U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

NERAL COUNSEL

JAN 20 2011

MEMORANDUM FOR: John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity

David Stevens, Assistant Secretary for Housing/ Federal Housing Commissioner

Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

FROM: Helen R. Kanovsky

SUBJECT: Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing.

I. *Introduction*

The Office of Fair Housing and Equal Opportunity (FHEO) requested our opinion as to whether Public Housing Agencies (PHAs) and owners of other federally assisted housing may grant current or prospective residents a reasonable accommodation under federal or state nondiscrimination laws for the use of medical marijuana.[1] Commensurate with the relatively recent upsurge of states passing medical marijuana laws, there has been a significant increase in the number of requests by residents of those states for exceptions to federal drug-free laws and policies to permit the use of medical marijuana as a reasonable accommodation for their disabilities. In 1999, this Office issued a Memorandum concluding that any state law purporting to legalize the use of medical marijuana in public or other assisted housing would conflict with the admission and termination standards found in the Quality Housing and Work and Responsibility Act of 1998 (QHWRA)[2] and be subject to preemption.[3] With this Memorandum, we reaffirm the Laster Memorandum's conclusions, and we address those conclusions in the context of requests for reasonable accommodation under federal and state nondiscrimination laws.

As discussed below, federal and state nondiscrimination laws do not require PHAs and owners of other federally assisted housing to accommodate requests by current or prospective

[1] For purposes of this Memorandum, "medical marijuana" refers to marijuana authorized by state medical marijuana laws, and the "use" of medical marijuana encompasses the use, unlawful possession, manufacture, and distribution of marijuana, as prohibited by the Controlled Substances Act. *See infra* Section III.B.2.

[2] QHWRA amended the United States Housing Act of 1937, 42 U.S.C. § 1437. Two of QHWRA's provisions, codified at 42 U.S.C. §§ 13661 and 13662, cover admission and termination standards, respectively, in federally assisted housing.

[3] *See* Sept. 24, 1999 Memorandum from Gail W. Laster, General Counsel, to William C. Apgar, Assistant Secretary, Office of Housing/Federal Housing Commissioner, and Harold Lucas, Assistant Secretary for Public and Indian Housing, on "Medical use of marijuana in public housing" [hereinafter Laster Memorandum] (attached).

residents with disabilities to use medical marijuana. In fact, PHAs and owners may not permit the use of medical marijuana as a reasonable accommodation because: 1) persons who are currently using illegal drugs, including medical marijuana, are categorically disqualified from protection under the disability definition provisions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act; and 2) such accommodations are not reasonable under the Fair Housing Act because they would constitute a fundamental alteration in the nature of a PHA or owner's operations. Accordingly, PHAs and owners may not grant requests by current or prospective residents to use medical marijuana as a reasonable accommodation for their disabilities, and FHEO investigators should not issue determinations of reasonable cause to believe a PHA or owner has violated the Fair Housing Act based solely on the denial of a request to use medical marijuana as a reasonable accommodation.

While PHAs and owners may not grant reasonable accommodations for medical marijuana use, they maintain the discretion either to evict or refrain from evicting current residents who engage in such use, as set forth in QWHRA. *See infra,* Section V.

II. *Background*

A. *Federal Drug Laws*

Marijuana is categorized as a Schedule I substance under the Controlled Substances Act (CSA). *See* 21 U.S.C. § 801 *et seq.* The manufacture, distribution, or possession of marijuana is a federal criminal offense, and it may not be legally prescribed by a physician for any reason. *See* 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).

B. *State Medical Marijuana Laws*

Since 1996, fifteen states and the District of Columbia have enacted laws that allow certain medical uses of marijuana despite the federal prohibition against its use.[4] Rather than permitting physicians to prescribe marijuana, these laws allow physicians to discuss the benefits and drawbacks of marijuana when determining whether to "recommend" it or "certify" that the patient qualifies for it under the medical conditions listed in the state statute. These state laws offer qualifying patients narrow exemptions from prosecution and/or arrest under state—but not federal—laws. The laws vary in how they protect medical marijuana users from state criminal laws, but all share the following features: 1) exemptions from arrest and/or prosecution for patients and caregivers who grow, possess, and use marijuana in conjunction with a doctor's "recommendation" or "certification"; 2) rules governing the caregiver's role in the procurement and administration of medical marijuana to the patient; 3) documentation requirements; and 4) quantitative limits on marijuana possession, cultivation, and usage.[5]

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[4] *See* Procon.org, "Medical Marijuana," *available at* http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881; *Arizona Becomes 15th State to Approve Medical Marijuana*, N.Y. TIMES, Nov. 14, 2010, *available at* http://www.nytimes.com/2010/11/15/us/politics/15arizona.html.

[5] *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 6-7 (2008), *available at* http://www.mpp.org/.../state-by-state-medical-marijuana-laws.html.

C. *Federal Admission and Termination Standards under QHWRA*

Section 576(b) of QHWRA addresses admissions standards related to current illegal drug use for all public housing and other federally assisted housing. Pursuant to that section, PHAs or owners

> shall establish standards that prohibit admission to the program or admission to federally assisted housing for any household with a member – (A) who the public housing agency or owner determines is illegally using a controlled substance; or (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance . . . may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13661(b)(1).

