

Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After *HUD v. Rucker*

Anne C. Fleming*

INTRODUCTION

The Supreme Court's 2002 decision in *Department of Housing and Urban Development v. Rucker*¹ has profoundly affected the tenancies of federal public housing tenants and Section 8 voucher holders. For the past decade, federal law has required local public housing authorities administering federally subsidized housing programs to include terms in tenant leases and voucher agreements mandating that any drug-related or violent criminal activity by a tenant's household members or guests can result in the eviction of the entire household or termination of the household's housing subsidy.² Prior to the *Rucker* decision, courts in many jurisdictions, including the Ninth Circuit Court of Appeals, held that such federally mandated lease provisions did not give housing authorities the right to evict "innocent tenants" for the drug-related and criminal activities of other household members and guests.³ This judicial interpretation of the federal statutes provided protection from for-cause evictions and terminations by housing authorities to tenants who could not foresee or prevent the criminal activities of third parties. Such protection was particularly important to mentally disabled tenants, who often, due to their disabilities, had no capacity to foresee or prevent third party lease violations and for whom the imposition of strict liability for the actions of third parties had no possible deterrent effect.

The Supreme Court in *Rucker*, however, overruled these prior innocent tenant decisions and held that local housing authorities are permitted

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¹ 535 U.S. 125 (2002).

² 42 U.S.C. § 1437d(1)(6) (2000) (public housing); 42 U.S.C. 1437f(o)(7)(D) (2000) (Section 8 leases).

³ *E.g.*, *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

under the governing regulations to evict entire households in federal public housing for the drug-related criminal activity of individual household members or guests, regardless of innocent tenants' knowledge of these activities.⁴ Under *Rucker*, local housing authorities have the discretion to consider mitigating circumstances when making a decision as to whether to evict an entire household,⁵ but innocent tenants do not have a federal law innocent tenant defense against an eviction action brought due to the criminal activity lease violation of another household member or guest.⁶ As the Court stated in *Rucker*, local housing authorities have the discretion "to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."⁷ The Court made no express limitation on this policy even for those who, due to mental disability, lack the mental capacity to foresee or prevent such third party activities.

The Court's ruling confirmed the right of housing authorities nationwide to evict innocent tenants, like those in the *Rucker* case, from federally subsidized housing for the drug-related or violent criminal activity of their household members and guests. Housing authorities are free to evict tenants like sixty-three-year-old Pearlie Rucker, a plaintiff in the *Rucker* case, who had lived in public housing since 1985 and was living with her mentally disabled daughter, her two grandchildren, and one great-granddaughter at the time of the eviction action.⁸ The housing authority tried to evict Rucker because police found her daughter in possession of cocaine three blocks from Rucker's apartment.⁹ The housing authority proceeded with this action despite Rucker's claim that she regularly searched her daughter's room for evidence of alcohol and drug use and had never found any evidence of drug use prior to this incident.¹⁰ Housing authorities are also free to evict tenants like two of the other plaintiffs in *Rucker*: Willie Lee, a seventy-one-year-old grandfather and public housing resident for over twenty-five years, and Barbara Hill, a sixty-three-year-old grandmother and public housing resident for over thirty years.¹¹ The housing authority sought to evict Lee and Hill because their grandsons, who resided with them, were caught smoking marijuana in the apartment complex park-

⁴ *Rucker*, 535 U.S. at 129.

⁵ Both the federal public housing and Section 8 voucher programs allow housing authorities to consider all relevant circumstances in determining whether to terminate assistance for or evict a participant household. Circumstances to consider include the seriousness of the case, the culpability of individual household members, and the effects of a housing authority eviction or termination on the family members not involved in the lease violation. 24 C.F.R. § 982.552(c)(2)(i) (2004) (Section 8 regulations); 24 C.F.R. § 966.4(1)(5)(vii)(B) (2004) (public housing regulations).

⁶ *Rucker*, 535 U.S. at 132–34.

⁷ *Id.* at 130.

⁸ *Rucker*, 237 F.3d at 1117.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

ing lot.¹² Lee and Hill both contended they had no prior knowledge of any illegal drug activity by their grandsons.¹³

The *Rucker* decision, which foreclosed an innocent tenant defense in eviction and termination actions from federally subsidized housing¹⁴ and imposed strict liability on public housing tenants for the actions of third parties, raises serious concerns for all federal public housing tenants and Section 8 voucher holders and particularly for mentally disabled tenants. Due to their disabilities, many mentally disabled tenants in federally subsidized housing have a limited ability to understand—much less control, foresee, or prevent—the actions of other household members and guests. Federal law generally entitles all disabled tenants in federally subsidized housing to seek “reasonable accommodations” from housing authorities to accommodate any disability-based limitations on their abilities to participate in the housing program.¹⁵ Courts, however, have not ruled on whether a mentally disabled tenant is entitled to request that a housing authority proceed not with a discretionary eviction or termination action, but pursue an alternate course of action as a reasonable accommodation of the innocent tenant’s mental disability. Such a reasonable accommodation to the housing authority’s post-*Rucker* eviction procedures could help ensure that the tenant’s household would be better able to comply with the criminal activity lease obligations in the future. The tenant could request, for example, that the housing authority refrain from evicting the tenant, allow the tenant to remove the violator from the lease, and procure social services support for the household. Such an accommodation would of course also need to conform to the federal requirements for reasonable accommodations, under either the Fair Housing Amendments Act,¹⁶ § 504 of the Rehabilitation Act,¹⁷ or the Americans with Disabilities Act.¹⁸

Although courts have not yet addressed the relationship between a housing authority’s duty to provide reasonable accommodations to mentally disabled tenants and its discretion to evict innocent tenants for third party lease violations post-*Rucker*, it makes little sense to hold mentally disabled tenants strictly liable for the actions of third parties. In the *Rucker*

¹² *Id.*

¹³ *Id.*

¹⁴ The issue of whether a *state* law innocent tenant defense is still viable post-*Rucker* has not been decided in many state courts. In Massachusetts, for example, this issue has not yet reached the appellate courts. Judge Winik of the Boston Housing Court has held, however, that the Massachusetts state law innocent tenant defense, as articulated in *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982), is preempted by the federal regulation cited in *Rucker*. *Boston Hous. Auth. v. Figueroa*, No. 02-SP-03297 (Trial Ct. Mass., Suffolk Div., Hous. Ct. Dep’t, Oct. 10, 2003).

¹⁵ Fair Housing Amendments Act, 42 U.S.C. §§ 3601–3631 (2000); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000).

¹⁶ 42 U.S.C. §§ 3601–3631 (2000).

¹⁷ 29 U.S.C. § 794 (2000).

¹⁸ 42 U.S.C. §§ 12101–12213 (2000).

opinion, Chief Justice Rehnquist suggested that holding tenants strictly liable for the actions of household members and guests would provide an incentive for tenants to be watchful over these parties and not be willfully blind to their lease-violating activities.¹⁹ Such a policy assumes that the threat of strict liability will encourage a tenant to take every possible step to foresee and prevent third party lease violations, including some steps that would perhaps not be taken if lack of knowledge or “innocence” were an eviction defense for the tenant. This reasoning does not apply with the same force in the case of mentally disabled tenants. Unlike the tenants envisioned by the *Rucker* Court, mentally disabled tenants may lack the capacity to foresee and prevent the actions of third parties. Therefore, a policy of holding these innocent tenants strictly liable for the actions of third parties has no potential to deter future drug-related or criminal activity and will not encourage these tenants to take any precautions they would not otherwise take.

This Note explores the relationship between a housing authority’s discretion under *Rucker* to evict or terminate innocent tenants and its duty to provide reasonable accommodations for disabled tenants. Part I discusses the origins of the drug-related and violent criminal activity lease provisions at issue in *Rucker* and the reasoning of the *Rucker* opinion. Part II examines the limits on a housing authority’s discretion to proceed with criminal activity evictions and terminations and the appropriate scope of judicial review of housing authority actions. Part III explores the requirements for a disabled tenant’s reasonable accommodation request and the likely challenges that a housing authority will make to a mentally disabled tenant’s request for such accommodation. Finally, Part IV discusses the possible form of a reasonable accommodation that would prevent a housing authority from proceeding with a discretionary eviction or termination against an innocent, mentally disabled tenant.

¹⁹ Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002). See SoCheung Lee, *Serving the Invisible and the Many: U.S. Supreme Court Upholds the Rucker One-Strike Policy*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 415, 435–36 (2002). The Court might have instead concluded that the strict liability policy has no greater deterrent effect or ability to regulate a tenant’s conduct than a knowledge-based policy because tenants under both policy regimes will take all possible cost-efficient measures to prevent the lease-violating activity from occurring. The Court could still justify the policy on the ground that someone must bear the cost of the damage caused by the lease violation and that the “innocent” tenant is more worthy of bearing this burden than the other “innocent” housing development residents. The Court, however, based its support for a strict liability policy on the idea that such a rule would incentivize tenants to act to foresee and prevent lease violations.

