10-1144-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REBECCA TAYLOR
KARL HUNTER, and
HEIWA SALOVITZ, o/b/o
Others similarly situated,
Plaintiffs-Appellant
V.
THE HOUSING AUTHORITY OF THE
CITY OF NEW HAVEN,
JIMMY MILLER, individually,
KAREN DUBOIS-WALTON, individually
and in her official capacity as Executive Director,
and DAVID ALVARADO,
IIONA LEFFINGWELL,
LOUISE PERSALL, and
ROBERT SOLOMON in their official
capacities as members of the
Housing Authority Commission for the City of New Haven,
Defendants-Appellee

BRIEF OF PLAINTIFFS-APPELLANT

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Briefed and argued by: Jennifer C. Vickery (Fed. Bar No. CT24089)
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JURISDICTION

Jurisdiction in the district court is based on 28 U.S.C. §§1331 and 1343(a)(3). The plaintiffs claimed violations of federal civil rights statutes.

Jurisdiction on appeal is based on 28 U.S.C. § 1292(a)(1). The plaintiffs appeal from a partial denial of a request for injunctive relief.

On March 29, 2010, the United States District Court, District of Connecticut (the Hon. Janet Bond Arterton) issued final judgment denying relief on all claims and motions, except plaintiffs' motion for sanctions against defendant Jimmy Miller. On March 31, 2010, the plaintiffs noticed this appeal. Taylor, Docket #244. On April 2, 2010, Plaintiffs filed a Motion to Alter Judgment. The district court denied said Motion on July 14, 2010. Taylor, Docket #248.

ISSUES PRESENTED

I. MAY TAYLOR PRIVATELY ENFORCE 24 C.F.R. §100.204 AND 24 C.F.R. §8.28(a) THROUGH SECTION 1983?

II. IS IT ERROR TO USE THE "SUBSTANTIAL BENEFIT" ASPECT OF THE SECTION 504 FRAMEWORK TO DECIDE A CLAIM UNDER § 3604(f)(2)?

III. MUST THE DISTRICT COURT'S FINDINGS ON MOBILITY COUNSELING BE REVERSED IN LIGHT OF ADMISSION #1 AND THE RECORD AS WHOLE?

IV. DID HANH'S PATTERN OF RESISTING DISCOVERY RELATED TO NOVAK JUSTIFY AN ADVERSE INFERENCE IN TAYLOR'S FAVOR?

STATEMENT OF THE CASE

Defendants are the Housing Authority of the City of New Haven ("HANH"), its current and former Executive Directors, Karen Dubois-Walton and Jimmy Miller, respectively, and its commissioners.

Plaintiffs are wheelchair-bound persons who need to move, but cannot search for accessible apartments effectively alone. They receive Section 8 rental subsidies administered by HANH. In 2006, three such persons sued HANH for assistance searching for wheelchair accessible apartments. Pl. Ex. 5, 6 & 7. In 2007, one of these filed a federal lawsuit and obtained partial injunctive relief. Gaither Docket #59. In 2008, Rebecca Taylor, in response to imminent foreclosure on the building where she lived, sought and won preliminary injunctive relief. Taylor Docket #1, 19, 22 & 23. In 2009, the district courts certified a class under Rule 23(b)(2), and consolidated discovery with that of the Gaither case. Taylor Docket #108 & Gaither Docket # 109. By stipulation, the merged all issues from the related Gaither lawsuit, except for damages, into the instant case. Transcript, pp. 8, line 15 to 9, line 10. Both cases alleged violations of the Fair Housing Act, as amended, Section 504 of the Rehabilitation Act, and 24 C.F.R. §100.204 and 24 C.F.R. §8.28(a). Both sought injunctive relief in the form of independent monitoring, and compensatory and punitive damages.

FACTUAL BACKGROUND

In July of 2006, HUD conducted a Section 504 compliance audit of the Housing Authority of the City of New Haven ("HANH" or the "Housing Authority"). Joint Ex. 3. HUD found that the Housing Authority pervasively noncompliant with HUD's Section 504 regulations. The 2006 report noted that the Housing Authority had not followed through on its promise to issue more Section 8 vouchers to disabled families, to make up for having excluded them from its accessible public housing, and had failed to assist disabled Section 8 participants in using the Section 8 program, by providing services such as a current listing of wheelchair accessible apartments available for rent, assistance finding funds to make modifications to non-accessible apartments, or mobility counseling.[1] Joint Ex. 3. One year after issuing the report, on July 30, 2007, HANH and HUD executed a second Voluntary Compliance Agreement ("the VCA"). Joint Ex. 5.[2] Executive Director Jimmy Miller did not inform the

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[1] "Mobility counseling" is a service provided by many large housing authorities to help Section 8 participants search for and ultimately lease a privately-owned apartment. 53:11-54:14. HANH provided such services for other purposes, but refused to do so for disabled families who needed help finding accessible units. 49:15-50:17 Pl Ex. 6, p. 46; 51:13-53:5; 68:22-69:8

[2] In1994, HUD had performed the same type of investigation on HANH, thereafter executing the same type of a Voluntary Compliance Agreement, which described the steps HANH would take to become compliant with disability laws. Subsequently, HANH did not perform many of the actions required by the first VCA. However, it suffered no consequences whatsoever from HUD as a result. Transcript p. 600, line 2 to p. 601, line 10.

Housing Authority's Commission of either the 2006 Report or the 2007 VCA. Transcript p. 607, line 25 to p. 608, line 22.

