

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

**SONIA WILLIAMS, on her own behalf, and on behalf
of DEVON SIZER, DEION BADGER, and CYONNA
BADGER, and PATRICIA ISAAC, on her own behalf,
and on behalf of minor child CHANNING ISAAC,**

Plaintiffs,

vs.

**CIVIL ACTION NO.
03 CV 6005**

**ROCHESTER HOUSING AUTHORITY, THOMAS
F. McHUGH, individually, and in his capacity as
Executive Director of the Rochester Housing Authority,
and JOHN HAIRE, individually, and in his capacity
as Director of Leasing Operations of the Section 8 Program.**

Defendants.

HON. JONATHAN W. FELDMAN
United States Magistrate Judge

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**MONROE COUNTY LEGAL
ASSISTANCE CENTER OF
LEGAL ASSISTANCE OF
WESTERN NEW YORK, INC.**

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STATEMENT OF FACTS

Plaintiffs Sonia Williams and Patricia Isaac are recovered substance abusers with criminal records for offenses committed prior to April 2000 and October 1999, respectively; each woman's offenses occurred during the time of her addiction. Both Plaintiffs have since demonstrated their recovery from addiction by successfully completing drug treatment programs, becoming productive members of society, and avoiding criminal behavior in the years since their recovery. As recovered substance abusers, Plaintiffs are persons with disabilities as defined by the Fair Housing Amendments Act of 1988 (hereinafter "FHAA") and Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504").

Both Plaintiffs applied to the Rochester Housing Authority (hereinafter "RHA") Section 8 Housing Voucher Program to secure housing subsidies for themselves and their minor dependent children and, in 2002, both were denied solely on the basis of their prior criminal histories. Thereafter, both Plaintiffs presented RHA with proof of recovery and rehabilitation and requested that as a reasonable accommodation to their disabilities their criminal records not be used against them to bar admission to the Section 8 Program. RHA gave no consideration to their requests for a reasonable accommodation and again denied both Plaintiffs admission to the Section 8 Program solely on the basis of their prior criminal histories. In 2004, Ms. Williams reapplied to the program and was denied again for the same reason.

RHA relies upon its written Drug Related Activity or Violent Criminal Activity Policy to deny Plaintiffs entry to its Section 8 Program. That policy states that RHA may deny admission to applicants who have records of criminal activity within one year prior to admission to the program. Notwithstanding the policy's one-year look-back timeframe for a record of criminal activity, the policy also permits RHA to look back beyond one year, without time restriction, to determine whether an applicant's record "suggests" a threat to peace or safety. In effect, the policy makes it possible for RHA to deny admission to any applicant on the basis of prior criminal record, no matter how old the record. In applying the policy, RHA never waives

objection to a criminal record as a reasonable accommodation for persons who have recovered from substance abuse. The practice of denying admission categorically to such applicants is so established that RHA does not provide denied applicants with notice of the right to an administrative review of the denial, although required by federal regulation.

SUMMARY OF ARGUMENT

The decision of RHA to bar Plaintiffs from the Section 8 Program is contrary to the law and impermissible for the following reasons:

First, the FHAA and Section 504 require that, upon demonstration of Plaintiffs' recovery from addiction, RHA must make a reasonable accommodation to Plaintiffs' disabilities and thereby waive its objection to Plaintiffs' criminal records stemming from past addiction as cause for barring them from the Section 8 Program.

Second, federal regulations at 24 CFR §§ 982.54(d)(4)(iii) and 982.553(a)(2)(ii) limits RHA to promulgating a policy that denies admission to applicant families who are currently engaged in specified types of criminal activity or have engaged in such activity during a *reasonable time* before admission. RHA policy does set a *reasonable time* period of one-year, but purports to provide RHA authority to ignore it. RHA acted contrary to federal regulatory requirements and its own one year *reasonable time* provision when RHA looked to criminal records much older than one-year as justification to deny Plaintiffs entry to the Section 8 Program without taking into account individual circumstances such as rehabilitation.

Third, the RHA policy for admission of persons with criminal records is impermissibly vague in its criteria for denial, is internally inconsistent as to its requirements, and provides RHA with unlimited authority to exclude persons with criminal histories. The policy, therefore, violates federal law and regulation and may not be relied upon to exclude Plaintiffs from the Section 8 Program.

Fourth, RHA did not adhere to controlling federal regulation and violated Plaintiffs' fundamental due process rights by failing to provide them with written notice of their right to an administrative review of denial of admission.

ARGUMENT

POINT I. RHA's Refusal to Consider A Rehabilitated Substance Abuser as a Person with Disabilities Violates the Fair Housing Amendments Act (FHAA) and the Rehabilitation act of 1973 (Section 504).

A. Recovered Substance Abusers must be accorded the same legal protections as other persons with disabilities in connection with review of their applications for admission to the Section 8 Housing Choice Voucher Program.

Defendant RHA does not dispute the applicability of Section 504 and the FHAA to the Section 8 Program that it administers. Nor has it put into contention the fact that Plaintiffs have recovered from substance abuse. (Defendant's Answer to Williams Complaint paragraphs numbered 21-26 and 30-34 either admits or lacks knowledge to form a belief.) Instead, RHA maintains that recovered substance abusers are not persons with disabilities protected by Section 504 and the FHAA and that it may rely on its "Drug Related Activity or Violent Criminal Activity" policy (Exhibit L, hereinafter "Criminal Activity Policy") to bar Plaintiffs from the Section 8 Program, in disregard of the protections those statutes afford.