I. THE “WAR ON DRUGS” AND *HUD v. RUCKER*A. *Federal Public and Subsidized Housing Regulations*

The provision of the United States Code mandating that public housing authorities include criminal activity eviction terms in all tenant leases, 42 U.S.C. § 1437d(1)(6), was created by Congress in the 1980s to attack the escalating drug violence and crime in federally assisted low-income housing.²⁰ This provision was added to the United States Housing Act of 1937²¹ through the Anti-Drug Abuse Act of 1988.²² The original purpose of the public housing system created by the Housing Act was “to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families” and “promote the goal of providing decent and affordable housing for all citizens.”²³ The public housing system created by the Act is managed and operated by state and local public housing authorities (“PHAs”), but is a federally assisted program.²⁴ Although eviction and termination decisions are made entirely by the local PHA, PHA decision-making and administrative procedures are governed by the federal regulations promulgated by the Department of Housing and Urban Development (“HUD”).²⁵ The provisions of the federal regulations regarding criminal activity evictions and terminations in federally subsidized housing and HUD’s interpretations of these regulatory provisions were upheld by the Court in *Rucker*.

Section 1437d(1)(6) of the United States Code now mandates that every public housing authority use leases which “provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”²⁶ This lease requirement is also

²⁰ Lee, *supra* note 19, at 417 (citing 42 U.S.C. § 11901 (3)–(5) (2000)).

²¹ Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437–1437f (2000)).

²² Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.). This addition to the Housing Act was amended by the Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079, and further amended by the Housing Opportunity Program Extension Act of 1996, which supported President Clinton’s “One Strike and You’re Out” policy. Pub. L. No. 104-120, § 9(a)(1), 110 Stat. 834 (1996) (codified as amended in scattered sections of 42 U.S.C. and 12 U.S.C.). The amendments have widened the scope of possible lease-violating activity from “on or near” the housing premises to “on or off” the premises, allowing public housing authorities to evict households for a broader range of violent and drug-related criminal activity. See 42 U.S.C. § 1437d(1)(6) (2000).

²³ 42 U.S.C. §§ 1437(a)(1)(A), 1437(a)(4) (2000).

²⁴ Lee, *supra* note 19, at 416. 42 U.S.C. § 1437 (2000).

²⁵ 24 C.F.R. pts. 966, 982 (2004).

²⁶ 42 U.S.C. § 1437d(1)(6). The Code includes a similar mandate for the leases between Section 8 voucher holders and their private landlords. 42 U.S.C. § 1437f(o)(7)(D) (2000).

reflected in the implementing federal regulations, which mirror the language of the statute.²⁷

The Section 8 voucher program, which issues housing choice vouchers to tenants to subsidize the cost of renting an apartment operated by a private landlord, is governed by statutes and criminal activity regulations similar to those for public housing.²⁸ The Section 8 statute and regulations require PHAs to establish standards that allow for termination of Section 8 rental assistance for a household's "drug-related" and "violent" criminal activity on or near the premises.²⁹ However, Section 8 tenancies operate quite differently from those of public housing residents. Through portable vouchers, the Section 8 program creates subsidized housing maintained by private landlords and does not concentrate low-income subsidized tenants in one development. The program therefore should not suffer from the same problems as those that plague public housing developments.³⁰ Although the regulations for Section 8 are similar to those for public housing, this key difference between the two programs should exclude Section 8 tenants from the strict liability interpretation of the federal regulations affirmed in *Rucker*.

²⁷ 24 C.F.R. §§ 966.4(1)(5)(i)(B), (ii)(A) (requiring public housing lease terms that allow the PHA to evict households for "drug-related" and "violent" criminal activity); 24 C.F.R. §§ 982.552(c)(1)(i), 982.553(b)(1)(iii), 982.553(b)(2) (requiring PHAs to establish standards that allow for termination of Section 8 rental assistance for a household's "drug-related" and "violent" criminal activity); 24 C.F.R. § 982.310 (requiring landlords receiving a federal Section 8 voucher subsidy to include lease terms that allow the landlord to evict households for "drug-related" and "violent" criminal activity).

²⁸ See 42 U.S.C. § 1437d(1)(6) (public housing); 42 U.S.C. § 1437f(o)(7)(D) (Section 8 Housing Choice Vouchers). The implementing federal regulations are also almost identical, except for the locus of the activity. 24 C.F.R. §§ 966.4(1)(5)(i)(B), (ii)(A) (requiring public housing lease terms that allow the PHA to evict households for "drug-related" and "violent" criminal activity "on or off" the premises); 24 C.F.R. §§ 982.552(c)(1)(i), 982.553(b)(1)(iii), 982.553(b)(2) (requiring PHAs to establish standards that allow for termination of Section 8 rental assistance for a household's "drug-related" and "violent" criminal activity "on or near" the premises). The Federal Register commentary on the Section 8 and public housing rules reiterates that the Section 8 standard for the location of the criminal activity is different from the public housing standard. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,777 (May 24, 2001) (to be codified at 24 C.F.R. pts. 966, 982).

²⁹ 24 C.F.R. §§ 982.552(c)(1)(i), 982.553(b)(1)(iii), 982.553(b)(2).

³⁰ Statistics comparing criminal activity rates between public housing developments and buildings housing Section 8 voucher holders are difficult to compile because there are numerous buildings housing Section 8 voucher holders and law enforcement officials have no reason to maintain separate crime statistics for these buildings. No such statistics were publicly available on HUD's website as of September 2004. However, the Section 8 program was designed to eliminate some of the problems with public housing, such as high concentrations of crime and violence, which can result from the lack of market forces operating to regulate public housing tenancies and the concentration of low-income public housing tenants in isolated developments. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ISSUE BRIEF NO. 1: VOUCHER RECIPIENTS ENJOY MUCH GREATER CHOICE ABOUT WHERE TO LIVE THAN RESIDENTS OF PUBLIC HOUSING AND ARE LESS LIKELY TO BE CONCENTRATED IN DISTRESSED NEIGHBORHOODS (2000), <http://www.huduser.org/publications/pdf/voucher.pdf>.

B. The Impact of Rucker on Federal Public Housing Tenants

The California federal public housing tenants in *Rucker* sued HUD and their local PHA to enjoin eviction actions brought against them in state court for drug-related criminal activity lease violations under the lease provisions mandated by 42 U.S.C. § 1437d(1)(6). The Ninth Circuit ruled in favor of the tenants to enjoin the eviction cases, on the ground that HUD's reading of the statute was contrary to legislative intent and therefore was not entitled to any deference.³¹ Examining the text of the criminal activity provision in conjunction with the remainder of the statute, the legislative history, and other Code sections enacted at the same time, the Court concluded that Congress did not intend for the statute to apply to the eviction of innocent tenants.³² The court also reasoned that, even disregarding the legislative history favoring the tenants' interpretation, the statute should not be read to create "odd and unjust results" such as permitting the PHA to evict an entire household if "a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana."³³ Finally, the court expressed concern that HUD's interpretation of the statute would "raise serious questions under the Due Process Clause of the Fourteenth Amendment"³⁴ by punishing tenants for the conduct of third parties, and held that the statute should be construed in a manner more consistent with constitutional mandates.³⁵

The Supreme Court dismissed most of the Ninth Circuit's analysis in its ruling. The tenants argued that Congress intended to preserve an innocent tenant defense to evictions caused by the lease-violating activity of other household members and guests.³⁶ HUD responded that Congress did not intend to preserve an innocent tenant defense to criminal-conduct evictions in enacting § 1437d(1)(6), and that the HUD regulations therefore properly allow local housing authorities the discretion to evict households for such activity, regardless of the knowledge of innocent tenants.³⁷ In overturning the Ninth Circuit's decision for the tenants,³⁸ Chief Justice Rehn-

³¹ *Rucker v. Davis*, 237 F.3d 1113, 1119 (9th Cir. 2001), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

³² *Id.* at 1123 ("Section 1437d(1)(6) is not a picture of clarity and may be subject to varying interpretations. When read in conjunction with the remainder of § 1437d(1) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to the eviction of innocent tenants.").

³³ *Id.* at 1124.

³⁴ *Id.*

³⁵ *Id.* at 1124–25.

³⁶ See Brief for Appellee at 4–23, Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781). See also Transcript of Oral Arguments at 29, *Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781).

³⁷ See generally Brief for Appellants, *Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781). See also Transcript of Oral Arguments at 17–18, *Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781).