QHWRA therefore requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a "controlled substance" as that term is defined by the CSA. *See* Laster Memorandum at 2-3 & n.4. The Laster Memorandum advised that to determine whether an applicant is using a controlled substance at the time of consideration for admission, the use of the drug must have occurred recently enough to warrant a reasonable belief that the use is ongoing. *See id* at 3-4. This requires a highly individualized, fact-specific examination of all relevant circumstances. *Id.* at 4.

In contrast, under QHWRA's termination standards, PHAs and owners have the discretion to evict, or refrain from evicting, a current tenant who the PHA or owner determines is illegally using a controlled substance. PHAs or owners must establish standards or lease provisions that

> allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member – (1) who the public housing agency or owner determines is illegally using a controlled substance; or (2) whose illegal use (or pattern of illegal use) of a controlled substance . . . is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13662(a).

Thus, while PHAs and owners may elect to terminate occupancy based on illegal drug use, they are not required to evict current tenants for such use. *See* Laster Memorandum at 6-7. Further, PHAs and owners may not establish lease provisions or policies that affirmatively permit occupancy by medical marijuana users because doing so would divest PHAs and owners of the very discretion which Congress intended for them to exercise. *See id.* at 6. As with admission standards, the use of the illegal controlled substance must have occurred recently enough to warrant a reasonable belief that the use is ongoing.

III. *Federal nondiscrimination laws do not require PHAs and owners to allow marijuana use as a reasonable accommodation for disabilities.*

The Fair Housing Act, Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act (ADA) prohibit, among other things, discrimination against persons with disabilities in public housing and other federally assisted housing. 42 U.S.C. § 3604 (f)(1)-(3); 29 U.S.C. § 794(a); 42 U.S.C. § 12132. One type of disability discrimination prohibited by all three statutes is the refusal to make reasonable accommodations in rules, policies, and practices when such accommodations are necessary to provide the person with disabilities with the full opportunity to enjoy a dwelling, service, program or activity.[6]

To establish discrimination for failure to accommodate a disability, a plaintiff must prove the following elements: 1) the plaintiff meets the statute's definition of "disability" or "handicap"; 2) the accommodation is necessary to afford him or her an equal opportunity to use and enjoy the dwelling (Fair Housing Act) or is necessary to avoid discrimination against him or her in the public service, activity, or program (Section 504 and ADA); 3) the plaintiff actually requests an accommodation; 4) the accommodation is reasonable; and 5) the defendant refused to make the required accommodation.[7] The relevant elements for purposes of this Memorandum are the first and fourth: whether a medical marijuana user falls within the definition of "disability" or "handicap," and whether an accommodation allowing the use of medical marijuana is reasonable in the context of public housing or other federally assisted housing.

A. *Under Section 504 and the ADA, current illegal drug users, including medical marijuana users, are excluded from the definition of "individual with a disability" when the provider acts on the basis of the illegal drug use.*

An individual must be disabled to be entitled to a reasonable accommodation. Although medical marijuana users may meet this standard because of the underlying medical conditions for which they use or seek to use marijuana, Section 504 and the ADA categorically exempt current illegal drug users from their definitions of "disability" when the covered entity acts on the basis of such use:

> [T]he term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[8]

1. "Illegal" use of drugs

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[6] 42 U.S.C. § 3604 (f)(3)(B) ("discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling"); 28 C.F.R. § 35.130(b)(7) ("[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Section 504 requires recipients of federal financial assistance to provide reasonable accommodations to disabled persons).

[7] *See, e.g.*, Joint Statement of HUD and the Department of Justice, "Reasonable Accommodations Under the Fair Housing Act," at question 12 [hereinafter "Joint Statement"].

[8] 29 U.S.C. § 705(20)(C)(i); 42 U.S.C. § 12210(a).

Under Section 504 and the ADA, whether a given drug or usage is "illegal" is determined exclusively by reference to the CSA. *See* 29 U.S.C. § 705(10)(A)-(B); 42 U.S.C. §12110(d)(1). Because the CSA prohibits all forms of marijuana use, the use of medical marijuana is "illegal" under federal law even if it is permitted under state law. *See* 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).

While Section 504 and the ADA contain language providing a physician-supervision exemption to the "current illegal drug user" exclusionary provisions, this exemption does not apply to medical marijuana users. The ADA's physician-exemption language, which mirrors Section 504, states:

> The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act . . . . Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act . . . or other provisions of Federal law.[9]

Because the phrase "supervision by a licensed health care professional" is modified by the subsequent phrase "or other uses authorized by the Controlled Substances Act," the exemption applies only to those uses that are sanctioned by the CSA. *See Barber v. Gonzales*, 2005 WL 1607189, at *1 (E.D. Wash. July 1, 2005); *James v. City of Costa Mesa*, 2010 WL 1848157, at *4 (C.D. Cal. April 30, 2010). Accordingly, because medical marijuana use violates the CSA, medical marijuana users are excluded from the definition of "individual with a disability" under Section 504 and the ADA, regardless of whether state laws authorize such use. *Barber*, 2005 WL 1607189, at *2.

2. Acting "on the basis of such use"

Section 504 and the ADA's exclusion of "current illegal drug users" applies to current medical marijuana users only when the PHA or owner is acting on the basis of that current use: "[T]he term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, *when the covered entity acts on the basis of such use*." 29 U.S.C. § 705(20)(C)(i); 42 U.S.C. § 12210(a) (emphasis added); *see also* 28 C.F.R. § 35.131(a)(1) ("this part does not prohibit discrimination against an individual *based* on that individual's current illegal use of drugs.")(emphasis added).