The position of RHA officials in charge of the Section 8 Program is set forth in their deposition testimony. RHA maintains that recovered substance abusers are not within the category of persons with disabilities and, are therefore, not entitled to the protections the civil rights statutes afford persons with disabilities, and this is expressed as official RHA policy. (Exhibit H, Haire dep. p. 22 l. 9 – p. 24 l. 6; Exhibit G, Sweeting dep. p. 21 l. 14.) Based on this policy RHA categorically refuses to exercise discretion to waive objection to an applicant's criminal record as a reasonable accommodation to recovered substance abuser's disability. (*Id.*; see also, Sweeting dep. p. 21 l. 21 – p. 24 l. 18.) An RHA informational memorandum from the Director of its Section 8 Program to the RHA Executive Director and CEO states that RHA applies its Criminal Activity Policy to reject any consideration of waiver of the Policy as a reasonable accommodation to a disability for recovered substance abusers because it is the

Section 8 office's position that recovered addicts are not "legitimately disabled." (Exhibit I; Exhibit H, Haire dep., p. 24 l. 14 – p. 27 l. 25, explaining Exhibit I.)

RHA may not decide for itself which groups of people are "legitimately disabled" and which are not; neither may it pick and choose which particular classifications of disabled persons are deserving of reasonable accommodation to their disabilities and which are not. RHA's practice of excluding recovered substance abusers from the definition of persons with disabilities protected by Section 504 and the FHAA and categorically refusing to offer them reasonable accommodation to their disabilities is erroneous.

There is no question that recovering or recovered substance abusers are within the definition of persons with disabilities who are protected by the civil rights laws. When the Fair Housing Act was amended in 1988 to extend its protection to persons with disabilities, Congress intended the definition of "handicap" under the FHAA to be consistent with the Section 504 definition. H.R. Rep. No. 711, 100th Cong., 2d Sess. 22 (1988), reprinted in 1988 U.S.C.A.N. 2183. Therefore, mirroring Section 504, the FHAA identifies persons recovered (or recovering) from substance abuse as members of the class of persons with disabilities whom the FHAA protects from discriminatory conduct. Regional Economic Community Action Program, Inc. v. Middletown, 294 F.3d 35, 46 (2d Cir. 2002); United States v. So. Mgmt. Corp., 955 F. 2d 914, 917-19 (4th Cir. 1992); Oxford House, Inc. v. Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993). In 1990, with passage of the American with Disabilities Act of 1990 ("ADA"), Congress amended Section 504 to specifically include recovered substance abusers in the definition of persons with disabilities who are protected under both Section 504 and the ADA:

(C)(i) For purposes of subchapter V of this chapter, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) 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).

RHA may not ignore the status accorded the Plaintiffs as persons with disabilities or deny the Plaintiffs the protection from discrimination which Section 504 and the FHAA affords them. Neither may the policy provision that RHA employs to exclude Plaintiffs from the Section 8 Housing Program override the protection afforded by the two statutes.

B. Recovered Substance Abusers must be provided “Reasonable Accommodations” of their disabilities, including consideration of waiving objections to admission based on a history of criminal conduct that was a consequence of their disabilities.

Plaintiffs, as persons with disabilities, are entitled to Section 504 and FHAA protections against discriminatory conduct. These protections include providing reasonable accommodations to their disabilities, regardless of their status as former criminal offenders.

Implementing the requirements of the FHAA, the relevant regulations of the Department of Housing and Urban Development (hereinafter “HUD”) make it unlawful for a covered housing provider to refuse:

to make reasonable accommodations in the rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling....

24 C.F.R. §100.204 (a) (2004). See also, 42 U.S.C.A. §3604 (f)(3)(B).

Although the FHAA does not specifically define reasonable accommodations, HUD’s “Preamble to the Final Rule” implementing the FHAA confirms in its discussion of 24 C.F.R. §100.204 that the concept of reasonable accommodations under the FHAA originated with the

case law and regulations interpreting Section 504 of The Rehabilitation Act. See 54 Federal Register 3283, Jan. 23, 1989, republished as Appendix I to Chapter I, Subchapter A of Title 24 of the C.F.R. (republished only from 1990 to 1996). Consequently, the definition of reasonable accommodations and rights related thereto are equivalent under the FHAA and Section 504. Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 333 (2d Cir. 1995); Regional Economic Community Action Program, Inc. v. Middletown, *supra* at 39. (2d Cir. 2002), quoting Shapiro.

This Court has previously determined that actions or policies regarding admission to federally subsidized housing that have the effect of excluding members of a protected class and, specifically, persons with disabilities, violate the FHAA and Section 504. Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D.N.Y. 1990). Actions constituting discriminatory conduct occur under the FHAA and Section 504 when a housing provider refuses to reasonably accommodate a disability by changing traditional rules or practices necessary to permit a person with handicaps an equal opportunity to housing. Shapiro v. Cadman Towers, Inc., *supra* at 333 (2d Cir. 1995).