³⁸ *Rucker*, 737 F.3d at 1113.

quist³⁹ emphasized the seriousness of the drug problem in public housing developments and the need for no-fault evictions to protect public housing residents.⁴⁰ The Court held that a plain reading of § 1437d(1)(6) gives local housing authorities the discretion to hold public housing tenants strictly liable for the drug-related criminal activity of household members and their guests, “regardless of whether the tenant knew, or should have known, of the drug-related activity.”⁴¹ The Court found that the meaning of the statute was “unambiguous” and clearly supported HUD’s reading.⁴² The Court declined to examine the legislative history of the statute because “reference to legislative history is inappropriate when the text of the statute is unambiguous.”⁴³

Chief Justice Rehnquist reasoned that HUD’s reading of the Code provision does not produce “absurd” or unjust results, as the Ninth Circuit claimed, because it does not *require* a PHA to evict an entire household for any criminal activity lease violation.⁴⁴ The decision of whether to pursue eviction in each case is entrusted to the discretion of the local PHA, which is in the “best position to take account of . . . the degree to which the housing project suffers from ‘rampant drug-related or violent crime,’ ‘the seriousness of the offending action,’ and ‘the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.’”⁴⁵ The Chief Justice added that a strict liability or “no-fault” eviction policy is a part of “normal landlord-tenant law and practice” in many jurisdictions and such a policy “maximizes deterrence and eases enforcement difficulties.”⁴⁶ Consequently, *Rucker* entitled PHAs to proceed with eviction actions against innocent public housing tenants, regardless of their knowledge of the lease-violating activities of household members or guests.

C. *The Impact of Rucker on Section 8 Voucher Holders*

The *Rucker* opinion did not explicitly address the applicability of its holding to the Section 8 voucher program, although at least one court has found the holding equally applicable in the Section 8 context.⁴⁷ The differences between Section 8 tenancies and federal public housing tenancies, however, seem to dictate that *Rucker* should not apply to Section 8 ten-

³⁹ Justice Breyer took no part in the consideration of the case. Chief Justice Rehnquist wrote on behalf of the remaining members of the Court.

⁴⁰ *Rucker*, 535 U.S. at 127, 134.

⁴¹ *Id.* at 136.

⁴² *Id.* at 132.

⁴³ *Id.*

⁴⁴ *Id.* at 133–34.

⁴⁵ *Id.* at 134.

⁴⁶ *Id.* (internal quotation marks omitted).

⁴⁷ *Oakwood Plaza Apartments v. Smith*, 800 A.2d 265, 269 (N.J. Super. Ct. App. Div. 2002).

ants.⁴⁸ The congressional and HUD concerns that prompted the strict liability policy, as enumerated by Chief Justice Rehnquist, are limited to the public housing context. In *Rucker*, the Court noted the concern that public housing tenants are grouped together in public housing projects, on which “drug dealers” increasingly impose “a reign of terror.”⁴⁹ The opinion also emphasized the effect of crime and drug activity on the health and safety of other project residents and on the “deterioration of the [project’s] physical environment.”⁵⁰ Chief Justice Rehnquist further noted that the government is acting as “a landlord” in public housing eviction cases⁵¹ and that “no-fault” eviction is “a common incident of tenant responsibility under normal *landlord-tenant* law and practice.”⁵²

Chief Justice Rehnquist’s explanation of why Congress might believe there is a need for no-fault evictions in public housing does not equally apply to Section 8 voucher terminations. Section 8 voucher holders are not grouped together in public housing projects, on which “drug dealers” increasingly impose “a reign of terror.”⁵³ The PHA acts as the voucher issuer to the Section 8 tenant, not as the landlord of the tenant’s building. There is a separate private landlord who can initiate an eviction action against the Section 8 tenant. Although a PHA’s action to terminate a tenant’s Section 8 subsidy has a high likelihood of forcing the tenant to leave the private housing unit, it does not require the private landlord to evict the tenant from the housing. Therefore, if removing all offending tenant households from their housing units is Congress’ primary concern in enacting these statutes, termination of a Section 8 tenant’s subsidy does not directly accomplish this goal. The Section 8 landlord, rather than the PHA, is better situated to accomplish that aim. Thus, it would seem that the primary concerns motivating the strict liability policy, as articulated by the *Rucker* Court, are limited to the public housing context.

One New Jersey state court, however, has held that *Rucker* is applicable in the Section 8 context. In *Oakwood Plaza Apartments v. Smith*,⁵⁴ the court rested its holding on the statutory analysis in *Rucker*, which seems equally applicable to the federal public housing and Section 8 regulations and statutes, rather than on the differences in how the two programs op-

⁴⁸ See *supra* note 30 and accompanying text.

⁴⁹ *Rucker*, 535 U.S. at 127. See generally Amy R. Bowser, *One Strike and You’re Out—Or Are You?: Rucker’s Influence on Future Eviction Proceedings for Section 8 and Public Housing*, 108 PENN ST. L. REV. 611 (2003) (discussing the application of the *Rucker* decision to Section 8 voucher tenancies).

⁵⁰ *Rucker*, 535 U.S. at 134.

⁵¹ *Id.* at 132 (“It is entirely reasonable to think that the Government, when seeking to transfer private property to itself in a forfeiture proceeding, should be subject to an ‘innocent owner defense,’ while it should not be when acting as a landlord in a public housing project.”).

⁵² *Id.* at 134 (internal quotation marks and citation omitted) (emphasis added).

⁵³ *Id.* at 127.

⁵⁴ 800 A.2d 265 (N.J. Super. Ct. App. Div. 2002).

erate and the communities in which these tenants live.⁵⁵ The *Oakwood* court did not consider the policy arguments against applying *Rucker* to Section 8 tenants, perhaps due to the *Rucker* Court's statutory analysis supporting its decision and the "virtual identity of language" between the public housing and Section 8 statutes.⁵⁶

The *Rucker* holding was based primarily on the Court's reading of the statute's plain meaning, not on the policy reasons behind Congress' actions or on the rationality of the no-fault eviction policy. The language in the Section 8 part of the Code relating to drug-related and violent criminal activity violations is almost identical to the language of § 1427d(1)(6), the public housing section of the Code at issue in *Rucker*.⁵⁷ Due to the "virtual identity of language" in the Section 8 and public housing statutory provisions, the *Oakwood* court held that the reasoning in *Rucker* applies to Section 8 tenancies.⁵⁸ Other courts may wish to revisit this conclusion in light of the strong policy considerations weighing in favor of different interpretations of the Section 8 and public housing regulations. Under *Oakwood*, however, criminal activity evictions of innocent public housing tenants and terminations of innocent Section 8 voucher holders' subsidies are subject to the exercise of discretion by local PHAs.

II. THE LIMITS OF PHA DISCRETION AND JUDICIAL REVIEW

After *Rucker*, courts have begun evaluating their ability to review PHA discretionary evictions and Section 8 terminations and judge what actions a PHA must take to exercise its discretion properly under the HUD regulations. Through judicial review of PHA actions, tenants may gain some protection against arbitrary or discriminatory evictions and terminations for alleged criminal activity lease violations. HUD has, however, disputed the ability of courts to review PHA discretionary actions and has attempted to limit judicial oversight of the PHA eviction and termination decision-making process.

The federal regulations allow, and HUD has openly encouraged, PHAs to use the discretion conferred upon them by HUD and approved in the *Rucker* opinion to consider mitigating circumstances in criminal activity evictions and Section 8 terminations.⁵⁹ As Chief Justice Rehnquist explic-

⁵⁵ See *id.* at 269.

⁵⁶ *Id.*

⁵⁷ See 42 U.S.C. § 1437d(1)(6) (2000) (public housing); 42 U.S.C. § 1437f(o)(7)(D) (2000) (Section 8 Housing Choice Vouchers). The implementing regulations are also almost identical, except for the locus of the activity. See *supra* note 28.

⁵⁸ *Oakwood*, 800 A.2d at 269.

⁵⁹ 24 C.F.R. § 966.4(l)(5)(vii)(B)–(D) (2004) (public housing evictions); 24 C.F.R. § 982.552(c)(2) (2004) (Section 8 voucher terminations); Letter from Michael M. Liu, Assistant Secretary of HUD, to Public Housing Directors (June 6, 2002) ("The Secretary and I urge you to consider such [mitigating] factors and to balance them against the competing policy interests that support the eviction of the entire household."), <http://www.hud.gov/>

itly stated in *Rucker*, the statute “does not *require* the eviction of any tenant who violated the lease provision.”⁶⁰ HUD, however, has authorized PHAs to adopt blanket, no-exceptions policies of pursuing all possible criminal activity-related evictions and terminations without considering any mitigating circumstances.⁶¹ As a result of the disagreement between HUD and tenants over the permissibility of such blanket eviction policies, lower courts presiding over PHA eviction cases have been confronted with the question of whether PHAs must exercise the discretion conferred upon them by statute and regulation or whether exercise of discretion is itself discretionary. Before deciding this question, courts have also had to address whether they have the authority to review a PHA’s use of its discretion at all. These questions remain unresolved.