A housing provider is acting on the basis of current drug use, when, for example, the provider evicts a tenant for violating the provider's drug-free policies. In that context, the tenant, even if suffering from a serious impairment such as cancer or multiple sclerosis, would not be "disabled" under the ADA or Section 504 for purposes of filing a claim under those laws challenging the eviction as disability discrimination. *See, e.g., Blatch v. Hernandez*, 360 F. Supp.

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[9] 42 U.S.C. § 12210(d)(1); *see also* 29 U.S.C. § 705(10)(B) (Section 504). Similarly, the Fair Housing Act House Report states that the "current illegal drug user" exclusionary provision in that law "does not eliminate protection for individuals who take drugs defined in the Controlled Substances Act for a medical condition under the care of, or prescription from, a physician." H.R. REP. NO. 100-711, at 22 (1988), *reprinted in* 1998 U.S.C.C.A.N. 2173, 2183.

2d 595, 634 (S.D.N.Y. 2005) (concluding that otherwise disabled public housing residents with mental illnesses are not considered disabled if a provider evicts them based on their current illegal drug use). A tenant who has a disabling impairment and is a current illegal drug user could, however, bring a claim under the ADA or Section 504 for disability discrimination where the housing provider evicted the tenant because the tenant asked to have grab bars installed in the shower. In that case, the provider would not have acted on the basis of the illegal drug use, but because the tenant requested grab bars.

For the same reason, an otherwise disabled tenant – a tenant with cancer, for example – is not "disabled" under the ADA or Section 504 for purposes of challenging a housing provider's refusal to grant a tenant's request for a reasonable accommodation to use medical marijuana as a cancer treatment. In denying the cancer patient's request to use medical marijuana because it is an illegal drug, the housing provider would have been acting on the basis of current illegal drug use.[10]

Courts have specifically addressed this drug-use exclusion in medical marijuana cases, finding that otherwise disabled plaintiffs were excluded from protection under Section 504 and the ADA when housing entities took actions against them based on their use of medical marijuana. For example, one court rejected an ADA claim from a student with serious lower back problems who had requested an accommodation to use medical marijuana in a state university housing facility. *See Barber v. Gonzales*, 2005 WL 1607189, at *1 (E.D. Wash. July 1, 2005). The court noted that "a federal claim under the ADA *does not exist* because the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acted on the basis of such use." *Id.* (emphasis added).

In another case, a medical marijuana user requested an accommodation to a PHA's drug-free policy that would allow him to continue using and cultivating marijuana in his unit. *See Assenberg v. Anacortes Hous. Auth.*, 2006 WL 1515603, at *2 (W.D. Wash., May 25, 2006), *aff'd*, 268 Fed.Appx. 643 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 104 (2008). The court concluded that although the tenant had a "debilitating" back injury, "because [he] was an illegal drug user, [the PHA] had no duty to accommodate him." 2006 WL 1515603 at *2, *5. The court of appeals affirmed and — with no analysis — stated that the ADA and Section 504 "expressly exclude illegal drug use" and "[the PHA] did not have a duty to reasonably accommodate [the plaintiffs'] medical marijuana use." *Assenberg*, 268 Fed. Appx. at 643; *see also Blatch v. Hernandez*, 360 F. Supp. 2d at 634 (finding that, in the context of general illegal drug use in public housing, under Section 504 and the ADA "the mentally disabled status of a current illegal drug user against whom action is taken based on that drug use . . . is [not] a viable basis for a claim that [the Housing Authority] is required to accommodate the disabled person by changing its generally-applicable rules.").

Thus, persons seeking an accommodation to use medical marijuana are not "individuals with a disability" under Section 504 and the ADA and therefore do not qualify for reasonable accommodations that would allow for such use. Furthermore, because requests to use medical marijuana prospectively are tantamount to requests to become a "current illegal drug user," PHAs are prohibited from granting such requests. However, current medical marijuana users are

[10] We note that PHAs or owners that choose to exercise their discretion under QHWRA not to evict a current tenant for medical marijuana use may not later use this drug use as pretext for refusing to provide other, non-marijuana-related accommodations.

disqualified from protection under the ADA and Section 504 only when the housing provider takes actions based on that illegal drug use.

B. *Though otherwise disabled medical marijuana users are not excluded from the Fair Housing Act's definition of "handicap," accommodations allowing for the use of medical marijuana in public housing or other federally assisted housing are not reasonable.*

The Fair Housing Act's illegal drug use exclusion is defined differently from the exclusion found in Section 504 and the ADA. Under the Fair Housing Act,

> "Handicap" means, with respect to a person—
>
> > (1) a physical or mental impairment which substantially limits one or more of such person's major life activities . . .
> >
> > . . .
> >
> > But such *term* does not include current, illegal *use* of or addiction to a controlled substance (as defined in Section 802 of Title 21 [CSA]).[11]

Unlike the language in Section 504 and the ADA, this provision does not categorically exclude individuals from protection under the Fair Housing Act. Rather, it prevents a current illegal drug user or addict from asserting that the drug use or addiction is itself the basis for claiming that he or she is disabled under the Act. Thus, if a person claims that medical marijuana use or addiction is the sole condition for which that person seeks a reasonable accommodation, that individual is not "handicapped" within the meaning of the Fair Housing Act, and no duty arises to accommodate such use. However, a person who is otherwise disabled (e.g., cancer, multiple sclerosis) is not disqualified from the definition of "handicap" under the Act merely because the person is also a current illegal user of marijuana. Because persons suffering from underlying disabling conditions not related to drug use are not disqualified from the Fair Housing Act's definition of "handicap" by virtue of their current medical marijuana use, we must examine whether accommodating such use is reasonable under the Act.[12]

1. Accommodations allowing the use of medical marijuana in public housing or other federally assisted housing are not reasonable under the Fair Housing Act.