It is well established that in the context of concerns regarding criminal behavior resulting from a disability, the FHAA and Section 504 may require a housing provider to change or modify its rules or practices regarding criminal conduct that would otherwise exclude persons with disabilities from housing. In Roe v. Sugar River Mills Assoc., 820 F. Supp. 636 (D.N.H. 1993), a mentally ill tenant engaged in abusive and assertive behavior to neighbors and management which resulted in a criminal conviction and an eviction proceeding, the District Court of New Hampshire held that the FHAA required the housing provider to show that no reasonable accommodation would acceptably minimize the risk to others before the mentally ill tenant could be denied housing. In Roe v. Housing Authority of Boulder, 909 F. Supp. 814 (D. Co. 1995), where a tenant with bipolar disorder assaulted and injured another resident and engaged in instances of threatening behavior, the District Court relied upon the FHAA, Section

504, and the ADA in ruling that a tenant must be given reasonable accommodation before being denied federally subsidized housing.

The burden of demonstrating that no reasonable accommodation will eliminate or acceptably minimize the direct risk to the safety of others posed by the behavior of a person with disabilities under the FHAA and Section 504 is on the housing provider. Roe v. City of Boulder, *supra* at 823-24; Roe v. Sugar River, *supra* at 640. In determining whether there is a risk to safety to others by making an accommodation to a disability the agency must actually demonstrate that the risk of injury or harm is serious and direct. School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987); Howard v. City of Beavercreek, 108 F. Supp. 2d 866, 875 (S.D. Ohio 2000).

In fact, HUD, the agency responsible for the federal Section 8 Housing Program, has recently issued guidance on reasonably accommodating disabilities related to mental illness or substance abuse; the guidance is found in a Joint Statement promulgated by HUD and the Department of Justice. The Statement, in Question and Answer format, provides definitions and guidelines for reasonable accommodations in rules, policies, practices, or services required under the FHAA. Joint Statement of the Department of Housing and Urban Development and the Department of Justice (hereinafter “Joint Statement”), May 17, 2004, available at http://www.usdoj.gov/crt/housing/jointstatement_ra.htm, attached for the Court’s convenience as Exhibit O. The Joint Statement is specifically intended to assist federally subsidized housing providers, such as RHA, to understand their fair housing law obligation to provide reasonable accommodations to persons with disabilities, including mental or substance abuse disabilities. The Joint Statement does not represent a change in policy, but rather, provides technical assistance on existing legal obligations. HUD, as the regulator of the Section 8 Program, should be accorded deference in the interpretation of its own regulations. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844 (1984).

The Joint Statement addresses the same issue of criminal or threatening conduct and reasonable accommodation that was addressed in Roe v. Sugar River Mills and Roe v. Housing Authority of Boulder, *supra*, and reaffirms that recovered or recovering substance abusers are entitled to reasonable accommodation and delineates a “direct threat” standard or exemption for withholding a reasonable accommodation. (Joint Statement Q and A No. 4.) The Joint Statement sets forth how a housing provider may determine that a person poses a direct threat serious enough to allow withholding of a reasonable accommodation:

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (i.e., a significant risk of substantial harm). In such situation, the provider may request that the individual document how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with disability poses a direct threat before excluding him from housing on that basis. (Joint Statement, Q and A No. 5.)

Thus, under HUD guidelines, RHA may not prohibit Plaintiffs’ entry into the Section 8 Program based on criminal records related to past substance abuse without “reliable objective evidence” of current or recent post-rehabilitation conduct that poses a direct threat to the safety of others.

C. RHA violated the FHAA and Section 504 when it failed and refused to consider Plaintiffs' requests for Reasonable Accommodations of their disabilities, and instead categorically denied Plaintiffs' admission to the Section 8 Housing Choice Voucher Program.

Persons with disabilities may not be excluded from housing based on fear, speculation or stereotypes about particular disabilities. Joint Statement Q and A No. 5. Thus, as to housing admissions, this Court has previously cautioned that:

Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion [from housing].

Cason, *supra* at 1009.

In this matter, neither of the Plaintiffs may be excluded from admission to Section 8 housing based on speculation or generalization as to her "threat to safety" as a former substance abuser in subsidized housing. Each Plaintiff is entitled to individual consideration, based upon reliable objective evidence, whether at the time she applied for Section 8 housing she should be excluded from the opportunity for housing as a direct threat to safety.

Objective evidence of a direct threat is discerned through either evidence of (1) current conduct or (2) a recent history of overt acts evidencing a direct threat to safety. Joint Statement, *Id.*; see also, applicable regulation at 24 C.F.R. §982.553 (a)(ii)(C)(2). The record is void of any evidence of current conduct on the part of either Plaintiff Isaac or Plaintiff Williams that poses a threat to safety.

Nor does either woman have a recent history of an overt act which evidences a direct threat to safety. Plaintiff Isaac's last incident with the law was in September of 1999. Plaintiff Williams' last incident was in March 2000. All the incidents of criminal conduct occurred prior to their treatment and recovery. Furthermore, Plaintiffs criminal histories before their recovery consisted of misdemeanor convictions, except for Isaac's felony conviction in 1998 for Attempted Criminal Possession of a Controlled Substance in the Third Degree, for which she

was put on probation. Plaintiffs' criminal histories ending several years ago do not indicate a serious and direct threat to safety – even without evidence of subsequent recovery from addiction.

RHA's Criminal Activity Policy¹ contains a one year look-back period for evidence of criminal or drug-related activity that might form the basis for an exclusion from Section 8 housing. (See Point II below regarding applicable time standard.) Applying that standard as to recent history, neither Ms. Isaac nor Ms. Williams may be disqualified from housing.