From 1999 through 2007, the Housing Authority was categorized by HUD as a "troubled agency." Transcript p.546, lines 23-24. The troubled agency designation a resulted in part from the fact that the Housing Authority was failing to distribute thousands of the Section 8 vouchers it had been granted. Transcript P. Ex. 30, pp. 166-196. Instead of issuing the vouchers to those who qualified for the Section 8 program, the Housing Authority repeatedly returned millions of dollars in unused Section 8 subsidies to the federal government. Transcript p. 549, lines 19-25. By January of 2008, HANH had amassed a $15,000,000 surplus of unused Section 8 funds, and was using just 1,300 of the 3,000 Section 8 vouchers allotted to it by HUD. Transcript, p. 453, lines 14-19; Joint 13 at p. 37.[3]

It was at this time that named plaintiff Rebecca Taylor learned that a judgment had entered against her landlord. Born with spina bifida, Taylor

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[3] From 2001 to the present HANH participated in a HUD pilot program called Moving to Work ("MTW"). The program gives HANH flexibility in how it spends Section 8 funding, but does not affect HANH's obligations to comply with civil rights laws. From 2006 to 2008, HANH did not use that flexibility to create any type of housing specifically for the disabled, and added just 13 wheelchair accessible units to its public housing stock. Transcript p. 553, line 4 to 554, line 7; Transcript p. 551, lines 12-25, and p. 577, lines 8 to 24; Transcript p. 578, line 1 to 4.

depended on a wheelchair, and yet lived in a building with stairways at all exits. Realizing she needed to move, but unable to look by herself, Taylor called her Section 8 Specialist, Denise Senior. Senior never returned the call. Pl. Ex. 1. Taylor also sent a fax to HANH's Reasonable Accommodations Coordinator on March 14, 2008, requesting help finding an apartment. Id. When no one responded, Taylor filed a federal lawsuit on April 15, 2008.[4]

The district court ordered HANH to give Taylor mobility counseling at a May 7, 2008 hearing. On May 13, 2008, HANH replaced its current Reasonable Accommodations Coordinator, and weeks later, Jimmy Miller stepped down as Executive Director six months ahead of his contract renewal date. Joint Ex. 31.

ARGUMENT

I. TAYLOR MAY ENFORCE 24 C.F.R. §8.28(a) AND §100.204 THROUGH SECTION 1983.

[4] Plaintiffs documented at least six other disabled Section 8 participants who had made the same type of request as Taylor, in written form. None was granted. Pl. Ex. 53, 58, 59, 40, and 41. As the evidence about some of the individuals was sealed to protect their privacy, it is summarized below by their initials:

Disabled S8 Individual	*Date of Request*	*Date of HANH Response*	*Evidence of Response*
L.D.	November 2005	October 2007	Pl. Ex. 41, sec. 78
F.M.	December 2006	January 2007	Pl. Ex. 40
D. Stokes-Hall	January 2006	December 2006	Pl. Ex. 58
K. Gaither	September 2006	November 2006	Pl. Ex. 59
R.M.	June 2006	August 2006	Pl. Ex. 40
A.C.	March 2007	May 2007	Pl. ex. 40

A. Legal Authority and Standard of Review

A district court's conclusions of law are reviewed by this Court de novo, Connors v. Conn. Gen. Life Ins. Co.,272 F.3d 127, 135 (2d Cir.2001).

The Fair Housing Act has been determined to be privately enforceable, because, unlike the FERPA provisions under consideration in Gonzaga University, the Fair Housing Act carries an express right of action. See e.g.,Anderson v. Jackson, 2007 WL 458232, *4 (E.D. La. 2007). If the law sought to be enforced "focuse[s] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person,' it confer[s] no individual rights and thus cannot be enforced by Section 1983. Gonzaga University v Doe, 536 U.S. 273, 281(quoting Blessing v. Freestone, 520 U.S. 329, 343-44 (1997)).

The Second Circuit had recognized the enforceability of Section 504 regulations prior to Gonzaga University, but has yet to revisit the issue in light of Gonzaga. Telesca v. Long Island housing Partnership, Inc., 443 F.Supp.2d 397, 406 (E.D.N.Y. 2006) (citing Dopico v. Goldschmidt, 687 F.2d 644, 651, n. 5 (2d Cir.1982) ("[P]laintiffs' private right of action under section 504 encompasses a right to allege violations of the [implementing] regulations.").

B. The District Court's Analysis Failed to Account for 24 C.F.R. §100.204, which Interprets the Fair Housing Act.

The district court recognized the possibility that 24 C.F.R. § 8.28(a) describes the types of reasonable accommodations that HUD requires a housing authority to grant. But it stopped short by applying this recognition to Section 504 alone, and failed to consider the same issue with respect to 24 C.F.R. §100.204. Plaintiffs contend on appeal that each regulation is independently enforceable, 24 C.F.R. § 8.28(a) implicitly, and 24 C.F.R. §100.204 expressly. In addition, plaintiffs contend that because 24 C.F.R. §100.204 tracks the same "reasonable accommodation" language that appears the Rehabilitation Act, plaintiffs may use it to enforce the accommodations more specifically described in 24 C.F.R. § 8.28(a). Thus, the two regulations together, both of which were relied upon by plaintiffs' Count III, are privately enforceable.

Plaintiffs claimed in Count III that the defendants knowingly violated 24 C.F.R. §100.204, a regulation issued in part 100 pursuant to the Fair Housing Act. The district did not perform the private right of action analysis on it. However, if it had, the reasoning employed in the decision would have required recognition of the plaintiffs' right to privately enforce 24 C.F.R. §100.204.

To decide the 24 C.F.R. § 8.28(a) claim, the district court first determined that, after Gonzaga University, a court asked to enforce a regulation through Section 1983 must first answer, as a threshold question, whether the statute

which the regulation interprets carries with it a private right of action. Next, the district court evaluated the Rehabilitation Act, searching for language demonstrating an unambiguous intent by Congress to create rights in a limited class of individuals. It found such language, and proceeded to deem the Rehabilitation Act itself privately enforceable under Gonzaga University. Nevertheless, the district court deemed 24 C.F.R. § 8.28(a) unenforceable, because it concerned matters not covered by the language of the Rehabilitation Act itself.[5]

Yet the above decision-making process trajectory leads to the opposite conclusion if applied to 24 C.F.R. §100.204, because this regulation tracks verbatim the language of the Rehabilitation Act, yet was issued in part 100, pursuant to the FHA and FHAA. First, the district court's threshold question

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[5] The district court arrived at its conclusion in two steps. First, it determined that although neither the Second Circuit nor the Supreme Court have determined whether a regulation may be enforced through Section 1983 on its own, if such enforcement is available, it is only to the extent that the underlying statute already carries a private right of action, whether expressed or implied.[5] Second, the district court reasoned that because all parties were in agreement that the Rehabilitation Act itself carries an implied right of action, then the relevant question was whether the regulation at issue in this case goes beyond the "scope" of the Rehabilitation Act. The district court answered this question in the negative, apparently because the text of the Rehabilitation Act does not mention the specific things discussed in the regulation. It stated:

> Since the regulation cannot provide a right that the statute does not, it follows *a fortiori* that no right to specific, distinct, tangible, or concrete things purportedly granted to disabled persons by regulation can be said to fall within the scope of the private right provided by the statute itself, *and therefore no such regulation-based right may be enforced through § 1983.*

[emphasis added].

about the private enforceability of the statute would be answered affirmatively. Courts within and outside of the Second Circuit have uniformly held that the FHA and FHAA are privately enforceable, and continue to do so following Gonzaga University. See Anderson v. Jackson, 2007 WL 458232, *4 (E.D. La. 2007) (following the Second Circuit, and reviewing cases holding that § 3608 of the Fair Housing Act is not too vague to be privately enforceable against a housing authority). Second, because 24 C.F.R. §100.204 simply reiterates the text of the Rehabilitation Act, as confirmed by the district court's own analysis, that text is unambiguously rights-creating. Thus, although the district court's decision does not specifically render decision upon this claim, applying its reasoning to the regulation would compel a finding that 24 C.F.R. §100.204 is privately enforceable through Section 1983.

II. THE DISTRICT COURT ERRED BY USING THE REASONABLE ACCOMMODATIONS FRAMEWORK TO DECIDE CLAIMS UNDER 42 U.S.C. § 3604(f)(2).

Defendants argued they had no legal obligation to provide mobility counseling, and the district court adopted this view in its decision. The Decision reasons that mobility counseling is not a part of what it defines as the benefit of the Section 8 program, and therefore the defendants could never be liable for failing to provide it. This reasoning is legally flawed, however, because (1) its restrictive definition of the benefit was not supported by the cited authority,

Liberty Resources, and (2) the " benefit" concept, while relevant to claims under subsection (f)(3) of 42 U.S.C. §3604, has no role in deciding a claim under subsection (f)(2). Instead, (f)(2) requires that if a defendant chooses to provide an optional service, such as parking space or mobility counseling, it must ensure equal access to that same service by disabled persons.

A. The District Court Subsumed the § 3604(f)(2) Claim Into Its Analysis of the Reasonable Accommodation Claims.

The district court determined that, in ruling on the Section 504 claims, it must first ask what did Congress intended to be the benefit of the Section 8 program. Decision, p. 30-31. Somewhat enigmatically, the district court then answered its question by stating that "help finding housing" is not a part of the benefit, and immediately quoting a case that declares that "aid" in "locating" housing *is* a part of the benefit:

> These sources make clear that the "individual services offered," Choate, 469 U.S. at 303, constituting the "benefit" of HANH's "program or activity," includes the provision of a voucher to a participant to find a unit; monthly assistance payments to a landlord to cover some portion of the cost of renting a private dwelling; and, upon request, assistance in a family's negotiation of a "reasonable rent." But this benefit does not include help finding housing, the provision of housing, or a guarantee that a participant will find suitable housing. As the Liberty Resources court concluded, "[n]either the [1937 Act] nor the HUD regulation promise to provide housing to all eligible participants. *Rather, they state that the purpose of [the Section 8 Program] is to aid families in locating and affording decent housing through the provision of rental subsidies.*

> The [Section 8] Program facilitates the placement of low-income families in affordable housing by seeking the assistance of private sector landlords." 528 F. Supp. 2d at 567. Decision, p. 42.

The district court went on to apply its determination that Section 8 does not include help finding housing not only to the Section 504 claims, but also to the claims under the FHA and FHAA. Decision, pp. 58 & 71.

Although this process resolves the claim under (f)(3), which contains the "reasonable accommodation" phrasing found in Section 504, it has no bearing on the (f)(2) claim. The federal courts have recognized that (f)(2) and (f)(3) are not co-extensive, in part because their textual differences make (f)(2) applicable to plaintiffs who have not requested a reasonable accommodation. See, e.g. Radecki v. Joura, 114 F.3d 115, 116 (8th Cir.1997) (reversing dismissal of claim under § 3604(f)(1)(A), even in the absence of evidence that plaintiff had alleged denial of a reasonable accommodation under 3604(f)(3)). The text of (f)(2) reads:

> **§ 3604. Discrimination in the sale or rental of housing and other prohibited practices**
> (f). . . [I]t shall be unlawful—
> (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—
> (A) that person; or
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
> (C) any person associated with that person.

Plaintiffs alleged in Count I of their Amended Complaint a violation of all sections of § 3604(f), and echoed the language of the both subsections, each in separate parts of paragraph 65 of the Third Amended Complaint:

> 65. The Defendants have intentionally discriminated against the plaintiffs on account of their disabilities and handicaps, discriminating against them in the *provision of services* and otherwise making dwellings unavailable to them by:
> a. refusing to maintain a current listing of the available, accessible apartments ("AUL"), such as HANH maintains for non-disabled Section 8 households;
> b. refusing to provide the same mobility counseling services as HANH provides to non-disabled Section 8 households;[emphasis added].

The "provision of services" language of subsection (f)(2) appears not only in the plaintiffs' pleadings and in their proposed Conclusions of Law, but throughout the motions and memoranda submitted in the course of this case, including plaintiffs' motions for preliminary injunctive relief. In this context, it was an error not to decide the (f)(2) claim independently.

B. By Offering Mobility Counseling to Section 8 Participants for Other Purposes, Yet Denying It for the Purpose of Finding Wheelchair Accessible Apartments, Defendants Violated § 3604(f)(2).

It is undisputed that from 2006 to 2008 the Housing Authority had chosen to provide mobility counseling services to non-disabled Section 8 families. They did so in two ways, through outside consultants and in-house. In 2004, the defendants had executed a contract with a consultant named HOU to provide up

to $100,000 annually in such services. The parties renewed the contract twice, but by 2007, over half of the funds remained unused. Also, in 2006, defendants directed HANH staff to offer a limited form of mobility counseling to all Section 8 participants if they would agree to move to the subsurbs. Miller related that HANH was under "pressure" from HUD to help Section 8 families move out of high minority, high poverty neighborhoods. Miller testified that "anybody" could receive mobility counseling services as part of the latter effort. Nevertheless, Miller admitted that disabled Section 8 participants were not permitted to use either of these services for the purpose of finding a wheelchair accessible apartment. HANH's Section 8 Director and staff confirmed his testimony, stating that they had never been instructed to provide mobility counseling themselves to help disabled families in need of accessible apartments, as they did to the general population. Instead, these requests were sent "upstairs" to the Reasonable Accommodations Coordinator. There, the request would languish for months or years until it was ultimately denied per HANH policy, unless the requesting family retained counsel. This practice of refusing requests for mobility counseling to find a wheelchair accessible apartment, but providing mobility counseling to families who wanted it for other reasons, amounted to intentional discrimination under §3604(f)(2).