A. *Is Discretion Discretionary?*

Although *Rucker* does not address the permissibility of a PHA adopting a blanket eviction policy, the opinion does suggest that a PHA’s exercise of discretion is not discretionary. Chief Justice Rehnquist wrote that the Court’s plain-meaning reading of § 1437d(1)(6), which allows PHAs to evict even innocent tenants for the activities of third parties, is permissible and not absurd because PHAs are endowed with discretion in making eviction and termination decisions and are not required to evict any tenant.⁶² This implies that allowing a PHA to adopt a policy of evicting all criminal activity lease violators regardless of mitigating circumstances *would* be absurd.⁶³ In the opinion, the Court specifically enumerated appropriate factors for a PHA to consider in its exercise of discretion, such as the amount of criminal activity in the housing development, the seriousness of the criminal activity, and the tenant’s attempts to prevent or mitigate the activity.⁶⁴ Additionally, the federal regulations also note that a PHA may consider all circumstances relevant to a case in rendering a decision on whether to proceed with eviction or termination.⁶⁵ The *Rucker*

offices/pih/regs/rucker6jun2002.pdf; Letter from Mel Martinez, HUD Secretary, to Public Housing Directors (Apr. 16, 2002) (“Eviction should be the last option explored, after all others have been exhausted.”), <http://www.nhlp.org/html/pubhsg/Martinez%204-16-02%20ltr.pdf>.

⁶⁰ Dep’t of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125, 133–34 (2002).

⁶¹ Letter from Carole W. Wilson, Associate General Counsel for Litigation, HUD, to Charles J. Macellaro, Attorney for Yonkers, N.Y. Housing Authority 5 (Aug. 15, 2002) (“[T]here is no legal authority for the proposition that a PHA cannot adopt a policy of maximum deterrence pursuant to which every violation of the lease provision required by Section 6(1)(6) results in lease termination and household-wide eviction.”), <http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf>.

⁶² *Rucker*, 535 U.S. at 133–34.

⁶³ See Caroline Castle, Note, *You Call That a Strike? A Post-Rucker Examination of Eviction from Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435, 1456–57 (2003).

⁶⁴ *Rucker*, 535 U.S. at 134.

⁶⁵ 24 C.F.R. § 966.4(1)(5)(vii)(B)–(D) (2004) (public housing evictions); 24 C.F.R.

Court therefore rested its holding on the assumption that decisions as to whether to proceed with possible eviction actions would be made on a case-by-case basis, not according to a PHA blanket policy.

The General Counsel for HUD, however, maintains that PHAs may permissibly adopt a blanket policy of evicting all criminal activity lease violators, regardless of mitigating circumstances.⁶⁶ HUD's comments on the federal regulations governing criminal activity evictions state that HUD's regulations "authorize, but do not *require*" a PHA to consider "social and situational factors" in deciding whether to proceed with criminal activity evictions.⁶⁷ HUD's reading of the federal regulations would allow a PHA to refuse to consider mitigating circumstances in all criminal activity eviction and termination cases.

B. What Constitutes an Unreasonable Action?

According to HUD, a court may only determine whether a lease violation actually occurred, and not whether the PHA or private landlord appropriately exercised its discretion in an eviction action.⁶⁸ Perhaps contrary to HUD's claims, courts considering eviction and termination cases have examined the landlord's use of discretion to determine if that discretion was exercised at all.⁶⁹ The courts that have presided over these eviction and termination cases have not, however, reached any consensus on what it means for a landlord to act unreasonably.⁷⁰

Because PHAs are not United States government agencies and review of their actions is therefore outside the scope of the Administrative Procedures Act,⁷¹ some courts have determined that they may review PHA actions *de novo* to determine whether they are in accordance with the governing federal statutes and regulations.⁷² If the PHA's actions are found not to be inconsistent with the governing statutes and regulations, then

§ 982.552(c)(2) (2004) (Section 8 regulations).

⁶⁶ Letter from Carole W. Wilson to Charles J. Macellaro, *supra* note 61.

⁶⁷ Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,782 (May 24, 2001) (to be codified at 24 C.F.R. pts. 966, 982) (emphasis added).

⁶⁸ *Id.* ("[A] court's function under HUD's regulations is to determine whether an eviction meets the requirements of the lease and of Section 6(l)(6) . . . and not whether a PHA has considered additional social and situational factors.")

⁶⁹ *See, e.g.*, *Oakwood Plaza Apartments v. Smith*, 800 A.2d 265, 270–71 (N.J. Super. Ct. App. Div. 2002).

⁷⁰ Compare *id.*, and Tom Perrotta, *Drug-Related Eviction Prompts Hearing into Landlord's Decision*, N.Y. L. J., Mar. 10, 2003, at 1 (reporting New York decision in *Hampton Houses, Inc. v. Smith*, No. L & T 83367/02 (N.Y. City Ct. Mar. 4, 2003)), with *Hous. Auth. of Joliet v. Chapman*, 780 N.E.2d 1106 (Ill. App. Ct. 2002).

⁷¹ 5 U.S.C. § 701(b)(1) (2000) ("'[A]gency' means each authority of the Government of the United States . . ."). A local PHA is a state agency administering federal funds, not a United States agency for purposes of reviewing its actions with appropriate deference under the Administrative Procedures Act. *Ritter v. Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 327 (4th Cir. 1994).

⁷² *Ritter*, 33 F.3d at 328.

the court will accord deference to the PHA's actions, but it can still review the actions for "reasonableness."⁷³ Lower courts have given differing interpretations to "reasonableness" in reviewing PHA and private landlord decisions to evict tenants for criminal activity lease violations.⁷⁴

One lower court decision held that a landlord's failure to exercise its discretion is a per se violation of HUD regulations and is therefore unreasonable. In *Oakwood Plaza Apartments v. Smith*,⁷⁵ a New Jersey appellate court found that HUD regulations *require* a landlord to exercise its discretion to weigh the positive and negative factors in each eviction case.⁷⁶ The court remanded the case because the record from below did not reflect the landlord's "weighing process" and therefore did not permit the court to determine if the landlord acted unreasonably by failing to exercise its discretion.⁷⁷ The *Oakwood* court's understanding of a landlord's responsibility to exercise the discretion conferred on it by regulation is consistent with other legal precedent regarding use of agency discretion. The Vermont Supreme Court in *Burbo v. Department of Social Welfare*,⁷⁸ for example, similarly held that a social welfare department abused its discretion by failing to exercise it when determining a client's reduction in welfare benefits.⁷⁹

The Office of General Counsel for HUD, however, asserts that *Oakwood Plaza Apartments v. Smith* is "inconsistent with, and contrary to, the rationale of *Rucker*."⁸⁰ HUD claims that the federal regulations should not be read to require a PHA to use its discretion at all and that courts have no power to review PHA discretionary decisions in order to determine if discretion was exercised.⁸¹ Other lower courts, acting more consistently with HUD's position, have declined to investigate whether and how a PHA exercised its discretion. The Illinois Court of Appeals in *Housing Authority of Joliet v. Chapman*, for example, held that a PHA could evict a tenant without regard to that tenant's knowledge of her son's criminal activity and did not address whether the PHA considered any mitigating cir-

⁷³ *Id.* at 328. See *Baldwin v. Hous. Auth. of Camden*, N.J., 278 F. Supp. 2d 365, 374 (D.N.J. 2003).

⁷⁴ Compare *Oakwood*, 800 A.2d 265, with *Chapman*, 780 N.E.2d 1106.

⁷⁵ *Oakwood*, 800 A.2d 265.

⁷⁶ *Id.* at 270.

⁷⁷ *Id.*; see also *Kazer v. Santiago*, No. 01SP01661 (Trial Ct. Mass., N.E. Div., Hous. Dept., Mar. 7, 2002) (finding that discretion conferred on PHA must be exercised by PHA and that PHA must issue agency decision reflecting consideration of relevant issues before it can terminate Section 8 assistance); Perrotta, *supra* note 70, at 1 (reporting New York decision in *Hampton Houses, Inc. v. Smith*, No. L & T 83367/02 (N.Y. City Ct. Mar. 4, 2003), which held that Section 8 landlord-owner must offer evidence regarding her determination to evict tenant for criminal activity to demonstrate that the owner used its discretion and used it properly).

⁷⁸ 599 A.2d 1045 (Vt. 1991).