If, *arguendo*, the facts were that either Plaintiff had a recent incident of criminal activity so as to raise the issue of a “direct threat to public safety,” further assessment of each Plaintiff's circumstance would reveal that her intervening successful treatment for substance abuse has eliminated any risk of a direct threat which arguably may have existed. Pursuant to the guidelines summarized in Joint Statement, the FHAA does not protect an individual with a disability whose tenancy would constitute a “direct threat” to the health or safety or other individuals or result in substantial physical damage to the property of others *unless* the threat can be eliminated or significantly reduced by a reasonable accommodation. Joint Statement Q and A No. 4; see also, Roe v. Sugar River, *supra* at 639-640 citing School Board of Nassau County v. Arline, 480 U.S. 273, 287-288 (1987); Roe v. City of Boulder, *supra* at 822-823. Thus, a “provider must take into account whether there has been any intervening treatment or medication that has eliminated the direct threat (i.e., a significant risk of substantial harm).” Joint Statement Q and A No. 5.

¹ The family must certify that no family member has committed or been involved in any drug related, violent or other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents, persons residing in the immediate vicinity, ...during the one-year period prior to admission to the program...RHA reserves the right to deny admission to the program or the addition of a family member to the household, even if the drug-related or criminal activity occurred more than one year from admission to the program or addition of a family member, if a pattern or severity of drug-related or criminal activity suggests that the health, safety or right to peaceful enjoyment of the premises by other residents or neighbors could be threatened. A police record verification form must be submitted to corroborate this certification. If a family member has been involved in drug-related activity and can demonstrate that he/she is recovering or has recovered from an addiction, RHA will consider waiving this policy, subject to the family member presenting evidence of current participation in, or completion of, treatment program....
See Exhibit L for full text.

Plaintiffs' Statement of Material Facts Not in Dispute demonstrates that Plaintiffs' successful treatment for substance abuse eliminates any direct threat to the safety of others. Ms. Williams successfully completed treatment programs at Conifer Counseling Services and at the Steppingstone Supportive Living Program, graduated with high recognition from the Rochester City Drug Treatment Court, obtained her GED and then completed the SUNY Brockport Certified Nursing Assistant Program, and has been employed full-time caring for elderly patients at the Episcopal Church Home for the past two years. Since her recovery Ms. Williams has cared and provided for her two children and has had no repetition of her drug-related criminal history.

Ms. Isaac has successfully completed the Catholic Family Center recovery program and the aftercare program at Evelyn Brandon Health Center, participated in the Sojourner House drug-free counseling program and vocational planning program for two years, attended classes at Greece Community Center to obtain a GED as the first step in her career goal of becoming a registered nurse, and lived a law-abiding life since 1999. Ms. Isaac has supported herself and her son through employment as an aide through Visiting Nurse Services and the Park Ridge Home; she also has had to rely on public assistance during periods when her employment was unsteady.

The two women prove the effectiveness of drug treatment and recovery for persons who have disabilities related to substance abuse. National fair housing and drug treatment policy strongly encourage assistance for persons recovering or recovered from drug abuse. In proceedings authorizing the Fair Housing Amendments Act in 1988, The House Judiciary Committee recognized exactly that goal:

Individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap [because] depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery.

Plaintiffs' current or recent conduct poses no direct threat to the safety of others as established by their clean criminal records since their recovery. Rather, Ms. Williams and Ms. Isaac are models of successful rehabilitation and recovery. RHA's action in rejecting Plaintiffs' request for waiver of their old criminal records as a basis for excluding them from admission to Section 8 housing is impermissible under the Section 8 regulator's guidelines and contrary to the case law set forth above which defines reasonable accommodation to a disability. RHA is required to reasonably accommodate Plaintiffs' disabilities by waiving their exclusion from housing based upon their criminal records relating to past substance abuse.

D. RHA's refusal to consider any recovered substance abuser as a person with disabilities constitutes disparate treatment of members of a protected class, in further violation of the FHAA and Section 504.

RHA violated the FHAA and Section 504 in denying Plaintiffs a reasonable accommodation when they pose no direct threat to the safety of others. As cited in Part A of Point I above, the record establishes that RHA applies its Criminal Activity Policy in a way that intentionally excludes recovered substance abusers and treats them differently from other persons with disabilities.

The Supreme Court has identified two analyses to determine if an entire class of persons protected by the civil rights laws has been discriminated against: 1) disparate-treatment; and 2) disparate-impact. Raytheon Company v. Hernandez, 540 U.S. 44 (2003). Disparate-treatment discrimination arises when an entity treats some people less favorably than others because of protected characteristic. Disparate-impact discrimination occurs when facially neutral practices fall more harshly on one group than another and cannot be justified by business necessity.

RHA did not apply a facially neutral rule when it excluded Plaintiffs under its Criminal Activity Policy. RHA's policy (if it can be called a policy at all) is one that gives RHA authority to deny admission, without defined criteria or guidelines, based on a wholly subjective

determination a criminal record “suggests” to RHA that the safety of others would be “threatened”. RHA categorically denied admission to Plaintiffs and others similarly situated by application of an unfounded presumption that recovered substance abusers may be denied admission for prior criminal activity without regard to their recovery and rehabilitation. (Plaintiffs contend that the policy itself is contrary to federal regulation and illegal: that argument is found in Points II and III, below.)

The admitted RHA practice of not recognizing recovered substance abusers as persons with disabilities and of not making reasonable accommodation to their disabilities is intentional discrimination and constitutes disparate-treatment of a class of persons protected by the FHAA and Section 504.