C. HANH Denied Taylor Mobility Counseling By Failing to Inform Her She Could Use the Service to Find a Wheelchair Accessible Apartment.

If the court had applied the legal standards relevant to subsection (f)(2), the plaintiffs would have prevailed on that claim. A claim that defendants hid the truth about a service offered in connection with renting housing is actionable. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982) (holding testers have standing as persons "directly injured" by a defendant's untruthful statements about housing, even if they are not themselves suing for a denial of housing). Taylor herself ultimately received mobility counseling after winning preliminary injunctive relief as part of this lawsuit. Yet by previously hiding from Taylor the availability of mobility counseling, the Housing Authority caused her to remain in an unsuitable dwelling. Throughout 2006 and 2007, Taylor lived in an apartment that was not wheelchair accessible. She was forced to essentially crawl down the front steps if no one was available to help her exit the building. From March of 2008 forward, Taylor endured extreme anxiety as she wondered whether she would be rendered homeless by the foreclosure proceedings against her landlord. Even assuming *arguendo* that the district court's conclusion that Taylor was not denied a reasonable accommodation is correct, the question of whether Taylor's rights to be

informed of and provided mobility counseling were violated remains unanswered.

III. THE DISTRICT COURT'S FINDINGS ON MOBILITY COUNSELING MUST BE REVERSED IN LIGHT OF ADMISSION #1, AND THE RECORD AS WHOLE.

A. Legal Authority and Standard of Review

A district court's decision on the exclusion of evidence by reason of an admission is reviewed by this Court for abuse of discretion. Commodity Futures Trading Comm'n v. Int'l Financial Services (NY), Inc., 323 F. Supp. 2d 482 (S.D.N.Y. 2004).

A matter admitted under Rule 36(a) is conclusively established, unless the court grants a motion to permit the admission to be withdrawn or amended. See Fed.R.Civ.P. 36(b); United States v. Kasuboski, 834 F.2d 1345, 1249 (7th Cir.1987); Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2d Cir.1966). Any evidence that contradicts a binding Rule 36 admission is properly excluded. 999 v. C.I.T. Corp., 776 F.2d 866, 870 (9th Cir.1985); Switchmusic.com, Inc. v. U.S. Music Corp., 416 F.Supp.2d 812, 818 (C.D.Cal. 2006). An admission "cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." Cooke v. Allstate Ins. Co., 337 F.Supp.2d 1206, 1210 (C.D.Cal. 2004). While a court has discretion to permit withdrawal of an

admission upon motion, such discretion should be exercised only "compelling circumstances," and where the party who obtained the admission will not be prejudiced. Moosman at 688; Commodity Futures, 323 F. Supp. 2d at 510-11 (S.D.N.Y. 2004).

B. Disregarding Admission #1, Which States a Policy of Not Providing Mobility Counseling, Was An Abuse of Discretion.

On July 18, 2007, defendant Jimmy Miller responded to plaintiffs Request for Admissions #1 as follows:

"The Housing Authority does not do searches for apartments."

See Pl. Ex. 21. The district court impermissibly altered the evidence by disregarding this conclusive admission. Pursuant to Rule 36(b), a matter admitted "is conclusively established" and a party may not introduce contradictory evidence. At the pretrial conference on July 29, 2009, the district court and the parties confirmed their mutual understanding that any evidence offered to regarding HANH's mobility counseling efforts would not be for the purposes of contesting liability on this issue, but solely for collateral purposes, such as proving punitive damages. 7-29-2009 Transcript, p. 27, lines 6-17.

However, throughout trial, defense witnesses attempted to contradict Admission #1. For example, under questioning from the district court, Miller tried again, first admitting that under his leadership, HANH mobility counseling to disabled families, Transcript, p. 766, lines 1-19, but adding that he had read

"records" indicating that HANH staff had nevertheless given mobility counseling all along, "although there was not authorization." Id. [6]

Plaintiffs objected to two of the most blatant of these attempts. First, plaintiffs objected to relevance and lack of timeframe when HANH's newest reasonable accommodations coordinator as of May 13, 2008, Laura Woodie, testified that she had provided mobility counseling for disabled Section 8 participants *before* actually taking the job. Transcript, p. 862, line 15 to p. 866, line 12. The district court permitted the testimony. Transcript, p 864, line 16. Second, plaintiffs objected when defense counsel attempted to elicit from HANH's former Section 8 Director, Iris Santiago, generalized assertions that she had performed mobility counseling on an ad hoc basis in 2006 and 2007. Transcript, pp. 1437-1438. Plaintiffs specifically pointed to Admission #1 as requiring that the testimony be excluded. The district court reserved judgment, see Transcript, p. 1439, but its subsequent finding that "HANH did not, on a programmatic or policy-wide basis, deny mobility counseling to those who

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[6] Miller's testimony shows that all of the two programs through which mobility counseling occurred during his tenure—Expanded Housing Opportunities and Brookside—served the general population, and were not available as a reasonable accommodation to disabled families who needed wheelchair accessible apartments. Miller described that Laura Woodie worked in HANH's public housing department prior to becoming the Reasonable Accommodations Coordinator on May 13, 2008, and part of her job was to relocate pubic housing families so that HANH could demolish the Brookside public housing complex. Transcript, pp. 36-37; Jt. Ex. 29.

requested it, even during the claimed liability period" squarely contradicts Admission #1, and appears to credit the objected-to testimony. Decision at 57.

A court has discretion to permit an amendment to an admission if it "promotes the presentation of the merits" and will not prejudice the opposing party. See Fed. R. Civ. P. 36(b). The trial testimony by Laura Woodie about pre-2008 mobility counseling directly contradicted the admission. In addition, it contravened the pretrial conference ruling that any evidence about mobility counseling would not be admissible to contest liability. Moreover, the district court's decision to permit this testimony was a mid-trial reversal of its own prior rulings that defendants could not withdraw or supplement Admission #1. This ruling rewarded the defendants' strenuous efforts to shield Novak and from deposition and prevent plaintiffs from discovering her correspondence, see Transcript, pp. 278, line 20 to 295, line 8, at a time when plaintiffs could no longer do anything about it. In short, the district court's action in refusing to exclude this testimony from evidence, and failing to regard the matter in the admission as conclusively established, was an abuse of discretion that has severely prejudiced the plaintiffs.