⁷⁹ *Id.* at 1046.

⁸⁰ Letter from Carole W. Wilson to Charles J. Macellaro, *supra* note 61, at 4 n.4.

⁸¹ Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,782 (May 24, 2001) (to be codified at 24 C.F.R. pts. 966, 982 (2004)).

cumstances.⁸² This approach is consistent with HUD's position that a PHA's failure to exercise discretion is not unreasonable.

C. *The One Clear Abuse of Discretion*

Despite these disagreements over the appropriate manner for a PHA to exercise its discretion and the allowable judicial review thereof, HUD concedes that PHA discretionary actions must comply with antidiscrimination and other civil rights requirements.⁸³ In a letter from HUD's General Counsel's Office, the agency acknowledged that a PHA would be prohibited from adopting a policy of "evicting only families of a particular race or political party affiliation" due to "independent legal requirements."⁸⁴ Although not explicitly mentioned in the General Counsel's letter, these "independent legal requirements" limiting PHA discretionary actions include constitutional mandates and federal civil rights legislation, such as the Fair Housing Amendments Act ("FHAA"),⁸⁵ Section 504 of the Rehabilitation Act ("Section 504"),⁸⁶ and the Americans with Disabilities Act ("ADA").⁸⁷ The HUD regulations governing criminal activity-related evictions and terminations explicitly note this nondiscrimination limit on PHA actions.⁸⁸ The Section 8 voucher regulations also state that "if a family includes a person with disabilities, the PHA decision concerning such [voucher termination] action is subject to consideration of reasonable accommodation in accordance with [the regulations implementing Section 504 of the Rehabilitation Act]."⁸⁹

⁸² Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2002).

⁸³ Letter from Carole W. Wilson to Charles J. Macellaro, *supra* note 61, at 3 n.2 ("A uniform policy of householdwide eviction also would be less vulnerable to any allegation that a PHA has engaged in a pattern of uneven enforcement that violates antidiscrimination or other civil rights requirements—requirements that, of course, continue to apply notwithstanding the general, and clear-cut, authority that PHAs possess to terminate, or to forgo termination of, any individual lease . . .").

⁸⁴ *Id.* at 5.

⁸⁵ Pub. L. No. 100-430, 102 Stat. 1619 (1994) (codified as amended at 42 U.S.C. §§ 3601-3631 (2000)).

⁸⁶ Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2000)).

⁸⁷ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

⁸⁸ The federal regulations governing Section 8 vouchers indicate that voucher termination actions "must be consistent with fair housing and equal opportunity provisions of Section 5.105 of this title." 24 C.F.R. § 982.552(c)(2)(v) (2004). The regulations use the same language to limit PHA eviction actions. 24 C.F.R. § 966.4(1)(5)(vii)(F) (2004). Section 5.105 provides that "nondiscrimination and equal opportunity" requires HUD programs to comply with the FHAA and implementing regulations, Section 504 and implementing regulations, and the ADA. 24 C.F.R. § 5.105 (2004).

⁸⁹ 24 C.F.R. § 982.552(c)(2)(iv) (2004).

III. REASONABLE ACCOMMODATIONS FOR DISABLED TENANTS FACING CRIMINAL ACTIVITY EVICTIONS OR TERMINATIONS

PHA discretion to proceed with eviction and termination actions is expressly limited, according to HUD's own regulations, by the federal anti-discrimination requirement that a PHA provide any qualified disabled tenant with whatever legally mandated reasonable accommodations she requests.⁹⁰ A PHA's failure to provide reasonable accommodations under the applicable federal statutes would be a clear violation of the governing HUD regulations and a per se abuse of PHA discretion. Just as a PHA would be prohibited from evicting only black tenants for criminal activity lease violations, it would be equally impermissible for a PHA to use its discretion to evict or terminate a tenant if such action conflicted with the PHA's duty to provide a reasonable accommodation to a disabled tenant.⁹¹ PHA actions are always subject to *de novo* review to determine if they comply with the governing regulations, including reasonable accommodation requirements.⁹²

Prior to the Supreme Court's decision in *Rucker*, mentally disabled tenants in many states did not need to resort to reasonable accommodation requests to defend against eviction actions for the violent and drug-related criminal activity of their household members and guests. In Massachusetts, for example, state law provided all tenants in public housing with an innocent tenant defense to for-cause evictions and terminations.⁹³ Furthermore, courts in several jurisdictions had found that Congress intended to preserve an innocent tenant defense in enacting the new criminal activity lease requirements for federally subsidized housing.⁹⁴ Mentally disabled tenants in many jurisdictions could therefore invoke this defense in eviction actions that involved the criminal activity of third parties of which they had no knowledge.⁹⁵ This lack of knowledge was often attributable to the

⁹⁰ See *supra* note 88.

⁹¹ See *supra* Part II.C.

⁹² *Ritter v. Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 328 (4th Cir. 1994).

⁹³ See *Spence v. Gormley*, 439 N.E.2d 741, 744 (Mass. 1982) (holding that Massachusetts state law, MASS. GEN. LAWS ch. 121B, § 32, provides a defense to eviction in "special circumstances" when the tenant could not have foreseen the lease-violating misconduct or was unable to prevent it by any available means).

⁹⁴ *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504 (Tenn. 2001); *Kimball Hill Mgmt. Co. v. Roper*, 733 N.E.2d 458 (Ill. App. Ct. 2000); *Am. Apartment Mgmt. Co. v. Phillips*, 653 N.E.2d 834 (Ill. App. Ct. 1995); *Diversified Realty Group, Inc. v. Davis*, 628 N.E.2d 1081 (Ill. App. Ct. 1993); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68 (N.C. Ct. App. 1995); *Del. County Hous. Auth. v. Bishop*, 749 A.2d 997 (Pa. Commw. Ct. 2000).

⁹⁵ Several jurisdictions, however, did not recognize an innocent tenant defense in these eviction and termination actions and held all tenants strictly liable for the activities of their household members and guests. See *City of San Francisco Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367 (Cal. App. Dep't Super. Ct. 1995); *Hous. Auth. of New Orleans v. Green*, 657 So. 2d 552 (La. Ct. App. 1995); *Ann Arbor Hous. Comm'n v. Wells*, 618 N.W.2d 43 (Mich. Ct. App. 2000); *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700 (Minn. 1999); *Syracuse*

limitations caused by the tenants' disabilities, and the tenants were therefore not held responsible for "acts that they could not avert by any means."⁹⁶

The *Rucker* decision precluded tenants from asserting a federal law innocent tenant defense, thus allowing housing authorities to find any tenant strictly liable for the criminal activity of her household members and guests. PHA discretion to move forward with eviction or termination actions is not, however, without limits. As discussed in Part II, *supra*, PHA decisions are subject to *de novo* judicial review to determine if they are consistent with the governing statutes and HUD regulations. A PHA's exercise of discretion is limited by the antidiscrimination provisions of the FHAA, Section 504, and the ADA. The regulations governing Section 8 terminations explicitly state,⁹⁷ and the public housing regulations more generally note,⁹⁸ that a PHA must *first* consider a tenant's request for reasonable accommodation under these antidiscrimination laws.⁹⁹ The federal regulations governing HUD programs also explicitly apply the language of Section 504 to all HUD programs.¹⁰⁰ It would therefore be contrary to federal regulations and a per se abuse of PHA discretion to evict or terminate a household prior to ruling on a reasonable accommodation request by a disabled tenant in public housing or a disabled tenant who receives a Section 8 voucher.¹⁰¹

Although a PHA is bound by HUD regulations to consider a reasonable accommodation request from any tenant prior to exercising its eviction discretion, these tenant requests must still satisfy the legal require-

Hous. Auth. v. Boule, 265 N.Y.S.2d 541 (N.Y. App. Div. 1999).

⁹⁶ *Spence*, 439 N.E.2d at 745 (discussing the state law "cause" requirement in for-cause evictions from public housing).

⁹⁷ See regulations cited *supra* note 88.

⁹⁸ 24 C.F.R. § 966.7(a)-(b) (2004) ("For all aspects of the lease and grievance procedures, a handicapped person shall be provided reasonable accommodation . . . the tenant may, at any time during the tenancy, request reasonable accommodation of a handicap of a household member . . ."); see also regulations cited *supra* note 88.

⁹⁹ 24 C.F.R. § 5.105 (2004) (providing that "fair housing and equal opportunity" requires HUD programs to comply with the FHAA and implementing regulations and Section 504 and implementing regulations).

¹⁰⁰ 24 C.F.R. § 8.4 (2004). "No qualified individual with handicaps shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance from the Department." *Id.* § 8.4(a).