How exclusion of recovered substance abusers could be standard practice and procedure at RHA is inexplicable in light of the clear statutory and regulatory language of the laws that RHA, as administrator for a critically important federal housing program, is responsible for carrying out. Nevertheless, the record is replete with admissions that recovered substance abusers are not given consideration as persons with disabilities entitled to reasonable accommodation as standard operating practice at RHA. Typical is the testimony of Linda Sweeting, RHA Operations Manager who is in charge of all Section 8 Program admissions. In reaction to Plaintiff Williams’ submission of numerous documents attesting to her recovery and rehabilitation pursuant to her request for a reasonable accommodation, Ms. Sweeting’s response was, “We didn’t spend a lot of time reviewing them” because her criminal record would disqualify her *regardless* of evidence of recovery. (Exhibit G, p. 22 l. 9 – p. 24 l. 16.)

The facts concerning Plaintiffs’ exclusion evince complete disregard by RHA for factoring recovery in determining an applicant’s suitability for the Section 8 Program. RHA refused to consider making any reasonable accommodation to Plaintiffs even though its own Criminal Activity Policy permits a waiver of the “policy” if the applicant can demonstrate

recovery from addiction. Despite Plaintiffs' recovery, RHA went beyond the one-year guideline for looking at criminal records and made a purely arbitrary determination to deny Plaintiffs admission. (Also see Points II and III below.) Significantly, RHA did not give Plaintiffs, or any other denied applicants, notice of their right to an administrative appeal of the RHA decision to deny them as required by 24 C.F.R. §982.554. In fact, it is RHA practice to issue notices containing erroneous and misleading information to the effect that HUD regulations prohibit admission to *anyone* with a drug-related *arrest*. (Exhibit K; see Point IV below for notice issue.)

Later, when Plaintiffs retained counsel and formally requested a reasonable accommodation and attempted to resolve the matter, RHA continued to maintain that recovered substance abusers are not persons with disabilities and are not entitled to a reasonable accommodation. Exhibit I. The RHA practice of intentional disparate treatment of recovered substance abusers is capsulized in the internal memo of Defendant John Haire, Director of the RHA Section 8 Program, to Thomas McHugh, Executive Director and CEO of RHA. In reaction to Plaintiff Sonia Williams' request for a reasonable accommodation and her presentation of proof of recovery and rehabilitation, Defendant Haire stated his position, as head of the RHA Section 8 Program:

My position is that, if MCLAC wants to sue, let 'em. I get pretty frustrated with these idiots lumping drug-users in with people who are legitimately disabled.

(Excerpted from Exhibit I.)

Discriminatory intent may be established by statements of officials that demonstrate discriminatory animus to a class of persons protected by the fair housing laws. Regional Economic Community Action Program, Inc. v. Middletown, *supra* at 49, quoting LeBlanc v. Fletcher, 67 F. 3d 412, 425 (2d Cir. 1995); United States v. Borough of Audubon, 797 F. Supp. 353, 359-362 (D.N.J. 1991), *aff'd*, 968 F. 2d 14 (3d Cir. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1343 (D.N.J. 1991). Every official in the RHA Section 8

Office chain of command, including its Director Mr. Haire, testified unequivocally that recovered substance abusers are not persons with disabilities and are not entitled to reasonable accommodation to their disabilities. Discriminatory disparate-treatment of recovered substance abusers in RHA policy and practice is plainly evident.

POINT II. RHA has failed to comply with the Federal Statutory and Regulatory Requirements that regulate the standards and procedures for denials of admission to the Section 8 Housing Choice Voucher Program.

A. In refusing to follow its own Administrative Plan, RHA violated the federal obligation to limit its period of exclusion for persons with criminal histories to a “reasonable time”.

Federal regulations, found at 24 C.F.R. Part 982, control when and under what circumstances Section 8 Program Housing Authorities are permitted to prohibit admissions. The regulatory authority to deny admissions for criminal activity is found at 24 C.F.R. §982.552 (c)(1)(xi), which references §982.553 for descriptions of the types of criminal activity that may disqualify an applicant from admission. However, 24 C.F.R. 982.552 (c) also subjects the regulatory prohibitions to admission to overriding civil rights requirements of statutes listed in 24 C.F.R. §5.105, which include the FHAA and Section 504. Specifically, prohibitions to admissions may not override the rights of persons with disabilities to reasonable accommodations to their disabilities:

(iv) If the family includes a person with disabilities, the PHA decision concerning such action is subject to consideration of reasonable accommodation in accordance with part 8 of this title.

(v) *Nondiscrimination limitation.* The PHA’s admission and eviction actions must be consistent with fair housing and equal opportunity provisions of §5.105 of this title.

24 C.F.R. §982.552 (c)(2)(iv) and (v).

Subject to the civil rights and fair housing law considerations set forth in §982.552, above, admission may be denied for either the mandatory reasons or the permissive reasons set forth in the regulations at 24 C.F.R. §982.553. There is one mandatory situation in which a

Housing Authority must deny admission for a period of time specified in the regulations: Where an applicant has been “evicted from federally assisted housing for drug related criminal activity” in the previous three years. The Authority may, however, shorten that regulatory three-year prohibition under specified circumstances, including successful drug rehabilitation. 24 C.F.R. §982.553 (a)(1)(i). The other mandatory situations require the Housing Authority, itself, to establish standards that prohibit admission. 24 C.F.R. §982.553 (a)(1)(ii) and (a)(2)(i). For certain mandatory prohibitions, the Housing Authority may establish its own “reasonable time” standards during which an applicant must not have engaged in the activities to establish eligibility for admission. 24 C.F.R. §982.553 (a)(2)(ii)(B); see also, parallel *reasonable time* provision for other federally assisted housing at 24 C.F.R. §5.855 (b).