Under the Fair Housing Act and other civil rights statutes protecting persons with disabilities, an accommodation may be denied as not reasonable if either: 1) granting the

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[11] 42 U.S.C. § 3602(h) (emphasis added).

[12] In *Assenberg v. Anacortes Hous. Auth.*, the trial court, with no analysis, determined that because the tenant was an illegal drug user, the PHA had no duty to accommodate him under the Fair Housing Act, the ADA, or Section 504. *See* 2006 WL 1515603, at *5. The court of appeals affirmed, stating only that the Fair Housing Act, the ADA, and Section 504 "all expressly exclude illegal drug use, and [the PHA] did not have a duty to accommodate [the tenant's] medical marijuana use." 268 Fed. Appx. at 644. Although the district court and the court of appeals, in unpublished opinions, each cited to the exclusionary provisions in the three statutes to support this conclusion, both courts failed to recognize the distinction between the statutory language in the Fair Housing Act, on the one hand, and the language in Section 504 and the ADA, on the other. *See* 2006 WL 1515603, at *5; 268 Fed. Appx. at 644.

accommodation would require a *fundamental alteration in the nature* of the housing provider's operations; or 2) the requested accommodation imposes an *undue financial and administrative burden* on the housing provider. *See, e.g.,* Joint Statement, *supra* note 7, at 3.

Accommodations that allow the use of medical marijuana would sanction violations of federal criminal law and thus constitute a fundamental alteration in the nature of the housing operation. Indeed, allowing such an accommodation would thwart a central programmatic goal of providing a safe living environment free from illegal drug use. Since the inception of the public housing program in 1937, Congress and HUD have consistently maintained that one of the primary concerns of public housing and other assisted housing programs is to provide "decent, safe, and sanitary dwellings for families of low income." United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937); 42 U.S.C. § 1437a(a)(5)(C)(b)(1); *see also* 24 C.F.R. § 880.101 (same with respect to Section 8 program). Congress has made it clear that providing drug-free housing is integral to the government's responsibility in this regard: "[T]he Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and *free from illegal drugs*." 42 U.S.C. § 11901(1) (emphasis added). Toward this end, Congress specifically vested PHAs and owners with the authority to take action against illegal drug use, including the use of medical marijuana. Illegal drug use renders the user ineligible for admission to public or other assisted housing,[13] conflicts with drug-free standards that PHAs and owners are required to establish for current tenants,[14] and would violate a user-tenant's lease obligation to refrain from engaging in any drug-related criminal activity on or off the premises.[15]

Although PHAs and owners are not charged with enforcing federal criminal laws, requiring them to condone violations of those laws would undermine a PHA or owner's operations. In the public housing context, courts considering accommodations requiring PHAs to alter their drug-free policies to allow tenants with disabilities to use medical marijuana have found them unreasonable because they would have the perverse effect of mandating that PHAs violate federal law. *See Assenberg*, 2006 WL 1515603, at * 5 ("'Reasonable' accommodations do not include requiring [a PHA] to tolerate illegal drug use or risk losing its funding for doing so"); *Assenberg*, 268 Fed.Appx. at 643 ("Requiring public housing authorities to violate federal law would not be reasonable"). For similar reasons, courts have been unwilling even to require employers to modify their drug-testing and termination policies to allow *off-site* use of marijuana in states authorizing medical marijuana use. *See, e.g., Ross v. Ragingwire Telecommunications, Inc.*, 33 Cal. Rptr. 2d 803, 808 (Cal. Ct. App. 2005) (stating that "[i]t is not reasonable to require an employer to accommodate a disability by allowing an employee's drug use when such use is illegal."). Because they would require that

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[13] *See* 42 U.S.C. § 13661 (requiring PHAs or owners to establish admission standards that "prohibit admission to . . . federally assisted housing for any household with a member who the [PHA] or owner determines is illegally using a controlled substance . . . ."); 24 C.F.R. § 5.854 (same as applied to federally assisted housing); 24 C.F.R. § 960.204 (same as applied to public housing).

[14] *See* 42 U.S.C. § 13662 (requiring PHAs or owners to establish standards that "allow the agency or owner . . . to terminate the tenancy or assistance for any household with a member . . . who the [PHA] or owner determines is illegally using a controlled substance . . . ."); 42 U.S.C. § 1437d(l)(6) (requiring public housing leases to state that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."); 24 C.F.R. § 966.4(l)(5)(i)(B) (same).

[15] *See* 24 C.F.R. § 966.4(f)(12)(i)(B) (requiring lease to provide that tenant is obligated to assure that no tenant, member of the household, or guest engages in drug-related criminal activity on or off premises); 24 C.F.R. § 5.858 (same as applied to all federally assisted housing).