¹⁰¹ Although each PHA is entitled to adopt its own administrative plan outlining the internal policies governing procedures like review of reasonable accommodation requests, such requests can generally be submitted at any time prior to the official termination of the tenancy or tenant subsidy. The Boston Housing Authority, for example, allows a tenant to submit a request at any time during the tenancy or participation in the Section 8 program, including after the tenant has received a notice of termination or eviction. BOSTON HOUS. AUTH., GUIDE TO REASONABLE ACCOMMODATION IN HOUSING POLICY & PROCEDURES §§ 6.1-.3, at 7 (n.d.), http://www.bostonhousing.org/pdfs/Reasonable_Accom_Policy.pdf (public housing) [hereinafter BOSTON HOUS. AUTH., GUIDE]; BOSTON HOUS. AUTH., LEASED HOUSING DIVISION REASONABLE ACCOMMODATIONS IN RENTAL ASSISTANCE POLICIES & PROCEDURES § 4.5, at 14 (2001), http://www.bostonhousing.org/pdfs/Reasonable_Accom_Policy_LH.pdf (Section 8 vouchers) [hereinafter BOSTON HOUS. AUTH., LEASED HOUSING].

ments for a reasonable accommodation. A tenant has the burden to prove that she is eligible to receive an accommodation, that the request states an “accommodation,” and that such accommodation is “reasonable.”¹⁰² Even if the tenant meets this burden, a request may still be denied if the PHA demonstrates that the accommodation is “unreasonable”¹⁰³ or that the tenant poses a “direct threat” to her community.¹⁰⁴ The cognitive limitations of most mentally disabled tenants render the already complicated task of making and advocating for the approval of such a request all the more difficult. The remainder of Part III will explore the possible challenges a PHA might mount to the reasonable accommodation requests of mentally disabled tenants facing an eviction or termination for third party criminal activity and how such challenges may be overcome by tenants and their advocates.

A. Challenges to Tenant Eligibility for a Reasonable Accommodation

Section 504 and its implementing regulations for HUD programs require that a tenant must be a “qualified individual with handicaps” to be eligible to receive a reasonable accommodation, meaning that she “meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.”¹⁰⁵ Under the HUD regulations governing reasonable accommodation requests, the tenant must be “capable of complying with all obligations of occupancy with or without supportive services provided by persons other than the recipient.”¹⁰⁶ The FHAA reasonable accommodation statute, which also applies to PHA actions, does not explicitly include the “qualified individual” requirement, although such a requirement might be inferred from the language dictating that the accommodation be necessary.¹⁰⁷

¹⁰² *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003).

¹⁰³ *Id.* at 1154 (“Under the FHAA, as under the RA [Rehabilitation Act] and the ADA, only *reasonable* accommodations that do not cause undue hardship or mandate fundamental changes in a program are required.”).

¹⁰⁴ Fair Housing Amendments Act, 42 U.S.C. § 3604f(9) (2000).

¹⁰⁵ 24 C.F.R. § 8.3 (2004).

¹⁰⁶ *Id.*

¹⁰⁷ 42 U.S.C. § 3604f(3)(B) (2000). Under the FHAA, made applicable to PHAs under 24 C.F.R. § 5.105, the PHA may not discriminate against any person by refusal to “make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [disabled] person equal opportunity to use and enjoy a dwelling.” *Id.* This provision applies to discrimination against the buyer or renter of a dwelling, a person residing in or intending to reside in that dwelling, or any person associated with the buyer or renter, without reference to program requirements. 42 U.S.C. § 3604f(2) (2000). There is no reference to an individual’s qualifications to rent or buy the housing unit in the statute. However, even if the FHAA has no express “qualified individual” requirement, courts might extrapolate one from the requirement that the accommodation be necessary and causally related to the individual’s disability. See *Giebeler*, 343 F.3d at 1156 n.9 (noting the difference in the language of the FHAA and the ADA “qualified individual” requirement and indicating that there may be an implicit requirement under the FHAA that a disabled individual must be “qualified” except for his disability to meet the “essential” requirements of the housing to receive a reasonable accommodation).

A PHA may argue that a mentally disabled tenant facing a criminal activity eviction is not a qualified individual under the Section 504 requirements because, given her household's lease violation, she clearly did not comply with her tenancy obligations and therefore proved her household incapable of complying with "all obligations of occupancy." The "qualified individual" requirement, however, should not be read this narrowly. The purpose of providing reasonable accommodations is to allow disabled individuals who would, due to their disability, otherwise be unable to comply with some obligations of a federal program to participate in that program.¹⁰⁸ Such a narrow reading of "qualified individual" is inconsistent with this purpose.

A mentally disabled tenant satisfies the "qualified individual" requirement under the HUD regulations, and any such requirement implied under the FHAA, because after a lease violation she would *prospectively* be able to comply with the "obligations of occupancy" with the aid of a PHA reasonable accommodation and, possibly, the addition of other supportive services. The accommodation would have to be structured such that the violation would be unlikely to reoccur with the accommodation in place, thereby allowing the tenant to comply with all the tenancy obligations post-violation. For example, the accommodation might include PHA agreement to assist the tenant in removing the criminal activity lease violator from the tenant's household, to allow the tenant to get social services for the criminal activity violator, or to permit the tenant to place a child violator in the custody of the Department of Social Services. The circumstances of each case will dictate how drastic the tenant's proposed household changes must be to satisfy the PHA that the tenant can prospectively comply with her lease obligations. The PHA should also agree, as part of this reasonable accommodation, to use its discretion to refrain from taking eviction or termination action in the case.¹⁰⁹

B. PHA Challenges to Whether the Tenant's Request Is an "Accommodation"

To determine if a qualified tenant's request is a "reasonable accommodation" under these statutes, courts must consider if the requested modification is an "accommodation" and then determine if that accommodation is "reasonable."¹¹⁰ A request may state an "accommodation"—a modification to a rule or policy that appropriately addresses the impact of the ten-

¹⁰⁸ Under the FHAA, a refusal to make reasonable accommodations in rules, policies, practices, or services, *when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling* is discrimination. 42 U.S.C. 3604f(3)(B).

¹⁰⁹ Specific examples of possible reasonable accommodations that might be requested by mentally disabled tenants in these circumstances will be discussed further in Part IV, *infra*.

¹¹⁰ *Giebeler*, 343 F.3d at 1148.

ant's disability on her ability to follow that rule or policy—that is not “reasonable” because the accommodation poses an undue burden on the landlord or housing authority. Courts have read the meaning of “reasonable accommodation” under the FHAA and ADA to be the same as “reasonable accommodation” under Section 504; thus, case law interpreting any of the three statutes can be applied in this analysis.¹¹¹

An “accommodation” is an alteration in the program that attempts to address the practical impact of a tenant's disability, not only “the immediate manifestations of the physical or mental impairment giving rise to the disability.”¹¹² Although in many cases the practical impact of the tenant's disability will be obvious, as for a blind tenant whose disability prevents him from reading PHA written notices, in some cases the “practical impact” of a tenant's disability may be less clearly tied to the disability. For a tenant with AIDS, the practical impact may be on his ability to earn sufficient income to meet the landlord's rental credit standard;¹¹³ for a tenant with multiple sclerosis, the practical impact may be on her ability to live independently without an allocated parking space on the housing premises.¹¹⁴ For a mentally disabled tenant, her disability practically impacts her ability to monitor the activities of her household members and guests and to foresee and prevent the lease-violating activities of these third parties.

For the proposed alteration to state an “accommodation” to the tenant's disability, the tenant must demonstrate the link between the disability and the policy to which she has requested an alteration.¹¹⁵ If there is no link, the request cannot be said to “accommodate” the tenant's disability. A mentally disabled tenant facing a criminal activity eviction or termination must therefore demonstrate that her disability has the practical impact of limiting her control over third parties and must show the nexus between this limitation and her household's past inability to comply with tenant obligations. The tenant could use medical evidence to show the cognitive limitations imposed by her disability, such as her difficulty recalling events, controlling others or monitoring others' behaviors. The tenant should also indicate any steps she has taken to control the activities of household members and guests within the limitations of her disability, so that it is apparent to the PHA that it is the limitations due to the tenant's

¹¹¹ *Id.*; *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (“There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.”).

¹¹² *Giebeler*, 343 F.3d at 1150.

¹¹³ *See id.* (holding that a landlord must allow a disabled tenant's mother to act as the co-signor on the lease as a reasonable accommodation to allow the tenant to meet the landlord's credit standard).

¹¹⁴ *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995) (holding that a landlord must provide a disabled tenant with a parking space near her apartment building, despite the landlord's strict first-come, first-served policy for allocating parking spaces).

¹¹⁵ *Cf. Giebeler*, 343 F.3d at 1151.

disability, rather than the tenant's lack of action, which have resulted in the tenant's failure to prevent lease-violating activity from occurring.