Aside from the mandatory prohibitions, a Housing Authority may establish admission standards for certain permissive prohibitions that are left to the discretion of the Housing Authority to implement or not. A Housing Authority, permissively, may prohibit admission if it:

... determines that any household member is currently engaged in, or has engaged in during a *reasonable period of time* before the admission:

1. Drug related criminal activity;
2. Violent criminal activity;
3. Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents of persons residing the in the immediate vicinity...
4. Other criminal activity which may threaten the health and safety of the owner, property management staff, or persons performing a contract administration function....

24 C.F.R. §982.553 (a)(2)(ii) (emphasis added). Consequently, a Housing Authority has the right to implement policies to deny admission to someone who has previously engaged in threatening criminal activity only if the activity occurred within a specified “reasonable time” before the time of admission. If the Housing Authority chooses to implement a prohibition to admission for drug related activity, it may do so if the prohibition relates to a reasonable period of time prior to an application. If the Housing Authority does not establish a standard for

determining “reasonable time”, then it is not permitted to deny an applicant admission because of criminal activity unless the criminal activity is currently taking place.

The RHA Criminal Activity Policy (Exhibit L) must conform to the permissive regulatory prohibition recited above (24 C.F.R. §982.553 (a)(2)(iii)). Insofar as the first sentence of the RHA Criminal Activity Policy provides a reasonable time standard of one-year for considering criminal records as a basis for prohibiting admission, it conforms, ostensibly, to the permissive prohibitions listed in the federal regulations. However, RHA’s policy nullifies its permissible one-year standard by adding another provision in the next sentence that allows an unlimited period of time for rejecting applicants with criminal records. This added provision fails to reference any standard establishing a reasonable period of time for looking back at criminal history as required by the regulation and, instead, substitutes open-ended authority to deny admission, no matter how old the criminal history. RHA has thereby negated its stated one-year reasonable time standard, and replaced it with one that is arbitrary and, therefore, unreasonable and impermissible.

Plaintiffs have not engaged in criminal activity since their recovery from substance abuse. At the time of each Plaintiff’s Section 8 application and rejection by RHA solely due to her prior criminal record related to past addiction, each had led a productive, responsible, law-abiding life for considerably more than one year. Plaintiffs qualify under the one-year reasonable time standard set forth by RHA in its admission policy, and RHA may not deny Plaintiffs admission to the Section 8 Program. The RHA policy provision providing for further authority to supercede the reasonable time requirement of the regulation must be treated as void.

B. In failing to describe any reasons for which persons with criminal histories will be excluded from admission for a time period longer than the “reasonable time” period established in the administrative plan, RHA has failed to comply with federal requirements that the Administrative Plan state the criteria for exclusions based upon criminal histories.

Section 8 Housing Authorities must promulgate written standards in their Administrative Plans for denying admission based on criminal history. 24 C.F.R. §§ 982.54 (d)(4)(iii) and 982.552 (e). The standards denying admission in the Administrative Plan may not exceed the authority to exclude applicants permitted by the mandatory or permissive prohibitions listed in 24 C.F.R. § 982.553 (a)(1) or (2). *Id.*

RHA excludes Plaintiffs from the Section 8 Program by citing the durationally unlimited section of its Criminal Activity Policy also discussed in Subargument A above. The section states that RHA “reserves the right” to deny admission:

even if the drug-related or criminal activity occurred more than one year from admission to the program or addition of a family member, if a pattern or severity of drug-related or criminal activity suggests that the health, safety or right to peaceful enjoyment of the premises by other residents or neighbors could be threatened.

Full text provided in Exhibit L.

RHA added this durationally unlimited section in October 2001 when its Board changed the Criminal Activity Policy to permit RHA to override its existing one-year reasonable time standard for rejecting applicants with criminal records. The minutes of the Board meeting that authorized the change taken together with deposition testimony reveal that the section was specifically intended to free RHA of any time limitation on using criminal records to bar admission. (Exhibit N, Board minutes; Exhibit H, Haire dep., p. 6 l. 18 – p. 10 l. 21.) This was done because the Section 8 Program Director, Mr. Haire, believed the one-year reasonable time standard to be inadequate to screen out persons whose criminal histories suggested they could pose a problem. *Id.*

This added section rendered the one-year reasonable time standard meaningless as a guideline for denying admission by juxtaposing an open-ended subjective evaluation for judging admissibility based on criminal history. Under the added section, the policy permits the agency to look back without time limitation to see if it can discern a “pattern” of “severity” of drug-related or criminal activity which “could” threaten the “health, safety to right to peaceful enjoyment of the premises by other residents or neighbors.” This is problematical: Looking to discern a “pattern” is much like speculating or making generalization as to the behavior of a former substance abuser, which this Court has said is impermissible as regards housing admissions. Cason, *supra* at 1009.

Inserting the durationally unlimited section into the Criminal Activity Policy gave RHA officials broad discretion, without clearly defined standards for the exercise of that discretion. Lacking clearly articulated and defined standards or guidelines, RHA policy becomes arbitrary and subject to the whims and prejudices of the individuals who are exercising it. That is exactly why federal regulations require Housing Authorities to establish written standards in policies for screening for criminal activity and require that they be stated in the Housing Authority Administrative Plan. 24 C.F.R. §§ 982.54(d)(4)(iii) and §982.552(e).