C. The Record as a Whole Compels A Finding That HANH Did Not Change Its Mobility Counseling Policy Until April 2008, After This Lawsuit Was Filed.

The bulk of the evidence and testimony offered at trial about individuals who received mobility counseling described events that took place *after* these lawsuits had commenced. Hence, it was irrelevant to liability. Such evidence did not contradict that, up until April 2008, HANH's policy was to deny mobility counseling based on disability. All of the individuals whom the evidence showed *actually received* mobility counseling prior to April 2008 had filed lawsuits against HANH.

Plaintiffs challenge the evidentiary basis of district court's findings of fact on the absence of a practice of denying mobility counseling to families seeking accessible apartments as unsupported by the record as whole, or even the court's own citations to the record. This brief addresses each such finding in order of its appearance in the Decision.

1. Page 57

The district court placed great weight upon its finding that Jimmy Miller had provided mobility counseling for two disabled individuals, Lona Mitchell and Louis Morrison. It accurately stated that Mitchell and Morrison each had *requested* mobility counseling before April 2008, in June of 2006 and November of 2007 respectively. The court then treated those dates as the dates when Miller approved the requests. However, such request dates do not show anything by themselves, because at HANH, such requests often sat for years unanswered.

Mitchell's case is illustrative: her file shows that she received a letter stating she had been "approved" in September of 2007, but she was not actually provided mobility counseling until March of 2009. Transcript, p. 983, line 20 to p. 984, line 17.

The record as a whole shows that in August 2007, Mitchell and Morrison were part of the group of five families whose paperwork was submitted by the newly created Reasonable Accommodations Committee to the HANH Commission. The Committee recommended that they receive mobility counseling, but needed the Commissions approval to pay for the services. The Committee's written recommendation was then "edited" by HANH's Commission, and the resulting resolution was then approved. Although Commission Chair Solomon disputed the accuracy of the minutes, he admitted that as written they appear to record that two families were excluded from receiving mobility counseling, because they had not commenced litigation against HANH. After the vote, HOU in fact provided mobility counseling to just the three families (Rhonda Gaither, Shirley Hampton, and Dorothy Stokes-Hall) who had filed lawsuits. The services were provided using HANH's existing contract with HOU, through their consultant, Greg Brunson.

At trial, Heinrichs admitted under cross-examination that the two non-litigant families were Mitchell and Morrison. Exhibits drawn from HANH's

files showed that Mitchell and Morrison finally received their reasonable accommodation approval decision letters in 2009 and 2008, respectively. Laura Woodie, HANH's Reasonable Accommodations Coordinator from May 2008 forward, testified to having personally provided Mitchell the mobility counseling services in 2009, three years after her 2006 request. Thus, while Mitchell and Morrison did ultimately receive mobility counseling, each of them waited much longer to receive help than they would have if HANH had used its existing contract with HOU to assist them in August of 2007. The plaintiffs submit that these additional parts of the record strengthen, rather than weaken, the case that, at least until April 2008, HANH had an overall policy of refusing mobility counseling as a reasonable accommodation.

2. Page 61

The district court further found that "only a small number of disabled voucher holders asked for mobility counseling." Decision at 61. However, this finding ignores overwhelming evidence that the reason so few asked for mobility counseling is that the defendants had conveyed to disabled Section 8 participants that mobility counseling was not an option for them. First, in March of 2006, when Miller himself revised HANH' reasonable accommodation forms—papers which defendants touted as their primary device for communicating the services available to Section 8 participants—he did *not*

list mobility counseling as one of the options. Pl. Ex. 34 & 36. Second, from 2006 through April 2008, Miller continued to sign or authorized pleadings and other representations that HANH would not provide mobility counseling to Section 8 participants. Admission #1; Pl. Ex. 5,6 and 7. For example, at Taylor's hearing for preliminary injunctive relief on May 7, 2008, Miller was present and did not object when HANH's counsel answered the court's query about whether HANH would at that time give mobility counseling to Taylor by saying "[W]e can't provide that, we don't have a contract." Pl. Ex. 1, p. 20, lines 13-18. Third, HANH's Section 8 staff confirmed that they were not instructed about the availability of mobility counseling to help their disabled participants find Section 8 apartments until at least April of 2008. Fourth, HANH's internal manual of Section 8 procedures says nothing about the availability of mobility counseling. Fifth, William Heinrichs, the Reasonable Accommodations Coordinator under Miller, testified in his January of 2008 deposition that neither he nor anyone else at HANH was currently providing mobility counseling as a reasonable accommodation. Sixth, every Section 8 participant who testified confirmed that prior to April of 2008, no HANH employee had ever told them they could ask for or have mobility counseling. Seventh, and most significantly, HANH did not add mobility counseling to the list of available reasonable

accommodations on its forms for Section 8 participants until after this lawsuit commenced on April 22, 2008. Pl. Ex. 35 & 37.

3. Page 62, footnote 31

The court cited page 103 of the transcript as evidence that even if Maureen Novak, the reasonable accommodation coordinator, did not believe the Housing Authority was legally obligated to provide mobility counseling as a reasonable accommodation, "she was overridden by her direct supervisor, Miller, who believed he did have such an obligation." Decision, footnote 31. Page 103 confirms that Miller admits to a "philosophical" disagreement with Novak, but does not suggest that he actually overruled her decisions. The exchange goes on for five more pages, without any indication that Miller overruled any of Novak's decisions about mobility counseling requests. On the contrary, Miller testifies that he continued to sign off on the reasonable accommodations decisions made by Novak until the day she resigned. Transcript, p.108, lines 1-14. Miller also stated that his disagreement with Novak about mobility counseling did not cause him to remove her from the position, or to reassign the reasonable accommodation decision-making function to another employee—even though he did reassign some of her other duties. Transcript, p.107, lines 9-19. Thus, the section of the testimony provides no

support for the finding that Miller had "overridden" Novak's anti-mobility counseling policy.