A PHA may, however, challenge the accommodation on the ground that the requested accommodation modifies a rule that poses challenges for all tenants, not just mentally disabled tenants. The PHA might also argue that the tenant's inability to satisfy the obligation is in part due to the failings of other, non-disabled household members and caregivers for the tenant, who should be looking after the mentally ill tenant to ensure that her household fulfills its responsibilities. The PHA could therefore argue that the disabled tenant's difficulty in satisfying the tenancy obligation cannot be shown to be *solely* due to disability. The Supreme Court has held, however, that accommodations may give "preference" to tenants with disabilities in the application or modification of a facially disability-neutral rule.¹¹⁶ An accommodation may alter a policy that is also a barrier to access to housing for non-disabled persons, such as a landlord's credit standards.¹¹⁷ Such an accommodation to a facially neutral policy is appropriate because the disabled tenant's inability to satisfy the policy obligation is at least in part *a result of her disability*, whereas other tenants are unable to meet the obligation for reasons other than disability.¹¹⁸ In the case of a mentally disabled tenant facing a criminal activity eviction, the tenant's inability to control or to monitor the activities of her household members and guests is a direct result of the cognitive limitations of a mental disability. A mentally retarded tenant, for example, may not be able to control the behavior of her adult children or live-in aide, or be able to predict whether they will engage in criminal activity. It is true that non-disabled tenants may also have difficulty exercising appropriate control over household members. However, the fact that the strict liability policy also creates a barrier for non-disabled tenants does not bar the PHA from modifying that policy for a disabled tenant when the policy is a barrier to access for the disabled tenant *due to the tenant's disability*. Even if the tenant has household members or other caregivers who should share in taking responsibility for the lease violation, a PHA's refusal to address the tenant's limitations through a reasonable accommodation is still inappropriate because liability for lease violations ultimately rests with the tenant and the tenant's disability practically limits her ability to satisfy household obligations. The burden, however, is on the disabled tenant to prove, through medical documentation or other evidence, the nexus between her disability and her past inability to ensure her household's compliance with the criminal activity lease provisions. Proving the nexus may be difficult, and if the PHA finds insufficient verification of the disability and need for accommoda-

¹¹⁶ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (holding that an employer cannot refuse to make an exception to the generally applicable seniority system of position assignment in the special circumstances of the disabled plaintiff employee).

¹¹⁷ *Giebler*, 343 F.3d at 1151.

¹¹⁸ *Id.* at 1150.

tion, housing authorities should ask the tenant for additional documentation regarding the disability and proposed accommodation before denying a request for a reasonable accommodation.¹¹⁹

C. PHA Challenges to Whether an Accommodation Is Reasonable

The tenant has the initial burden of proving that an accommodation is reasonable. The accommodation must be either reasonable in most cases, or, if not ordinarily reasonable, it must be reasonable on the facts of the particular case.¹²⁰ For mentally disabled tenants, these standards effectively require that the tenant demonstrate the appropriateness of accommodation in her particular case, in light of her disability and the circumstances surrounding the criminal activity. It is unlikely that a tenant could prove that a reasonable accommodation by the PHA, in staying an eviction or termination action against a disabled tenant, is reasonable in most cases.

To be “reasonable,” an accommodation must (1) be necessary to allow the tenant to participate in the housing program,¹²¹ and (2) impose no “fundamental alteration in the nature of the program” or “undue financial or administrative burden.”¹²² For a mentally disabled tenant, an accommodation to halt a PHA termination or eviction is clearly necessary to allow the tenant the opportunity to continue to enjoy the housing of her choice, because without such accommodation the tenant might be removed from her housing unit by the PHA, or lose her subsidy.¹²³

The requirement that a reasonable accommodation impose no “undue financial or administrative burden” is more easily satisfied for a men-

¹¹⁹ BOSTON HOUS. AUTH., LEASED HOUSING, *supra* note 101, § 4.10, at 15. The Boston Housing Authority (“BHA”) also states that as a principle it will assume that “the [Section 8 tenant] requesting a reasonable accommodation is an expert with respect to his/her own disability and the accommodation that is necessary to accommodate such a situation.” *Id.* at 3. The BHA has a similar principle and verification policy for public housing tenants’ reasonable accommodations. BOSTON HOUS. AUTH., GUIDE, *supra* note 101, at iv, §§ 8.4, 8.6, at 9–10.

¹²⁰ Before the Supreme Court’s opinion in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the tenant’s burden was to produce “evidence that a reasonable accommodation was possible.” *Giebler*, 343 F.3d at 1156. *Barnett* required that the plaintiff prove either (a) that the accommodation is facially reasonable (i.e., reasonable in the run of cases), or (b) that the accommodation may not be reasonable in the run of cases, but is reasonable on the particular facts of a case. *Barnett*, 535 U.S. at 403–05.

¹²¹ *Giebler*, 343 F.3d at 1155, 1157 (requiring the disabled tenant to prove that the accommodation is “necessary” (i.e., that the tenant would likely be denied an equal opportunity to enjoy the housing of her choice, but for the accommodation)). The “necessary” requirement seems, however, to be somewhat subsumed by the requirement of a “nexus” between disability and proposed alteration under the accommodation prong analysis, *supra*, although the two requirements are discussed separately in the case law. *See id.* at 1148 (discussing the required “nexus” between disability and accommodation); *id.* at 1155 (discussing the “causation” or “necessary” requirement).

¹²² *Id.* at 1157.

¹²³ *Id.* at 1155.

tally disabled tenant than the requirement that the accommodation create no “fundamental alteration in the nature of the program.”¹²⁴ The PHA incurs little to no administrative or financial cost in allowing a disabled tenant to retain the subsidy or housing unit that the tenant currently occupies. Unlike in reasonable accommodation cases in which the request is that the PHA raise the tenant’s subsidy above the subsidy ceiling or require that a landlord waive fees generally applicable to an ordinary tenancy,¹²⁵ the PHA incurs no cost in agreeing not to proceed with an action to evict or terminate a tenant and instead allowing the tenant to secure social services for or remove the lease violator.¹²⁶

The question of whether the accommodation would require a “fundamental alteration” in the nature of the program is more difficult. A PHA might argue that it is central to its program that the PHA evict or terminate criminal activity violators and their households under the federal statutory scheme evaluated in *Rucker*. However, although proceeding with an eviction or termination is one course of action for a PHA to take, the *Rucker* opinion emphasizes that such action is not required.¹²⁷ A PHA may use its discretion to decline to proceed with an eviction or termination action. A mentally disabled tenant’s request that a PHA not pursue an eviction or termination action cannot pose a fundamental alteration to a program that already allows a PHA to make the same decision under its own discretion. As the Supreme Court noted in *US Airways, Inc. v. Barnett*,¹²⁸ while holding that the employer must allow the disabled employee in the case a reasonable accommodation exception to the company’s seniority system for assigning job positions, “the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.”¹²⁹ A PHA would have difficulty arguing, given its own discretion in eviction and termination decisions, that proceeding with all criminal activity evictions or terminations is a fundamental policy guiding its administration of federally subsidized housing. Although HUD permits a PHA to adopt a blanket, no-exceptions policy of proceeding with all evictions, such an individual PHA office’s policy cannot be said to be funda-

¹²⁴ *Id.* at 1157.

¹²⁵ See *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413 (9th Cir. 1994) (finding the landlord may be required to waive guest fees for disabled tenant as reasonable accommodation).

¹²⁶ The only potential cost of such an accommodation to the PHA is in loss of points under the Public Housing Assessment System (“PHAS”). Under PHAS, PHAs receive points if they can document that they appropriately evicted public housing residents who engage in activity “detrimental to the public housing community.” 24 C.F.R. § 966.4(1)(5)(vii)(A) (2004); see also 24 C.F.R. § 902.43(a)(5) (2004). However, it is not clear that innocent disabled tenants are detrimental to the community and that their eviction would or should earn a PHA points under PHAS.

¹²⁷ *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 127, 133–34 (2002).

¹²⁸ 535 U.S. 391 (2002).

¹²⁹ *Id.* at 405.

mental to the entire program if it is adopted only by the choice of the individual PHA.

A stronger argument for a PHA is that exercising its discretion independently is fundamental to its program administration, and that a reasonable accommodation request for the PHA not to proceed with an eviction fundamentally alters its exercise of discretion. Unbridled and unlimited exercise of PHA discretion is not, however, fundamental to the subsidized housing programs PHAs administer, as PHAs are already limited in their exercise of discretion by the mandates of constitutional protections and civil rights laws.¹³⁰ A disabled tenant's reasonable accommodation request that a PHA not proceed with an eviction or termination action imposes no greater limitation on the exercise of PHA discretion than is already imposed by the legal requirement that a PHA cannot proceed with eviction or termination actions based on tenants' race or ideology. Civil rights laws already appropriately restrict the possible range of PHA decision-making in the eviction and termination areas. Enabling reasonable accommodation requests does not require a fundamental alteration in the exercise of PHA discretion.