PHAs and owners condone illegal drug use and would undermine the long-standing programmatic goal of providing a safe living environment free from illegal drug use, accommodations allowing marijuana-related activity constitute a fundamental alteration in the nature of the PHA or owner's operations and are therefore not reasonable.

2. Other marijuana-related conduct that is not reasonable

The CSA prohibits not only the use of marijuana, but also its manufacture, possession, and distribution, regardless of state medical marijuana laws. *See* 21 U.S.C. §§ 841(a)(1); 844(a). The drug-free policy to which PHAs and owners must adhere, as expressed in the mandatory lease terms described above, requires that PHAs and owners have the discretion to evict tenants for "any drug-related criminal activity on or off such premises." *Supra* note 14. Tenants likewise must refrain from engaging in drug-related criminal activity. *Supra* note 15. As a result, mandatory drug-free policies prohibit all forms of "drug-related criminal activity," including the possession, cultivation, and distribution of marijuana. *See* 24 C.F.R. §§ 966.2 and 5.100 (defining "drug-related criminal activity" in relation to the CSA). Consequently, just as accommodations allowing the *use* of medical marijuana are not reasonable, accommodations allowing other marijuana-related conduct prohibited by the CSA are also not reasonable.

IV. *In the unlikely event that state nondiscrimination laws are construed so as to require PHAs and owners to permit medical marijuana use as a reasonable accommodation, those laws would be subject to preemption by federal law.*

Because PHAs and owners are also bound by the laws of the state in which they operate, medical marijuana users might attempt to avail themselves of the reasonable accommodation provisions found in state nondiscrimination laws. Some state nondiscrimination statutes do not have explicit provisions excluding current illegal drug users from their definitions of "disability." Furthermore, while some states do exclude current illegal drug users from protection, they may not consider behavior that complies with state law, such as the state-authorized use of medical marijuana, to be illegal drug use.

We nonetheless believe it is unlikely that state nondiscrimination laws would be interpreted to require PHAs and owners of federally assisted housing to permit the use of federally-prohibited drugs. For example, the Supreme Court of California held that an otherwise disabled plaintiff failed to state a cause of action under a state nondiscrimination law when he alleged that his employer had unlawfully discharged him because of his off-site medical marijuana use. *See Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 924 (Cal. 2008). The court reasoned, in part, that because employers have a legitimate interest in considering the use of federally-illicit drugs when making employment decisions, the employer had no duty to accommodate the plaintiff's medical marijuana use: "[California law] does not require employers to accommodate the use of illegal drugs. The point is perhaps too obvious to have generated appellate litigation . . . ." *Id.* at 926.

If a state nondiscrimination law were construed to require accommodations allowing for the use of medical marijuana, such an interpretation would be subject to preemption by the federal laws

governing drug use in public housing and other federally assisted housing, and by the CSA. The CSA expressly preempts state laws that "positively conflict" with the CSA. *See* 21 U.S.C. § 903. A state law that would require accommodation of medical marijuana use "positively conflicts" with the CSA because it would mandate the very conduct the CSA proscribes. *See* 21 U.S.C. § 903; 21 U.S.C. 841(a)(1); 844(a) (criminalizing marijuana-related conduct); *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) (interpreting the "positive conflict" language in the CSA to preempt state laws that "purport to make legal any conduct prohibited by federal law"); *see also Columbia v. Washburn Products, Inc.*, 134 P.3d 161, 166-67 (Or. 2006) (Kistler, J., concurring) (concluding, in state employment discrimination case involving the use of medical marijuana, that "the federal prohibition on possession is inconsistent with the state requirement that defendant accommodate its use . . . . The fact that the state may choose to exempt medical marijuana users from the reach of state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits.").

Although federal laws governing public housing and federally assisted housing do not expressly state an intention to preempt state law, a state law interpreted to require accommodation of medical marijuana use would nonetheless be subject to preemption under the doctrine of implied conflict preemption. Implied conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt.*, 505 U.S. 88, 98 (1992) (internal citations and quotations omitted). State nondiscrimination laws requiring accommodation of medical marijuana use would be subject to preemption by federal laws governing drug use in public housing and other federally assisted housing because: 1) by requiring an accommodation when federal admissions standards mandate the exclusion of the applicant, they would render compliance with federal law impossible; and 2) by requiring an accommodation that divests PHAs and owners of the discretion to evict provided by QHWRA and HUD regulations, they would stand as an obstacle to the accomplishment and execution of federal law objectives. *See supra* Section II.C. and notes 13-14.

V. *Conclusion*

In sum, PHAs and owners may not grant reasonable accommodations that would allow tenants to grow, use, otherwise possess, or distribute medical marijuana, even if in doing so such tenants are complying with state laws authorizing medical marijuana-related conduct. Further, PHAs and owners must deny *admission* to those applicant households with individuals who are, at the time of consideration for admission, using medical marijuana. *See* 42 U.S.C. § 13661(b)(1)(A); Laster Memorandum at 2.

