

NO. A04-0435

State of Minnesota
In Supreme Court

Beth Ann Hinneberg,

Appellant,

vs.

Big Stone County Housing and
Redevelopment Authority,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF CASE AND FACTS.....	2
A. Statement Of The Case.....	2
B. Statement Of Facts	2
LEGAL ARGUMENT	6
A. Standard Of Review	6
B. The Section 8 Housing Choice Voucher Program	7
C. Respondent’s Section 8 Housing Voucher Program Is Subject To Anti-Discrimination Laws Protecting Persons From Discrimination Because Of Disability.....	10
1. The Fair Housing Act.....	10
a. The Fair Housing Act covers housing authorities providing subsidies for purchase or rental of dwellings.....	10
b. The Fair Housing Amendments Act requires respondent to reasonably accommodate appellant’s disabilities	20
2. Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973 covers housing authority programs providing subsidies to non-resident disabled persons	23
D. Appellant Is Entitled To Reasonable Accommodation In Respondent’s Housing Choice Voucher Program.....	33
1. Modification of respondent’s non-resident jurisdictional limitation is a reasonable request reasonably necessary to accommodate her disability.....	33

2. Appellant’s requested accommodation is reasonable and will not impose undue financial and administrative burden nor fundamentally alter respondent’s Section 8 program..... 34

E. This Court Should Reverse The Hearing Decision And Remand The Case To The Hearing Officer With Instructions To Find In Favor Of Appellant..... 37

CONCLUSION 38

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Alexander v. Choate</i> , 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 661 (1985)	1, 24, 25, 27
<i>Avalon Residential Care Homes v. City of Dallas</i> , 130 F. Supp. 2d 833 (N.D. Tex. 2000)	22
<i>Clifton Terrace Associates v. United Technologies Corp.</i> , 929 F.2d 714 (D.C. Cir. 1991)	18
<i>Essling's Homes Plus Inc. v. City of St. Paul</i> , --- F. Supp. 2d ---, 2004 WL 3190050 (D. Minn. 2004)	15
<i>Frederick L. v. Department of Public Welfare</i> , 364 F.3d 487 (3rd Cir. 2004)	34
<i>Giebler v. M & B Associates Inc.</i> , 343 F.3d 1143 (9th Cir. 2003)	1, 20
<i>Heights Community Congress v. Hilltop Realty</i> , 774 F.2d 135 (6th Cir. 1985)	15, 18, 19
<i>Lawrence v. Courtyards at Deerwood Ass'n Inc.</i> , 318 F. Supp. 2d 1133 (S.D. Fla. 2004)	18
<i>Massachusetts Housing Finance Agency v. U.S.</i> , 910 F. Supp. 21 (D. Mass. 1996)	14, 19
<i>McGary v. City of Portland</i> , 386 F.3d 1259 (9th Cir. 2004)	14
<i>Michigan Protection & Advocacy Service v. Babin</i> , 18 F.3d 337, 345 (6th Cir. 1994)	17, 18
<i>Michigan Protection & Advocacy Service v. Babin</i> , 799 F. Supp. 695 (E.D. Mich. 1992)	17
<i>NAACP v. American Family Mutual Ins. Co.</i> , 978 F.2d 287 (7th Cir. 1992)	1, 11, 19
<i>Nevels v. Western World Ins. Co.</i> , --- F. Supp. 2d ---, 2004 WL 3221580 (W.D. Wash. 2004)	16
<i>Oconomowoc Residential Programs, Inc. v. City of Milwaukee</i> , 300 F.3d 775 (7th Cir. 2002)	1, 21
<i>Pennsylvania Protection and Advocacy v. Department of Public Welfare</i> , --- F.3d ---, 2005 WL 674500 (3rd Cir. 2005)	36
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 980 (1979)	25
<i>Southend Neighborhood Improvement Ass'n v. County of St. Clair</i> , 743 F.2d 1207 (1984)	13