Moreover, the transcript as a whole compels the opposite conclusion. Miller himself testified that HANH did not start offering mobility counseling as a reasonable accommodation until *after* he left the role of Executive Director in June of 2008. See Transcript, p.759, lines 5-8; pp. 761, line 8 to 762, line 1; p. 766, line 11. Miller's basic defense strategy at trial was to claim that he had wanted the Housing Authority to provide mobility counseling as a reasonable accommodation, but was prevented from following his better judgment. Miller also blamed many other things for stopping him from changing HANH's policies while he was Executive Director, including HUD, various mobility counseling companies, HANH's budget problems, the "state of disarray" at HANH prior to his arrival, and even a flood in Indiana. When Miller was presented with a June of 2007 letter denying mobility counseling signed by Novak, see Pl. Ex. 40, p. 4, he exclaimed, "[Y]ou should talk to her."[7] While

[7] Novak was an individual defendant in the Gaither litigation filed in May of 2007. The plaintiffs sought and received an expedited discovery schedule in that case. When Novak "went on medical leave" to Nebraska in August of 2007, plaintiffs sought and received assurances from defense counsel that she would be made available to be deposed. Thereafter, parties engaged in a two-year battle over whether Novak would return to Connecticut. The plaintiffs' filed multiple motions to compel, sanction, and appoint a forensic computer expert to investigate the defendants' representations that Novak's computer hard drive had been accidentally erased. As to Novak's deposition, the motions were resolved by the parties' stipulation that neither side would call Novak as a witness at trial. The court denied the other motions in its Decision.

Miller may well have been implying that Novak was to blame for the policy, he never testified that he corrected it. Thus, the district court's finding that any decisions by Novak to deny mobility counseling were "overridden" by Miller is plain error.

Ultimately, three facts can be derived from Miller's testimony affirming that he personally signed off on each of the reasonable accommodation decision letters denying requests for mobility counseling. First, Miller clearly knew that disabled families were requesting and being routinely denied mobility counseling. See Pl. Exhibit 40. Second, Miller must have known, based on the absence of any specific facts articulated within the letters he was signing, that the requests were being denied in a blanket manner—i.e., not for individualized reasons. Id. Whereas other denial letters signed by Miller typically included comments such as that the request was incomplete or did not seem to be necessary based on the severity of the disability, the mobility counseling denials did not include such comments. Id. Third, Miller's testimony admits that he was aware that he had the authority to order Novak to change the policy, but did not do so. In sum, regardless of whether these letters reflected the personal views of Novak or Miller, the evidence shows that, as an organization, HANH's practice was to deny requests for mobility counseling as a reasonable accommodation, until Novak's departure in August of 2007.

IV. HANH'S PATTERN OF REFUSING TO PRODUCE EITHER NOVAK OR HER COMPUTER FILES JUSTIFIES AN ADVERSE INFERENCE IN TAYLOR'S FAVOR THAT SHE REQUESTED MOBILITY COUNSELING AS A REASONABLE ACCOMMODATION.

In the course of discovery, defendants at various points represented that the computer hard drive used by Maureen Novak, HANH's Reasonable Accommodations Coordinator until August of 2007, was lost, or that it had been "wiped." Plaintiffs filed and renewed motions asking the district court to sanction the defendants by requiring them to pay for a forensic examination of the computer's hard drive, or to pay to transport Novak back to Connecticut from Nebraska to be deposed. Defendants then claimed the hard drive was not lost and had not been erased, and complied with Order # 101 and #134 by producing certain forms of electronic discovery in May and June 2009. A week before trial, defendants disclosed thousands more "newly discovered" emails from the time period when Novak worked at HANH. Plaintiffs immediately renewed their motions for sanctions, but asked that the district court infer intent to discriminate from both the untimely emails and the misrepresentations about Novak's hard drive that defendants. The district court reserved judgment. Its Decision ultimately held that the onus was on the plaintiffs to have proven post-trial that the late email disclosures contained relevant material. However, it did not analyze the result of the defendants pattern as a whole, or whether their false

statements and/or failure to preserve the Novak hard drive justified the requested adverse inference.

A. Legal Authority and Standard of Review

A district court's decision on a motion for discovery sanctions may be reviewed by this Court for abuse of discretion. See, e.g., Selletti v. Carey, 173 F.3d 104, 110 (2d Cir.1999). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). An adverse inference instruction serves the remedial purpose, "insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." Kronisch v. United States, 150 F.3d 112, 126-28 (2d Cir.1998).

"The party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction' but Courts must take care not to 'hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would subvert the ... purposes of the adverse inference, and would allow parties who have ...

destroyed evidence to profit from that destruction.';. . . . Accordingly, where a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence (satisfying the "culpable state of mind" factor), that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the "relevance" factor)." Residential Funding Corp. v. Degeorge Home Alliance, Inc., 306 F.3d 99, 57-59 (2d Cir, 2002).

The burden-shifting analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) requires the plaintiffs in this case to produce evidence of a prima facie case of reasonable accommodation. 2922 Sherman Avenue Tenants' Assoc. v. District of Columbia, 444 F.3d 673, 682 (D.C. Cir. 2006). Under the FHAA, The burden then shifts, such that "[t]he ultimate burden at trial of proving that a proposed accommodation is not reasonable or that plaintiffs cannot be accommodated rests with defendants." Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township, 996 F. Supp. 409, 435 (D. NJ 1998).

B. Taylor's Evidence of the Timing and Exigent Circumstances of Her Requests Was Sufficient to Create a Prima Facie Case of Discrimination Under the FHAA.

The district court's subsidiary factual findings state a prima facie case for Rebecca Taylor. Nevertheless, the court refused to find that Taylor had met her burden, because it viewed the date of the request as a critical piece of evidence that was highly contested.

Because the voice mail request certainly would have fallen within a period of time when the defendants admit to not providing mobility counseling to the disabled, the precise date was unnecessary to establish Taylor's prima facie case. In fact, the testimony of William Heinrichs at the preliminary injunction hearing revealed that the Housing Authority had been aware of the named plaintiff's immediate need for assistance for two weeks prior to the hearing, but had not done anything. See Pl. Ex. 1 (Transcript of PI Hearing). At trial, Heinrichs answered differently, but then admitted again under cross-examination that he was advised of Taylor's dire need to move, but did not offer her mobility counseling:

Q. Were you aware before the lawsuit that Rebecca Taylor was seeking reasonable accommodation from HANH?
A. No, I was not.
MR. SWIFT: I have nothing further, your Honor.
THE COURT: All right,cross-examination.