We note, however, that PHAs and owners have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana. *See* 42 U.S.C. § 13662(a)(1); Laster Memorandum at 5-7. If a PHA or owner desires to allow a resident who is currently using medical marijuana to remain as an occupant, the PHA or owner may do so as an exercise of that discretion, but not as a reasonable accommodation. HUD regulations provide factors that PHAs and owners may consider when determining how to exercise their discretion to terminate tenancies because

of current illegal drug use. *See* 24 C.F.R. §§ 966.4(l)(5)(vii)(B) (factors for PHAs); 5.852 (factors for PHAs and owners operating other assisted housing programs).

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

September 24, 1999

MEMORANDUM FOR: William C. Apgar, Assistant Secretary, Office of Housing/Federal Housing Commissioner, H

Harold Lucas, Assistant Secretary, Office of Public and Indian Housing, P

FROM: Gail W. Laster, General Counsel, G

SUBJECT: Medical use of marijuana in public housing

The Office of Housing requested our opinion with respect to whether a section 8 tenant's use of medical marijuana[1] requires an owner to terminate the tenancy of the medical marijuana user. It further inquired whether the cost of medical marijuana is deductible for purposes of determining adjusted income under applicable section 8 regulations.[2] Several HUD Field Offices have also requested guidance on this matter. Because these issues are also relevant to the public housing program and the section 8 programs operated by the Office of Public and Indian Housing, this memorandum is also addressed to that office. As more fully articulated below, we conclude that State laws purporting to legalize medical marijuana directly conflict with the admission and occupancy requirements of the Quality Housing and Work Responsibility Act of 1998 ("Public Housing Reform Act") and are thus subject to preemption.[3]

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[1] The term "medical marijuana" in this memorandum means marijuana which, when prescribed by a physician to treat a serious illness such as AIDS, cancer, or glaucoma, is legal under State law.

[2] These issues arose in the wake of Washington State's November 3, 1998 referendum in which voters approved the medical use of marijuana. According to the Office of National Drug Control Policy ("ONDCP"), the following States have enacted laws purporting to legalize medical marijuana to date: Alaska, Arizona, California, Connecticut, Massachusetts, New Hampshire, Nevada, Oregon, Vermont, Virginia, and Washington and, depending on the interpretation of the law in Louisiana, may also be legal there under certain circumstances. See ONDCP's web page, "Status of State Marijuana Initiatives" (copy attached).

[3] The Public Housing Reform Act amended the United States Housing Act of 1937 ("Act"), 42 U.S.C. § 1437. As more fully discussed below, it also contains four freestanding sections, sections 576

I. Admissions Standards

Section 576(b)(1) of the Public Housing Reform Act requires public housing agencies ("PHAs") and owners to establish standards that:

> ***prohibit*** admission to . . . federally assisted housing for any household with a member--
> (A) who the public housing agency or owner determines is illegally using a controlled substance; or
> (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such a household member's illegal use (or pattern of illegal use) of a controlled substance . . . may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. §13661(b)(1) (emphasis added). We interpret the word "prohibit" in this context to mean that the admission standards which the statute prescribes require that PHAs and owners *must* deny admission to the first class of households, i.e., those with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a controlled substance.[4] See 64 Fed. Reg. 40262, 40270 (1999) (to be

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through 579, which apply across the board to all federally assisted housing. Three of these four sections, section 576 ("Screening of Applicants for Federally Assisted Housing"), section 577 ("Termination of Tenancy and Assistance for Illegal Drug Users and Alcohol Abusers in Federally Assisted Housing"), and section 579 ("Definitions"), govern the questions articulated above. They are codified in Chapter 135 ("Residency and Service Requirements in Federally Assisted Housing") of Title 42 of the United States Code, 42 U.S.C. §§ 13661, 13662, & 13664, rather than with the Act itself.

[4] None of the three applicable freestanding provisions identified in footnote 3 contains a definition of "controlled substance." Section 579(a)(1) of the Public Housing Reform Act, however, attributes the related phrase, "drug-related criminal activity," with the meaning specified in section 3(b) of the Act. 42 U.S.C. § 13664(a)(1). Section 3(b)(9) of the Act defines "drug-related criminal activity" as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as such term is identified in section 102 of the Controlled Substances Act.)" 42 U.S.C. § 1437b(9). The Controlled Substances Act in turn

codified at 24 C.F.R. §§ 5.853(a)(1)) (proposed July 23, 1999). Id. at 40274 (to be codified at 24 C.F.R. § 882.518(a)(1)(i).

With respect to the determination as to whether a person is illegally using a controlled substance, the Act does not indicate a minimum length of time that must have transpired since the last illegal use of a controlled substance for an applicant to be deemed eligible to receive Federal assistance. Legislative history to the Americans with Disabilities Act ("ADA"), which similarly excludes "current users of illegal drugs" from its protections, indicates that in excluding such persons from coverage, Congress intended to exclude persons "whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current." H.R. Conf. Rep. No. 101-596, at 64, reprinted in 1990 U.S.C.C.A.N. 267, 573. See also, D'Amico v. City of New York, 955 F. Supp. 294, 298 (S.D. N.Y. 1997) (Rehabilitation Act's prohibition against current illegal use of controlled substances encompasses illegal uses occurring recently enough to justify reasonable belief that illegal drug use is current), aff'd 132 F.3d 145 (2d Cir.), cert. denied, 118 S.Ct. 2075 (1998). We thus interpret the Public Housing Reform Act's prohibitions against "current" illegal use of a controlled substance as encompassing uses occurring recently enough to warrant a reasonable belief that the use is ongoing.