<i>Tennessee v. Lane</i> , 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)	30
<i>Town of Huntington v. Huntington Branch,</i> NAACP, 844 F.2d 926 (2nd Cir), aff'd, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 180 (1988), reh'g denied 488 U.S. 1023, 109 S. Ct. 82 (1989)	15
<i>Trafficante v. Metro. Life Ins. Co.</i> , 409 U.S. 205, 211-12, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972)	11
<i>Tsombanidis v. West Haven Fire Dep't</i> , 352 F.3d 565 (2nd Cir. 2003)	22
<i>Tsombandinis v. West Haven Fire Dep't</i> , 180 F. Supp. 2d 262 (D. Conn. 2001)	16
<i>United States v. Village of Marshall, Wisc.</i> , 787 F. Supp. 872 (W.D. Wisc. 1991)	22
<i>Wai v. Allstate Ins. Co.</i> , 75 F. Supp. 1 (D.D.C. 1999)	16
<i>Wisconsin Community Service v. City of Milwaukee</i> , 309 F. Supp. 2d 1096 (E.D. Wis. 2004)	30

State Cases

<i>Carter v. Olmsted Hous. & Redevelopment Auth.</i> , 574 N.W.2d 725, 729 (Minn. App. 1998)	6, 37
<i>Citizens for a Balanced City v. Plymouth Congregational Church</i> , 672 N.W.2d 13 (Minn. App. 2003)	22, 23
<i>Dietz v. Dodge County</i> , 487 N.W.2d 237, 239 (Minn. 1992)	7
<i>Fosselman v. Comm'r of Human Servs.</i> , 612 N.W.2d 456 (Minn. App. 2000)	7
<i>Radke v. St. Louis County Bd.</i> , 558 N.W.2d 282 (Minn. App. 1997)	7, 37
<i>Tischer v. Hous. & Redevelopment Auth. of Cambridge</i> , --- N.W.2d ---, No. A03-845 (Minn. March 24, 2005)	7, 37

Federal Statutes

29 U.S.C. § 794 (2004)	8, 24
42 U.S.C. § 12131	1
42 U.S.C. § 12131(1) (1995)	23
42 U.S.C. § 12131(2) (1995)	28
42 U.S.C. § 12132 (1995)	23, 27, 28
42 U.S.C. § 1437(a)(1) (2003)	7
42 U.S.C. § 1437c-1(d)(15) (2003)	8
42 U.S.C. § 1437f(a) (2003)	7, 9, 19
42 U.S.C. § 1437f(a)(1) (2003)	13
42 U.S.C. § 1437f(r)(1) (2003)	1, 26
42 U.S.C. § 1437f(r)(1)(a) (2003)	8, 25, 32

42 U.S.C. § 1437f(r)(1)(B) (2003)	27, 31
42 U.S.C. § 3601 (2003)	11
42 U.S.C. § 3604(a)	12, 18
42 U.S.C. § 3604(f) (2003)	1, 10, 20
42 U.S.C. § 3604(f)(3)(B) (2003)	23
42 U.S.C. §§ 12131-12134 (2003)	8
42 U.S.C. §§ 2000d-2000d-4 (2003)	8
42 U.S.C. §§ 3601-3619 (2003)	8

Federal Regulations

24 C.F.R. § 5.105(a) (2004)	31
24 C.F.R. § 8.1(a) (2004)	30
24 C.F.R. § 8.4(a) (2004)	31
24 C.F.R. § 8.33 (2004)	31, 32, 33, 34
24 C.F.R. § 100.204 (a) (2004)	19, 20, 23
24 C.F.R. § 903.7(o) (2004)	9
24 C.F.R. § 982.1 (2004)	8
24 C.F.R. § 982.51 (2004)	8
24 C.F.R. § 982.52(a) (2003)	8
24 C.F.R. § 982.53 (2004)	8, 31
24 C.F.R. § 982.53(b)(2) (2004)	9
24 C.F.R. § 982.53(c) (2004)	9
24 C.F.R. § 982.353 (2004)	1
24 C.F.R. § 982.353(b) (2004)	33
24 C.F.R. § 982.353(c)(2)(iii) (2004)	35
24 C.F.R. § 982.355 (2003)	9, 34
24 C.F.R. § 982.355(e)(6) (2004)	34, 35
28 C.F.R. § 35.130 (2004)	1, 3
28 C.F.R. § 35.130(b)(7) (2004)	29, 33, 34

Miscellaneous

Housing Choice Voucher Program Guidebook, <i>at</i> http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm	9, 32, 34
PIH NOTICE (HA) 2005-1, <i>at</i> http://www.hud.gov/offices/pih/publications/notices/05/pih2005.1.pdf	36
Minneapolis, Minnesota, Code of Ordinances, § 536.20 (2003)	23

STATEMENT OF LEGAL ISSUES

1. Do the protections of the Fair Housing Amendments Act of 1988 apply to housing agencies providing financial assistance and other services designed to make dwellings available to low income and disabled persons?