CROSS-EXAMINATION
BY MS. VICKERY:
Q. Mr. Heinrichs, is it your testimony that you never spoke with me about Ms. Taylor, Rebecca Taylor, prior to attending her preliminaryinjunction hearing?
A. No, it is not.

Q. So you did in fact have communication with me between the time that Ms. Taylor's case was filed on April 22nd, 2008, and the time of the hearing on May 7, 2008, correct?
A. That is correct.
Q. And it was about her needs and how to reasonably accommodate her, correct?
A. Does that have to be a yes or no?
Q. Yes.
A. I don't remember.
Q. It's possible that it was about her needs for reasonable accommodation, is it not?
A. Yes.
Q. When you attended the actual preliminary injunction hearing, you testified -- you indicated
through your attorney, correct, that you had in fact been communicating with me in trying to resolve Ms.Taylor's issue, correct?
A. I guess so. I'm sorry if I'm not remembering it well.
Q. And, in fact, Ms. Taylor had not been assisted in any -- she had not been given mobility
counseling within that timeframe of April 22nd through May 7th, correct?
A. She had not, to my knowledge.
Q. You hadn't given it to her?
A. That is correct.

Transcript, pp. 1277-78.

Given the fact that part of the information HANH and Heinrichs had received about Taylor on April 22, 2008 was a pleading that attached a default judgment on a foreclosure against her landlord, Taylor's request for mobility counseling as a reasonable accommodation was clearly an emergency request. A defendant's actual knowledge that a disabled plaintiff needs a reasonable accommodation trumps technical requirements. See Radecki v. Joura, 114 F.3d 115, 116 (8th Cir.1997). In this case, it is undisputed that Taylor's needed to

receive mobility counseling on an emergency basis had been clearly communicated to Heinrichs, the proper person at HANH, in several ways, and HANH chose to adhere to its policy of not providing mobility counseling until after the district court had announced it intended to order relief for Taylor on May 7, 2008.

Just as significantly, prior to the events that triggered this lawsuit, HANH had been aware of Rebecca Taylor's need for mobility counseling for years, inasmuch as its staff had inspected the apartment, and had undoubtedly seen that it has stairs at all points of egress. When Denise Senior met on a yearly basis with Ms. Taylor, she undoubtedly saw that Taylor is confined to a wheelchair. Whether or not Taylor's Section 8 worker directly refused to help her find a new apartment when she was faced with foreclosure, it should be troubling enough that HANH staff members had for years ignored Ms. Taylor's obvious need for a wheelchair accessible apartment.

C. The District Court's Refusals to Order Forensic Examination of Novak's Hard Drive Prejudiced Taylor Severely.

If the district court is correct in finding the exact date necessary, its absence must be construed in Taylor's favor, inasmuch as the defendants either failed to preserve Novak's hard drive. Taylor was intensely fearful of becoming homeless and perhaps losing custody of her daughter—so much so that her testimony at the preliminary injunction hearing had to be stopped for a period in

order to collect herself. Pl. Ex. 1. Extreme anxiety may have kept Taylor from recalling the date of her last Section 8 recertification, but she was certain she had called Denise Senior in March. Yet, defendants made no effort to contradict Taylor on this issue while she was alive. Despite having requested and received two weeks to prepare for Taylor's preliminary injunction hearing, defense counsel did not call the obvious witness, Denise Senior.

Instead, HANH waited until trial to put Senior on as a witness. Transcript, pp. 1541 to 1572. Senior testified that that if Taylor had requested a reasonable accommodation her HANH file would not show it, because Senior would have sent the request to Novak, without keeping a copy in the Taylor file. Senior's testimony shows that Novak's computer records could be expected to show Taylor's request. Pl. Ex. 32; Transcript, p. 1567, line 17- to p. 1568, line 14; Jt. Ex. 19, p.27. Pl. Ex. 33. On this record, an adverse inference was justified.

CONCLUSION

Plaintiffs pray this Court will reverse the district court's conclusions that the plaintiffs lack a private right to enforce 24 C.F.R. § 8.28(a) through 24 C.F.R. § 100.204; decide the § 3604(f)(2) claim and recertify subclass (b) class as to mobility counseling. Alternatively, plaintiffs pray that this Court reverses the denial of plaintiff' Fed. R. Civ. P. Rule 37 motions, and imposes an adverse inference that Taylor requested mobility counseling.

Respectfully Submitted,

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ADDENDUM
TO BRIEF OF THE PLAINTIFFS-APPELLANT

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handicap requiring the accessibility features of the vacant unit.

(b) When offering an accessible unit to an applicant not having handicaps requiring the accessibility features of the unit, the owner or manager may require the applicant to agree (and may incorporate this agreement in the lease) to move to a non-accessible unit when available.

§ 8.28 Housing certificate and housing voucher programs.

(a) In carrying out the requirements of this subpart, a recipient administering a Section 8 Existing Housing Certificate program or a housing voucher program shall:

(1) In providing notice of the availability and nature of housing assistance for low-income families under program requirements, adopt suitable means to assure that the notice reaches eligible individuals with handicaps;

(2) In its activities to encourage participation by owners, include encouragement of participation by owners having accessible units;

(3) When issuing a Housing Certificate or Housing Voucher to a family which includes an individual with handicaps include a current listing of available accessible units known to the PHA and, if necessary, otherwise assist the family in locating an available accessible dwelling unit;

(4) Take into account the special problem of ability to locate an accessible unit when considering requests by eligible individuals with handicaps for extensions of Housing Certificates or Housing Vouchers; and

(5) If necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception rent under §982.504(b)(2) for a regular tenancy under the Section 8 certificate program so that the program is readily accessible to and usable by persons with disabilities.

(b) In order to ensure that participating owners do not discriminate in the recipient's federally assisted program, a recipient shall enter into a HUD-approved contract with participating owners, which contract shall include necessary assurances of nondiscrimination.

[53 FR 20233, June 2, 1988, as amended at 63 FR 23853, Apr. 30, 1998]

§ 8.29 Homeownership programs (sections 235(i) and 235(j), Turnkey III and Indian housing mutual self-help programs).