The courts of appeal which have addressed this issue in cases brought under Federal civil rights statutes have reached different conclusions regarding the length of time that must have passed since the last instance of illegal use for a person not to be considered a "current" illegal user. Most agree, however, that the issue of whether or not a person is a "current" illegal user under Federal civil rights laws requires a highly individualized, fact-specific examination of all relevant circumstances. See, e.g., Shafer v. Preston Memorial Hospital, 107 F.3d 274, 278 (4th Cir. 1997) (employee whose last illegal use of drugs occurred three weeks prior to termination held to be "currently engaging in the illegal use of drugs" under ADA); Collins v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) (passage of "months" between last illegal use of controlled

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defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 42 U.S.C. § 802(6). Schedule I includes marijuana. 21 U.S.C. § 812(c) (Schedule I) (c)(10). We therefore attribute the latter definition of "controlled substance" to that phrase, as used in sections 576 and 577 of the Public Housing Reform Act. Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same Act are intended to have the same meaning") (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934)).

substance and termination held insufficient for employees to escape classification of current illegal users under ADA); United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992) (persons drug-free for one year held not "current" users under Fair Housing Act). In any event, it is likely that when issues arise with respect to medical marijuana, the person in question will be currently using the controlled substance.

With respect to the second class of households addressed in section 576(b)(1)(B), i.e., those including a member for whom the PHA or owner determines that reasonable cause exists to believe that the member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment[5], section 576(b)(2) of the Public Housing Reform Act affords PHAs and owners limited discretion to admit such households. That section provides as follows:

> ***Consideration of Rehabilitation.***--In determining whether, pursuant to paragraph (1)(B), to deny admission to the program or federally assisted housing to any household based on a pattern of illegal use of a controlled substance or a pattern of abuse of alcohol by a household member, a public housing agency or an owner may consider whether such household member--
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> (A) has successfully completed a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable);
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> (B) has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable); or
>
> (C) is participating in a supervised drug or

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[5] Section 576(b)(1)(B) of the Public Housing Reform Act does not expressly limit the reasonable cause determination to *past* illegal use or a ***past and noncontinuing*** pattern of illegal use, of a controlled substance. But given section 576(b)(1)(A)'s prohibition against admitting any household with a member who the PHA or owner determines is illegally using a controlled substance, i.e., at the time of consideration for admission or recently enough to warrant a reasonable belief that a household member's illegal use is ongoing, we interpret section 576(b)(1)(B) to require PHAs and owners to deny admission to households based on a reasonable cause determination that the household member's ***past*** illegal use or ***past and noncontinuing*** pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment of the premises. 42 U.S.C. § 13661(b)(1)(B).

> alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable).

42 U.S.C. § 13661(b)(2). A PHA or owner may admit such a household under this provision after having determined that both conditions in one of the three considerations enumerated above have been met, i.e., some evidence of drug rehabilitation and no current illegal use. See 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(a)). As with households including a member who the PHA or owner determines is illegally using a controlled substance, a PHA or owner may admit a household under section 576(b)(1)(B) on the condition that the household member for whom reasonable cause exists to believe that such person's past and noncontinuing illegal use may interfere with other residents' health, safety, or right to peaceful enjoyment, may not reside with the household or on the premises. 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The law of preemption provides that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). Moreover, a State statute "is invalid to the extent that it 'actually conflicts with a . . . federal statute.'" International Paper Co., v. Ouellette, 479 U.S. 481, 492 (1987) (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978). "Such a conflict will be found when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Ouellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713).

It is our opinion that State statutes which purport to legalize marijuana stand as such an obstacle to the accomplishment of the purpose of section 576(b)(1) of the Public Housing Reform Act, i.e., to require owners of federally assisted housing to "establish standards that prohibit admission to federally assisted housing" for the two categories of households identified in section 576(b)(1). To the degree that a PHA may look to these State laws for authorization to admit families with a member who is using medical marijuana on the grounds that under State law the use of medical marijuana is not the illegal use of a controlled substance, we believe that the PHA would not be in compliance with section 576. We therefore conclude, with regard to required standards prohibiting admission to federally assisted housing of households with members who are illegally using a controlled substance, that State medical marijuana statues which purport to remove medical marijuana from classification as a controlled substance are preempted by section 576 of the Public Housing Reform Act.

II. Termination of Tenancy and Assistance

With regard to existing public housing tenants and program participants, section 577(a) of the Public Housing Reform Act requires that PHAs and owners:

> establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that *allow* the agency or owner . . . to terminate the tenancy or assistance for any household with a member--
>
> (1) who the public housing agency or owner determines is illegally using a controlled substance; or
>
> (2) whose illegal use (or pattern of illegal use) of a controlled substance . . . is determined by the [PHA] or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13662(a) (emphasis added). Unlike the prescribed admission standards, which "prohibit" admission of households identified in section 576(b)(1), the prescribed continued occupancy and assistance standards merely "allow" termination when a PHA or owner determines that a household member is illegally using a controlled substance or when a household member displays a past and noncontinuing pattern of illegal use which is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. See 64 Fed. Reg. at 40274 (to be codified at 24 C.F.R. § 882.518(b)(1)(i)).