The Court of Appeals held that the Fair Housing Amendments Act did not apply to the Section 8 Housing Choice Voucher program operated by a housing agency.

Apposite Authorities:

- A. 42 U.S.C. § 3604(f) (2003).
 - B. *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992).
 - C. *Giebler v. M.&B. Associates Inc.*, 343 F.2d 1143 (9th Cir. 2003).
 - D. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002).
2. Must the determination whether a person is a “qualified individual with a disability” under the Americans with Disabilities Act of 1990 (ADA) and its implementing regulations include consideration of modification of program rules, policies, or practices as a reasonable accommodation?

The Court of Appeals held that appellant was not a qualified individual under the Americans with Disabilities Act.

Apposite Authorities:

- A. 42 U.S.C. §§ 12131, 12132 (1995).
- B. *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 661 (1985).
- C. 42 U.S.C. § 1437f(r)(1) (2003), 24 C.F.R. § 982.353 (2004).
- D. 28 C.F.R. § 35.130 (2004)

STATEMENT OF CASE AND FACTS

A. Statement Of The Case

Respondent approved appellant's application for participation in the Section 8 Housing Choice Voucher program and issued a Voucher to her. Appellant then requested modification of a policy of respondent's Voucher program as a reasonable accommodation of her disability. Respondent's policy restricts, for one year, the territorial area within which the Voucher can be used. Respondent denied appellant's request.

Appellant appealed denial of her reasonable accommodation request. A quasi-judicial appeal hearing decision, upholding the Big Stone County Housing and Redevelopment Authority's (HRA) decision, was received January 17, 2004.

Appellant sought certiorari review in the Court of Appeals March 16, 2004. The Court of Appeals issued an unpublished opinion affirming the hearing decision on December 28, 2004. This Court granted appellant's motion for discretionary review March 15, 2005.

B. Statement Of Facts

Appellant applied for participation in the Section 8 Housing Choice Voucher program operated by respondent Big Stone County Housing and Redevelopment Authority (HRA). Her application was approved, and respondent issued her a Voucher.

A. 1.

After looking for rental housing for a short period of time, appellant reconsidered her decision to relocate to Big Stone County. She decided that she needed to remain close to her several providers of health care near Hopkins, Minnesota, in Hennepin County, where she had lived for some time. After consulting with Ms. Ruth McVay, a Senior Social Worker in the Hennepin County Behavioral Health Case Management Division, appellant sought permission from the HRA to use her Section 8 Housing Voucher in Hopkins. Supp. Rec., p. 3 (lines 3-12), 5 (2-9), 5 (25) – 6 (1-3); A. 1. Appellant made her request in writing, with Ms. McVay's assistance, and noted that she sought reasonable accommodation under various State and federal laws providing for accommodation in housing. Supp. Rec. 25.

Appellant supported her request for reasonable accommodation with medical records sent by various health providers, as well as letters from her several physicians and therapist documenting the need to maintain current health services related to her disabilities. Supp. Rec. 19-24, 26-30. In addition, Ms. McVay sent a second letter to the HRA, renewing appellant's request for reasonable accommodation and providing a more detailed review of appellant's disabilities and needs. Supp. Rec. 16-17.

Respondent denied appellant's request to use her Voucher in the Hopkins area on November 25, 2003 and, again, on December 16, 2003. Supp. Rec. 32, 33-34. Respondent's denials mentioned alternative transportation and medical resources, and referred to the HRA's portability policy limiting use of Vouchers outside Big Stone

County for one year for non-resident program participants. *Id.* at 33-34. Respondent's portability policy states:

A family whose head or spouse has a domicile (legal residence) or works in the jurisdiction of the Big Stone County Housing Authority at the time the family first submits its application for participation in the program to the Big Stone County Housing Authority may lease a unit anywhere in the jurisdiction of the Big Stone County Housing Authority or outside the Big Stone County Housing Authority jurisdiction as long as there is another entity operating a tenant-based Section 8 program covering the location of the proposed unit.

If the head or spouse of the assisted family does not have a legal residence or work in the jurisdiction of the Big Stone County Housing Authority at the time of its application, the family will not have any right to lease a unit outside of the Big Stone County Housing Authority jurisdiction for a 12-month period beginning when the family is first admitted to the program. During this period, the family may only lease a unit located in the jurisdiction of the Big Stone County Housing Authority.