The facts concerning Ms. Williams’ and Ms. Isaac’s denial of admission exemplify the abuses that can occur when a criminal history policy veers from regulatory requirements requiring clear standards for screening for criminal activity. Those facts reveal that RHA uses the vague and open-ended added section to systemically override, or trump, the legal protections that federal law provides for persons with disabilities and that federal regulation requires criminal admissions policies to abide by.

In practice, RHA applies the expanded authority in the Criminal Activity Policy as blanket authority to deny admission for past criminal history without regard to the fair housing requirement to reasonably accommodate substance abuse disabilities as set forth in the

regulations at 24 C.F.R. § 982.552 (c)(2)(iii) and as actually recited in RHA's Criminal Activity Policy. (Exhibit L.) Despite the regulation at 982.552(c)(2)(iii), and despite the language reciting it in the Criminal Activity Policy, RHA officials in charge have testified RHA does not grant waivers of objection to criminal history as a reasonable accommodation to recovered substance abusers. (See, e.g., Haire dep., Exhibit H, p.22 l. 25 – p. 24. l. 6; and Sweeting dep., Exhibit G, p. 23 l. 21 – p. 24. l. 8.) The RHA Program Director justified this categorical exclusion of recovered substance abusers by citing the added section in the Criminal Activity Policy. (See Exhibit I.)

The categorical rejection of recovered substance abusers reaches down to affect decisions and actions at all levels of RHA hierarchy. The Operations Manager in charge of admissions, Ms. Sweeting, states official RHA policy to be “that former drug users do not fall under the class of those allowed reasonable accommodation.” (Exhibit G, Sweeting dep., p. 20 l. 23 – p. 21 l. 25.) Predictably, she does not “spend a lot of time” looking at evidence of a former substance abusers recovery because she knows that a prior criminal record disqualifies the applicant *regardless* of evidence of recovery. (Exhibit G, Sweeting dep., p. 22 l. 21 – p. 24 l. 16.)

In turn, the Admissions Office personnel under Ms. Sweeting have no training on the FHAA. (Exhibit F, Marro dep., p. 9 l. 11 – 13.) Consequently, Ms. Marro, the admissions specialist who interviewed Ms. Williams during her application, made no inquiry whatsoever about Ms. Williams' recovery from addiction when Ms. Williams' drug treatment case worker came with her to the screening interview to explain the circumstances of Ms. Williams' recovery. (Exhibit F, Marro dep., p. 19 l. 7 – 24, p. 21 l. 4.)

Section 8 workers do not have any guidelines as what criminal records would disqualify an applicant from housing, nor are they informed as to what records may be too remote to disqualify someone. (Exhibit G, Sweeting dep., p. 8 l. 11 – p. 11 l. 5.) Even rejection notices to deny applicants were at one time done in a random and unsupervised way. (Exhibit G, Sweeting

dep., p. 11 l. 9 – p. 12 l. 12.) The RHA form rejection notices were finally regularized sometime in 2001; however, the content of the current notices is erroneous and misleading. (Exhibit K; Exhibit G, Sweeting dep., p. 12 l. 13 – p. 13 l. 10.) (See Point IV below.)

When, as here, an admissions policy assigns its officials discretion unguided by clear standards and criteria, admissions decisions may be made in ways that are arbitrary and subject to the misconceptions and prejudices of individual decision makers. RHA admissions policy must follow the federal regulations limiting when applicants can be denied admission to the Section 8 Program based on past criminal activity. To the extent it does not do so, the RHA policy deprives applicants of their rights under 42 U.S.C. §1983, 42 U.S.C. §1427f and 24 C.F.R. §982.551 et. seq.

Applicants to the Section 8 Program under 42 U.S.C. §1437f have a constitutionally protected “property interest in [those] benefits that entitle [them] to due process safeguards.” Ressler v. Pierce, 692 F.2d 1212, 1216 (9th Cir. 1982). Admission criteria are subject to due process safeguards. “While admissions to publicly-aided housing projects are subject to due process requirements, courts should interfere with the administration of a project only if there are no ascertainable standards to guide the owner’s discretion, and a resulting arbitrary exercise of power.” Daubner v. Harris, 514 F. Supp. 856, 869 (S.D.N.Y. 1981), affd. without opinion, 688 F.2d 815 (2nd Cir. 1982).

RHA Criminal Activity Policy provisions permitting denial of admission without clear, reasonable, and objective written standards is arbitrary, contrary to federal regulations, and denies applicants their right to due process of law.

C. In failing to provide Plaintiffs with notice of their right to an Administrative Review of the denial of their admission, and in failing to provide persons with disabilities with notice of their right to request a reasonable accommodation to those disabilities, RHA has violated the federal housing requirements and denied Plaintiffs their constitutional right to due process.

RHA admits that it did not provide either Plaintiff with notice of her right to an informal review when it denied their applications for admission. Nor did RHA provide these notices to other denied applicants. Failure to provide notice of right to administrative appeal is the systemic pattern and practice of RHA's Section 8 Office.

Federal regulations require RHA to provide notice whenever it denies admission for criminal activity, as shown by a criminal record, together with a copy of the relevant record:

If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with §982.554.

24 C.F.R. §553(d)(1). Furthermore, if there is a person with a disability in the household, any denial of admission must be subject to consideration of a reasonable accommodation before the admission may be denied:

(iv) If the family includes a person with disabilities, the PHA decision concerning such action is subject to consideration of reasonable accommodation in accordance with part 8 of this title.