If the tenant can prove reasonableness in her particular case, the burden then shifts to the PHA to prove that the accommodation is unreasonable or that the tenant poses a "direct threat" to the health, safety, or property of other individuals.¹³¹ The "direct threat" that a mentally disabled tenant poses to a community is in the danger that there will be further criminal activity perpetrated by her household members or guests. There is, unfortunately, clear support for the proposition that mentally disabled tenants who cannot control their household members pose such a danger. As Chief Justice Rehnquist noted in the *Rucker* opinion, "a tenant who cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a *threat* to other residents and the project."¹³²

This threat, however, can be mitigated by the reasonable accommodation. Although the tenant's cognitive limitations cannot be cured, removal of the violating household member or the procurement of social services for the violator can reduce the threat of the tenant's inability to control the violator, such that this lack of control does not directly threaten the community. As noted above, the severity of the measures necessary to mitigate the threat to the community posed by the tenant's cognitive limitations will depend on the seriousness of the lease violation and the likelihood that the offender will violate the lease terms again.

¹³⁰ This limitation was explicitly noted in a letter from HUD's General Counsel's Office to PHA Directors. See Letter from Carole W. Wilson to Charles J. Macellaro, *supra* note 61, at 5.

¹³¹ Fair Housing Amendments Act, 42 U.S.C. § 3604(f)(9) (2000).

¹³² 535 U.S. at 134 (internal quotation marks omitted) (emphasis added).

IV. THE FORM OF A REASONABLE ACCOMMODATION REQUEST

Under the foregoing analysis, a mentally disabled tenant is entitled to PHA consideration of a reasonable accommodation request prior to the eviction or termination of that tenant for a criminal activity lease violation. Such an accommodation is necessary to allow a mentally disabled tenant to surmount the barrier to housing access created by the *Rucker* strict liability policy.

In the hypothetical, although not uncommon, case of a mentally disabled mother living with a young adult son who violated the lease by engaging in drug use on the housing premises, the disabled tenant could craft a request that would satisfy the reasonable accommodation requirements.¹³³ The mother would first need to demonstrate, through medical documentation, that she is mentally disabled.¹³⁴ The mother could also request documentation from medical professionals illustrating how her mental disability limits her ability to monitor her son and to foresee or prevent his actions. The mother would then need to present any evidence, through her own statements or those of other household members, as to what precautions, if any, she took to ensure her son was not engaging in lease-violating activity. The mother's evidence must demonstrate that she took all possible measures, given her cognitive limitations, to prevent this activity and that her inability to foresee or prevent the violation was a result of her disability. If this burden can be met, the mother will have demonstrated her threshold eligibility for a reasonable accommodation.

Having proved the nexus between the disability and the violation, the mother must then articulate a reasonable accommodation to the normal eviction procedures. The accommodation must make it unlikely that future lease violations will occur by, for example, altering the household composition or by procuring social services for the household. In this case, the mother might remove the son from the household and bar him from visiting the property as a guest. Taking such a drastic step clearly places a great deal of stress on all family members, but it may be the only way to

¹³³ The ages, genders, and relationships of the household members in this hypothetical have been selected based on the author's experiences in representing tenants facing *Rucker* issues in both Section 8 and public housing. However, mentally disabled heads of households of all ages, both genders, and of various relationships to the alleged lease violators are faced with evictions and terminations raising *Rucker* issues due to the lease-violating activities of third parties that the tenants were unable to foresee or prevent.

¹³⁴ An additional barrier to crafting a reasonable accommodation request for a mentally disabled tenant may be the tenant's own understandable reluctance to disclose and discuss her disability with the housing authority. Due to the stigma attached to mental disability, the tenant may be unwilling to disclose her private medical information discussing this disability, even if such disclosure might help prevent eviction and even if the tenant is assured that the information cannot be disclosed by the PHA to anyone not involved in processing the request. Any reasonable accommodation request must therefore be thoroughly discussed with the tenant, and the tenant's attorney or advocate must always follow the tenant's decisions about disclosure of this sensitive medical information.

satisfy the housing authority that the accommodation will prevent future criminal activity lease violations from occurring. As an alternative to this difficult and drastic action, the mother might suggest that the son be placed in drug treatment or receive other social services support that would address his lease-violating behavior without requiring him to leave the household. Such an intermediate measure may not, however, be sufficient to satisfy the housing authority that the continued tenancy will not pose a threat to the housing community, given the tenant's personal inability to control the violator's behavior and the past violation.

The precise form of the reasonable accommodation, and the necessity of taking the drastic step of removing the violator from the lease and barring him from the property, will depend on the severity of the lease violation and the likelihood that less severe measures would adequately address the lease-violating behavior. Tenants may be required to choose between staying in their subsidized apartment and continuing to reside with a family member who is a lease violator. Although this choice is a difficult one for the entire household, most particularly for the disabled tenant who must make the request to the housing authority to remove the family member, the availability of a reasonable accommodation does at least allow the mentally disabled tenant to retain her housing in some form after a third party lease violation, albeit at a large potential cost to her relationship with her son.

CONCLUSION: THE ROLE OF REASONABLE ACCOMMODATION IN
OVERCOMING *RUCKER* STRICT LIABILITY FOR MENTALLY
DISABLED TENANTS

At first glance, the requirement that a PHA provide reasonable accommodations to disabled tenants seems to be in direct conflict with HUD's regulations allowing PHAs the discretion to initiate no-fault evictions or terminations for any tenant household's criminal activity lease violations. However, the PHA's duty to accommodate disabled tenants expressly limits the discretion conferred on the PHA by HUD.

A Boston Housing Court Judge has found that a direct legal conflict does exist between the Massachusetts state law innocent tenant defense and the federal requirement that a PHA be given discretion to conduct no-fault evictions.¹³⁵ The court found that it is impossible both to allow the tenant such a defense and to give the PHA the federally mandated discretion to disregard the knowledge of the tenant in criminal activity eviction actions.¹³⁶ Judge Winik ruled that the state law defense was preempted by the federal statute, due to this irreconcilable conflict.

¹³⁵ *Boston Hous. Auth. v. Figueroa*, No. SP0203297 at 6 (Trial Ct. Mass., Suffolk Div., Hous. Ct. Dept., Oct. 10, 2003).

¹³⁶ *Id.*

However, in the conflict between a PHA's duty to provide disabled tenants with reasonable accommodations and a PHA's freedom to exercise its discretion as affirmed in the *Rucker* decision, the statutes at issue are both federal. The no-fault eviction statute in question specifically contemplates that PHA actions will be in compliance with federal reasonable accommodation statutes.¹³⁷ As a matter of federal statutory interpretation, "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."¹³⁸ Upon a thorough examination of the two statutes, the duty of the PHA to provide reasonable accommodations to disabled tenants can exist within a statutory framework that allows PHAs the discretion to conduct no-fault evictions and terminations.

The statutes should be read together in the ways suggested by this Note, to recognize that a PHA has a duty to provide reasonable accommodations to mentally disabled tenants prior to proceeding with no-fault eviction or termination actions against these tenants. A mentally disabled tenant is entitled under federal antidiscrimination laws to request, as a reasonable accommodation of the tenant's disability, that a PHA not proceed with an eviction or termination action if that disability prevented the tenant's compliance with her lease obligation. A disabled tenant can then properly request that a PHA allow the tenant to take steps to allow her to comply with her lease obligations in the future. Such an accommodation can be structured to satisfy the legal requirements for reasonable accommodation requests, as discussed in Part IV. This reading of the statutes together, giving full effect to each, is in accordance with the requirements of statutory interpretation and best satisfies the complementary goals of the Housing Act of 1937 and the Fair Housing Amendments Act: to provide "decent and affordable housing for all citizens"¹³⁹ and to ensure that mentally disabled tenants have an "equal opportunity" to live in federally subsidized housing.¹⁴⁰

¹³⁷ 24 C.F.R. § 982.552(c)(2)(v) (2004) (Section 8 vouchers) ("The PHA's admission and evictions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title."); 24 C.F.R. § 966.4(l)(5)(vii)(F) (2004) (public housing) ("The PHA's eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.").

¹³⁸ *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

¹³⁹ U.S. Housing Act of 1937, 42 U.S.C. § 1437a(4) (2000).

¹⁴⁰ Fair Housing Amendments Act, 42 U.S.C. § 3604f(3)(B) (2000).