Section 8.1, "Portability, General Policies," Big Stone County HRA Administrative Plan. Supp. Rec. 11.

Appellant sought a hearing to appeal respondent's decision. The hearing was held on January 9, 2004. The hearing officer and two staff members of the HRA, Jodi Hormann and Mary Beling, were present at the hearing, in Ortonville, Minnesota; appellant and Ms. McVay were present, by telephone conference call, in Minneapolis, Minnesota. Supp. Rec. 2 (1-7). Appellant was not represented by counsel at the hearing. The proceeding was tape-recorded. A transcript was prepared from the audio recording. Supp. Rec. 2 (18-19).

Appellant and Ms. McVay¹ offered extended testimony concerning appellant's health and medical conditions, each of her health care providers, and her need to be able to make use of her Voucher so as to maintain and continue her treatment with these sources of support and care.² Supp. Rec. 3 (18-19), 3 (21), 4 (5), 4 (10-20), 6 (6-14). The hearing officer also appears to have had the written materials from appellant's doctors and health providers received by the HRA in support of appellant's request for reasonable accommodation. A. 1; Supp. Rec. 8 (11-18). This likely included Ms. McVay's letter of January 8, 2004, in which she further detailed appellant's disabilities and the several "medical and psychosocial rehabilitative services" appellant had come to rely upon to maintain health and well-being. Supp. Rec. 8 (11-12), 16. In a letter to respondent, appellant's therapist recommended that appellant maintain her relationships with providers in Hennepin County, noting that she "did not do well with change[.]" Supp. Rec. 20.

Jodi Hormann, Administrative Assistant at the HRA, provided testimony supporting the HRA's decision to deny appellant's request for reasonable accommodation. Ms. Hormann testified that the Housing Authority denied appellant's

¹ The unidentified Speaker named in the hearing transcript was Ruth McVay, Hennepin County Senior Social Worker, present with appellant in Minneapolis.

² The recording of the hearing proceeding was inadequate. Testimony of witnesses located remotely was often difficult or impossible to decipher. Testimony transcribed as *inaudible* in the written transcript, *T. passim.*, masks substantial segments of testimony. This was particularly the case with regard to the testimony of appellant, who speaks quite softly. For example, of the thirty-three minute period covered on the hearing tape, about seventeen minutes of testimony does not appear in the transcript. The gap in the written record comprises something more than half of the testimony.

request to use her Voucher in Hopkins because HRA policies required that appellant live within Big Stone County for the first twelve months of Voucher use, regardless of any request for reasonable accommodation. Supp. Rec. 3 (3-12); *restated at* 5 (2-9). Ms. Hormann also offered some information about medical services available within Big Stone County she thought might meet appellant's needs, Supp. Rec. 5 (10-22), but then re-iterated her belief that the HRA's portability policy prevented consideration of appellant's needs for reasonable accommodation. Supp. Rec. 5 (22-24).

The hearing decision upheld denial of appellant's request to use her Voucher in Hopkins. Though noting appellant's request for accommodation, the hearing officer did little to specifically address or examine the basis for or legitimacy of her request. Instead, the hearing officer concluded that respondent's denial of appellant's request for reasonable accommodation was "in accordance with the administrative policy of the Big Stone County HRA, as well as the regulations governing the federally funded Housing Choice Voucher program." A. 2.

LEGAL ARGUMENT

A. Standard Of Review

Review of an agency's quasi-judicial decision by certiorari may be taken to determine whether the agency has acted upon jurisdictionally or procedurally improper grounds, whether the decision is not supported by substantial evidence, is arbitrary or capricious, or based upon an incorrect or erroneous theory of law. *Carter v. Olmsted Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998); *see also* *Dietz v.*

Dodge County, 487 N.W.2d 237, 239 (Minn. 1992). Should the reviewing court determine the law has been misinterpreted, it may correct the misinterpretation or misapplication. *Fosselman v. Comm’r of Human Servs.*, 612 N.W.2d 456 (Minn. App. 2000); *Radke v. St. Louis County Bd.*, 558 N.W.2d 282 (Minn. App. 1997). Correction by the court may include augmentation of findings, or outright reversal of the decision. *Tischer v. Hous. & Redevelopment Auth. of Cambridge*, --- N.W.2d ---, No. A03-845 (Minn. March 24, 2005).