As discussed above, with respect to the classification of medical marijuana, Federal law preempts any discretion on the part of the PHA or owner from determining that medical marijuana is not a controlled substance. Therefore, an owner or PHA could not make a determination that use of medical marijuana per se is never grounds for termination of tenancy or assistance. And, consequently, could not establish standards or lease provisions that generally permit occupancy of Federally assisted housing by medical marijuana users.

That being said, the statute provides the PHA and the owner with the discretion to determine on a case-by-case basis when it is appropriate to terminate the tenancy or assistance of a household. The propriety of any decision to evict a household or to terminate assistance for past or current illegal use of a controlled substance, or for a stated or demonstrated intent by a resident prospectively to use medical marijuana, requires a highly individualized, fact-specific analysis that is tailored to the relevant circumstances of each case. See Southern Management Corp., 955 F.2d at 918; Forrisi v. Bowen, 794 F.2d 931, 933 (4th

Cir. 1986) (decided under Rehabilitation Act). It is therefore not practicable to articulate specific guidance which is relevant to all cases where a PHA is considering eviction or termination of assistance for past or current illegal use of a controlled substance or for a resident's stated or demonstrated intent prospectively to use medical marijuana.

In determining how to exercise the discretion which section 577 of the Public Housing Reform Act affords, however, PHAs and owners should be guided by the fact that historically, HUD has not extensively regulated the area of eviction and termination of assistance, leaving the ultimate determination of whether to evict or terminate assistance to their reasoned discretion. HUD intends that PHAs and owners utilize their discretion under section 577 to make consistent and reasoned determinations with respect to eviction and termination of assistance determinations. In cases where a household member states or demonstrates an intent prospectively to use medical marijuana, PHAs and owners should consider all relevant factors in determining whether to terminate the tenancy or assistance, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or if assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions prohibiting the illegal use of controlled substances.

For households with a member who a PHA or owner determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment, the prescribed continued occupancy and assistance standards, like the prescribed admissions standards, must allow the PHA or owner to consider evidence of successful rehabilitation or current participation in a supervised drug rehabilitation program when determining whether to terminate tenancy or assistance to such a household. Section 577(b).

Again as discussed above with respect to section 576, State statutes which purport to legalize medical marijuana directly conflict with the quoted provisions of section 577 of the Public Housing Reform Act insofar as they purport to remove marijuana, when used pursuant to a physician's prescription, from the Controlled Substances Act's list of controlled substances. The limited discretion which section 577 affords PHAs and owners to refrain from terminating the tenancy of or assistance for illegal drug use, however, does not include any discretion to determine that marijuana is not a controlled substance within the meaning of the Controlled Substances Act, 21 U.S.C. § 812(b)(1)(c), even if a State statute purports to legalize its use for medical purposes.

If enforced, such laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting section 577 of the Public Housing Reform Act, i.e., to require that PHAs and owners "establish standards which allow them to terminate the tenancy or assistance" for either class of households identified in section 577(a). Ouellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713). If given effect, such laws would operate to divest PHAs and owners of the discretion which Congress intended them to have regarding termination of tenancy or assistance for use of a controlled substance. We thus conclude that State medical marijuana statutes, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, are preempted by section 577 of the Public Housing Reform Act.

III. Conclusion

Based on this analysis, we conclude that PHAs and owners must establish standards that require denial of admission to households with a member whom the PHA or owner determines to be illegally using a controlled substance, or for whom it determines that reasonable cause exists to believe that a household member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment. Section 576(b). The Public Housing Reform Act affords PHAs and owners limited discretion to admit households with a member for whom such a reasonable cause determination is made in the face of evidence of rehabilitation. Section 576(b)(2). HUD's proposed rule would further allow a PHA or owner to impose as a condition to admission a requirement that "any household member who engaged in or is culpable for the drug use . . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)). Because State medical marijuana laws, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, directly conflict with the objective of the Public Housing Reform Act's requirements regarding admissions, they are preempted.

We further conclude that PHAs and owners must establish standards or lease provisions for continued assistance or occupancy which allow termination of tenancy or assistance for any household with a member who the PHA or owners determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. The Public Housing Reform Act affords PHAs and owners limited discretion to refrain from terminating the tenancy or assistance for any household with a member for whom such a determination is made in the face of evidence of rehabilitation. Section 577(b). HUD's

proposed rule would further allow a PHA or owner to impose as a condition for continued assistance a requirement that "any household member who engaged in or is culpable for the drug use . . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The standards which section 577 requires must also allow PHAs and owners to terminate the tenancy of or assistance to a household with a member who states or demonstrates an intent prospectively to use medical marijuana. In determining whether to exercise their discretion to evict or terminate assistance for such a household, PHAs and owners should consider all relevant factors particular to each case, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or it assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions that prohibit illegal use of controlled substances.

With regard to the Office of Housing's question concerning the deductibility of the cost of medical marijuana, the Internal Revenue Service has already concluded, based on the premise that marijuana is a Federally controlled substance for which there are no legal uses, that the cost of medical marijuana is not a deductible medical expense. Rev. Ruling 97-9, 1997-9 I.R.B. 4, 1997 WL 61544 (I.R.S.). While for the purposes of HUD's assisted housing programs, PHAs and owners are not technically bound by the IRS Revenue Ruling, consistent with the conclusions in this memorandum, we believe that PHAs and owners should be advised that they may not allow the cost of medical marijuana to be considered a deductible medical expense.