Any housing units newly constructed or rehabilitated for purchase or single family (including semi-attached and attached) units to be constructed or rehabilitated in a program or activity receiving Federal financial assistance shall be made accessible upon request of the prospective buyer if the nature of the handicap of an expected occupant so requires. In such case, the buyer shall consult with the seller or builder/sponsor regarding the specific design features to be provided. If accessibility features selected at the option of the homebuyer are ones covered by the standards prescribed by §8.32, those features shall comply with the standards prescribed in §8.32. The buyer shall be permitted to depart from particular specifications of these standards in order to accommodate his or her specific handicap. The cost of making a facility accessible under this paragraph may be included in the mortgage amount within the allowable mortgage limits, where applicable. To the extent such costs exceed allowable mortgage limits, they may be passed on to the prospective homebuyer, subject to maximum sales price limitations (see 24 CFR 235.320.)

§ 8.30 Rental rehabilitation program.

Each grantee or state recipient in the rental rehabilitation program shall, subject to the priority in 24 CFR 511.10(l) and in accordance with other requirements in 24 CFR part 511, give priority to the selection of projects that will result in dwelling units being made readily accessible to and usable by individuals with handicaps.

[53 FR 20233, June 2, 1988; 53 FR 28115, July 26, 1988]

§ 8.31 Historic properties.

If historic properties become subject to alterations to which this part applies the requirements of §4.1.7 of the standards of §8.32 of this part shall

part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant.

(b) A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.

(c) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A tenant with a handicap asks his or her landlord for permission to install grab bars in the bathroom at his or her own expense. It is necessary to reinforce the walls with blocking between studs in order to affix the grab bars. It is unlawful for the landlord to refuse to permit the tenant, at the tenant's own expense, from making the modifications necessary to add the grab bars. However, the landlord may condition permission for the modification on the tenant agreeing to restore the bathroom to the condition that existed before the modification, reasonable wear and tear excepted. It would be reasonable for the landlord to require the tenant to remove the grab bars at the end of the tenancy. The landlord may also reasonably require that the wall to which the grab bars are to be attached be repaired and restored to its original condition, reasonable wear and tear excepted. However, it would be unreasonable for the landlord to require the tenant to remove the blocking, since the reinforced walls will not interfere in any way with the landlord's or the next tenant's use and enjoyment of the premises and may be needed by some future tenant.

Example (2): An applicant for rental housing has a child who uses a wheelchair. The bathroom door in the dwelling unit is too narrow to permit the wheelchair to pass. The applicant asks the landlord for permission to widen the doorway at the applicant's own expense. It is unlawful for the landlord to refuse to permit the applicant to make the modification. Further, the landlord may *not,* in usual circumstances, condition permission for the modification on the applicant paying for the doorway to be narrowed at the end of the lease because a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises.

§ 100.204 Reasonable accommodations.

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

(b) The application of this section may be illustrated by the following examples:

Example (1): A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a *no pets* policy. It is a violation of §100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a *first come first served* basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of §100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

§ 100.205 Design and construction requirements.

(a) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. For purposes of this section, a covered multifamily dwelling shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if the dwelling is occupied by that date, or if the last building permit or renewal thereof for the dwelling is issued by a

more unit sizes in all or a designated part of the PHA jurisdiction within the FMR area.

(g) *HUD review of PHA payment standard schedules.* (1) HUD will monitor rent burdens of families assisted in a PHA's voucher program. HUD will review the PHA's payment standard for a particular unit size if HUD finds that 40 percent or more of such families occupying units of that unit size currently pay more than 30 percent of adjusted monthly income as the family share. Such determination may be based on the most recent examinations of family income.

(2) After such review, HUD may, at its discretion, require the PHA to modify payment standard amounts for any unit size on the PHA payment standard schedule. HUD may require the PHA to establish an increased payment standard amount within the basic range.

[64 FR 26648, May 14, 1999; 64 FR 49658, Sept. 14, 1999, as amended at 64 FR 56914, Oct. 21, 1999; 65 FR 16822, Mar. 30, 2000; 65 FR 58874, Oct. 2, 2000; 66 FR 30568, June 6, 2001; 67 FR 56688, Sept. 4, 2002]

§ 982.504 Voucher tenancy: Payment standard for family in restructured subsidized multifamily project.

(a) This section applies to tenant-based assistance under the voucher program if all the following conditions are applicable:

(1) Such tenant-based voucher assistance is provided to a family pursuant to § 401.421 of this title when HUD has approved a restructuring plan, and the participating administrative entity has approved the use of tenant-based assistance to provide continued assistance for such families. Such tenant-based voucher assistance is provided for a family previously receiving project-based assistance in an eligible project (as defined in § 401.2 of this title) at the time when the project-based assistance terminates.

(2) The family chooses to remain in the restructured project with tenant-based assistance under the program and leases a unit that does not exceed the family unit size;

(3) The lease for such assisted tenancy commences during the first year after the project-based assistance terminates.

(b) The initial payment standard for the family under such initial lease is the sum of the reasonable rent to owner for the unit plus the utility allowance for tenant-paid utilities. (Determination of such initial payment standard for the family is not subject to paragraphs (c)(1) and (c)(2) of § 982.505. Except for determination of the initial payment standard as specifically provided in paragraph (b) of this section, the payment standard and housing assistance payment for the family during the HAP contract term shall be determined in accordance with § 982.505.)

[64 FR 26649, May 14, 1999]

§ 982.505 Voucher tenancy: How to calculate housing assistance payment.

(a) *Use of payment standard.* A payment standard is used to calculate the monthly housing assistance payment for a family. The "payment standard" is the maximum monthly subsidy payment.

(b) *Amount of monthly housing assistance payment.* The PHA shall pay a monthly housing assistance payment on behalf of the family that is equal to the *lower* of:

(1) The payment standard for the family minus the total tenant payment; or

(2) The gross rent minus the total tenant payment.

(c) *Payment standard for family.* (1) The payment standard for the family is the lower of:

(i) The payment standard amount for the family unit size; or

(ii) The payment standard amount for the size of the dwelling unit rented by the family.

(2) If the PHA has established a separate payment standard amount for a designated part of an FMR area in accordance with § 982.503 (including an exception payment standard amount as determined in accordance with § 982.503(b)(2) and § 982.503(c)), and the dwelling unit is located in such designated part, the PHA must use the appropriate payment standard amount for such designated part to calculate the payment standard for the family. The payment standard for the family shall be calculated in accordance with

Rule 36. Requests for Admission

(b) Effect of an Admission; Withdrawing or Amending It.

A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.