B. The Section 8 Housing Choice Voucher Program.

The stated purpose of the Section 8 Housing Choice Voucher program is to “aid[] low-income families in obtaining a decent place to live and [to] promot[e] economically mixed housing.” 42 U.S.C. § 1437f(a) (2003). Along with other programs for making decent, safe, and sanitary housing available to low-income persons, the Section 8 program is deemed by Congress to be a partnership between housing assistance recipients, local housing authorities, the public, and the federal government. 42 U.S.C. §1437(a)(1) (2003). The program provides rental subsidies as cash paid directly to landlords on behalf of program participants leasing residential property. Full funding for payment of rental subsidies, along with funding for administrative costs of operating programs, is provided directly to several thousand local housing authorities throughout the country by the U.S. Department of Housing and Urban Development (HUD).

Section 8 Housing Assistance Payments (HAP) are paid by housing authorities to property owners to supplement partial monthly rental payments paid directly to landlords

by tenant households. The goal of insuring housing affordability for renter households is accomplished by limiting tenant payment to thirty percent of the household's income plus the balance of rent remaining after maximum available program subsidy payments, called Payment Standards, are paid by the housing authority. *See generally* 24 C.F.R. § 982.1 (2004); 42 U.S.C. § 1437f(a) (2003); 24 C.F.R. § 982.1, subd. 4(a)(ii) (2004).

To gain approval from HUD to operate a Section 8 program, a housing authority must specify the territorial jurisdiction within which it will operate. 24 C.F.R. § 982.51 (2004). The jurisdictional area of a housing authority is exclusive, save for some very limited exceptions. Local Section 8 programs must comply with all HUD regulations and maintain compliance with other HUD-promulgated authorities for operation of the program, including formal notices appearing in the *Federal Register*, and HUD-issued "program directives" directing practices and procedures for program operations, published pursuant to the Administrative Procedures Act. 24 C.F.R. § 982.52(a) (2003).

Local Section 8 programs must also certify their compliance with federal equal opportunity laws. 24 C.F.R. § 982.53 (2004). These laws include the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3619 (2003), Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4 (2003), the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2004), and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134 (2003). In addition, housing authorities must certify that they will administer their programs in a manner that will "affirmatively further fair housing," 24 C.F.R.

§ 982.53(b)(2) (2004), and must operate them in such a manner. 42 U.S.C. § 1437c-1(d)(15) (2003); 24 C.F.R. § 982.53(c) (2004); *see also* 24 C.F.R. § 903.7(o) (2004).

One of the most important features of the Voucher program is the ability of participating households to use their housing Voucher nationwide. *See* 42 U.S.C. § 1437f(r)(1)(a) (2003). This portability feature allows voucher program families to transfer a Voucher from the jurisdictional area of an “initial” housing authority (PHA), and use the Voucher in the jurisdiction of a “receiving” housing authority in any geographic area the family wishes to reside. 24 C.F.R. § 982.355 (2003). Subsidy assistance funds may be “administered” by the receiving authority, with the receiving housing authority serving as a conduit for funding. Alternatively, the Voucher household can be “absorbed” by the receiving housing authority, using its own allocation of voucher funding from HUD, and freeing the initial housing authority to provide a Voucher to another family selected from its waiting list. *Id.*; *see also* “Housing Choice Voucher Program Guidebook,” Chapter 13 (2001), at <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>. The portability feature promotes the national goal of furthering economically mixed housing and housing choice. 42 U.S.C. § 1437f(a) (2003).

C. Respondent’s Section 8 Housing Voucher Program Is Subject To Anti-Discrimination Laws Protecting Persons From Discrimination Because Of Disability.

1. The Fair Housing Act.

- a. The Fair Housing Act covers housing authorities providing subsidies for purchase or rental of dwellings.**

The Fair Housing Amendments Act of 1988 provided protections against discrimination in housing for persons with disabilities. The amendment stated, in pertinent part, at subsection (f):

As made applicable by section 3603 of this title and except as exempted by sections 3603 (b) and 3607 of this title, it shall be unlawful---

...

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of [that buyer or renter].

...

(f)(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[.]

42 U.S.C. § 3604 (2003). The Amendments Act continues, specifying that,

- (3) For purposes of this subsection, discrimination includes---

...

(B) 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[.]