24 C.F.R. §982.552(c)(2)(iv). Notice of denial and right to review must be prompt, state the reasons for denial, and describe how to obtain the review. 24 C.F.R. §982.554(a). The required review process is set forth at 24 C.F.R. §982.554. The RHA Administrative Plan purports to offer review for denials but does not specify how this is to be done, what notices are necessary, or the considerations relevant to the review. Exhibit P from RHA Section 8 Office Administrative Plan.

The notice that RHA sends to applicants who have been denied for reason of a prior drug-related criminal history, and that is identified as the standard form notice by the RHA official in charge of admissions (Exhibit G, Sweeting dep., p. 11 l. 20 – p. 18 l. 10), is attached as Exhibit L and reads as follows:

Dear Applicant:

We had reached your name on the waiting list, but we are unable to offer you a rental subsidy because you or a member of your household has been arrested in connection with drugs. According to HUD regulations, a person who has had a drug arrest is not eligible for Section 8 Rental Assistance.

Your application has been removed from the waiting list, if you have a question regarding this matter, you are welcome to call me at 697-6100.

To say that this notice does not comply with the federal notice regulation would be extreme understatement. Not only does the notice fail to comply with the requirement to notify the applicant of a right of review, the RHA notice actually contains the false and misleading information that a drug *arrest* automatically disqualifies an applicant from Section 8 housing. This notice demonstrates the arbitrary way the people with drug-related or criminal histories are treated by RHA.

The right to adequate notice of denial of a property right or interest is fundamental, and protected by the due process clause of the Fourteenth Amendment of the United States Constitution, Goldberg v. Kelly, 397 U.S. 254 (1970); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978). RHA is obligated by law to provide full, prompt and adequate notice of denial of admission to the Section 8 Program each and every time an applicant is denied. 42 U.S.C. §1437d (k)(1); 24 C.F.R. §982.554. The content of the notice must comprehensively state the reasons for denial and be in plain and easily understandable language. Ortiz v. Eichler, 794 F.2d 889 (3rd Cir. 1986). The procedure for review of denial of admission must be meaningful and impartial, and satisfy due process concerns. Ressler v. Pierce, 692 F.2d 1212, 1221-22 (9th Cir. 1982).

Remedial judicial intervention is appropriate and necessary when a Section 8 housing authority has failed in its obligation to provide adequate notice or proper procedures for review

of admissions denials. See McNeil v. NYC Housing Authority, 719 F. Supp. 233 (S.D.N.Y. 1989); Ressler, *supra*. Court ordered remedies may include determining the content and method of distribution of notices, prescribing the manner of conducting the review, and delegating appropriate parties to conduct the review. Ressler, *supra*; see also, McNeil, *supra*; and Henry v. Gross, 803 F.2d 757 (2d Cir. 1986).

Given its dereliction in providing legally required notices to denied applicants, an appropriate remedy would be to require RHA to send notices that are approved by the Court to all denied applicants. McNeil, Henry, Ressler, *supra*. These notices may specify the address and phone number of local legal services organizations that are available to represent applicants denied admission to the Section 8 Program. The addition of legal services information in the notice is a necessary remedy in view of the systemic failure of Defendant RHA to provide notices of reviews of admissions denials, and is a wholly appropriate and common remedy. See, e.g., Ressler, *supra*, at 1220.

RHA notices of right to an informal review should reference the applicant family's right to request a reasonable accommodation for family members who are persons with disabilities (24 C.F.R. §982.552(c)(2)(iv)) and, specifically, reference the family's right "to submit evidence of the household member's current participation in, or successfully completion of, a supervised drug or alcohol rehabilitation program or evidence of having been rehabilitated successfully," as provided by 24 C.F.R. §982.552(c)(2)(iii). Inclusion of these references in RHA notices is essential to correcting the systemic denial of applicants' rights under the FHAA and Section 504, by the RHA Section 8 Office. The Court may also insure that the procedure for obtaining the review be as simple and easy as possible for the applicant and that it be conducted in a meaningful and impartial manner. Ressler, *supra*. Plaintiffs are entitled to monetary compensation for RHA's intentional violation of their fundamental due process rights.

CONCLUSION

It is respectfully requested that the Court grant summary judgment in favor of Plaintiffs except as to Plaintiffs' claims for damages; and as to damages, it is requested that the Court schedule a settlement conference for the purpose of resolving the issue of Plaintiffs damages, including punitive damages.

It is respectfully requested that the Court order Defendants to waive objection to Plaintiffs' criminal records and admit them to the Section 8 Housing Choice Voucher Program forthwith, as a reasonable accommodation to their disabilities, and as required by Section 504 and the FHAA. It is additionally, requested that the Court order Defendants to revise their policy for denying applicants with criminal histories and promulgate admissions policies and procedures that are consistent with Section 504 and the FHAA, as approved by the Court.

Furthermore, it is respectfully requested that the Court order Defendants to develop proper notices of denial of admission containing notice of the right to request an administrative review and the right to request a reasonable accommodation to a disability, and order that these notices contain information about available legal services. It is also requested that the Court order that Defendants develop appropriate and fair procedures for the request and conduct of informal review of denial of admission.

Finally, it is respectfully requested that the Court award the costs, fees, and expenses incurred in this action.

Dated: August 30, 2004 Respectfully submitted,

/s/ Louis Prieto
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