- Is there a nexus between the disability and the incident?
- Can the housing authority deny the requested accommodation because the tenant is a direct threat?

Nexus



- PHA claimed tenant failed to establish causal link between disability and altercation with manager.
- At the grievance hearing, Teresa's doctor testified that she had changed Teresa's medical regimen about two weeks before the incident. Teresa was unable to have her new prescription filled immediately because she was having problems with her MediCal paperwork. She was not on medication at time of incident, but is now back on a regular treatment regimen.

Direct Threat Assessment

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- Direct threat assessment:

- Individualized and based on current medical knowledge or best available objective evidence
- Must assess: a) nature, duration, severity of risk; b) probability that potential injury will occur; c) whether reasonable accommodation will mitigate risk. 24 C.F.R. § 9.131(c); 28 C.F.R. § 36.208(c); HUD-DOJ Joint Statement, Q. 5; cf. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002).

Some Cases



- *Boston Hous. Auth. v. Bridgewaters*, 452 Mass. 833, 898 N.E.2d 848, 859 (Mass.2009)
- *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 342 (E.D.N.Y. 2012)
- *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636, 637 (D.N.H. 1993)
- *Super v. J. D'Amelia & Associates, LLC*, 2010 WL 3926887, at *6 (D. Conn. Sept. 30, 2010)

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