42 U.S.C. § 3604(f) (2003). The same operative language – “it shall be unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling . . .” – specifying unlawful characteristics for other persons covered by the Act, including race, color, religion, sex, familial status, and national origin, appears in provisions of the

original Fair Housing Act adopted in 1968. Civil Rights Act of 1968, Pub. L. 90-284, Title VIII, § 804, 82 Stat. 73, 83 (1968) (codified at 42 U.S.C. § 3604).

The span or reach of activities involved in the sale or rental of housing to which the Fair Housing Act has application has been examined by various courts since the Act's passage. What is clear is that protections of the Act extend far beyond the discrete acts of sellers or lessors directly associated with provision of dwellings. Congress broadly stated the policy behind the Fair Housing Act to be to "provide [for], within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (2003). As such, courts have required an expansive and broad interpretation well-serving of that purpose. *See, e.g., Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211-12, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972).

An important line of cases examining the extent of covered entities under the Fair Housing Act involved providers of insurance coverage. For the basic question of insurance itself, and insurers as covered entities under the Act, this line of cases reached its culmination in *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992). Plaintiffs in *American Family* were eight individuals and several civil rights organizations alleging that insurance sales and pricing practices in the Milwaukee, Wisconsin area violated Fair Housing Act provisions against discrimination based on race. They alleged that defendant's redlining practices, either charging more for property liability insurance coverage in certain neighborhoods of the city than others, or outright refusing to write insurance policies in selected neighborhoods, made it more difficult for

prospective homeowners wishing to live there to obtain or afford mortgage loans for purchase of a dwelling. 978 F.2d at 290.

Insurance, of course, is not specifically mentioned in the Fair Housing Act. The *American Family* Court acknowledged that grouping of persons with insurable risk by those persons' characteristics is in the very nature of insurance, pointing out that, "Risk discrimination is not race discrimination." *Id.* However, the nature of the plaintiffs' claims required the Court to complete its fair housing analysis by determining whether the practices at issue affected plaintiffs' ability to obtain mortgage loans for purchase of dwellings, thus making otherwise unavailable or denying the purchase of a dwelling because of the racial characteristics of the neighborhoods redlined under defendant's sales and pricing strategies, in violation of 42 U.S.C. § 3604(a). *Id.* at 291.

Writing for the Court, Judge Easterbrook did not find it significant that defendant did not actually provide mortgage loans. Instead, the Court found that insurance and insurance company practices were, indeed, covered under the Fair Housing Act, pointing to the simple reality of the result, that "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." *Id.*, at 297. Given the expansion and reach of covered acts inherent in the language "make otherwise unavailable or deny," the Court held that the Act applied. *Id.* at 302.

American Family's "no insurance, no loan; no loan, no house" rule is directly analogous to the situation in which appellant finds herself with respect to respondent's Section 8 Housing Voucher program. Just as the lack of insurance made acquisition of a

house to plaintiffs there “otherwise unavailable,” so the lack of rental assistance provided under terms of the reasonable accommodation requested by appellant in this case results in “no rental” of a dwelling for appellant under the Section 8 program.

The Court of Appeals’ opinion, however, limits Fair Housing Act coverage to those entities “integrally involved in the procurement of additional housing for the disabled,” that are “direct provider[s] of housing,” or that are “engaged in the sale or rental of housing.” *Hinneberg v. Big Stone County HRA*, No. 04-0435, slip op. at 8, and 9-10 (Minn. App. Dec. 28, 2004). This limitation ignores the scope and extent inherent in the Fair Housing Act’s broad cast of coverage to all actions making sale or rental of dwellings “otherwise unavailable or den[ied.]” Although the Court acknowledges case precedent extending the reach of the Act to activities beyond “procurement” or “direct provision” of housing, mentioning mortgage and insurance “redlining,” steering, and exclusionary zoning actions, it does not explore and apply the legal reasoning found in those decisions. Had the Court applied the reasoning, it would have held that the Fair Housing Act applied in appellant’s case. For example, the Court cites an earlier decision of the Seventh Circuit in *Southend Neighborhood Improvement Ass’n v. County of St. Clair*, 743 F.2d 1207 (1984), a predecessor to *American Family*, but does not discuss insurance in terms of availability. *Hinneberg*, slip op. at 9. Similarly, the Court of Appeals’ reference to other precedent finding a “degree of ambiguity” in the reach of Section 3604’s “make otherwise unavailable” criterion, *see* slip op. at 9, does not include an effort to determine the implications of the ambiguity or the breadth of activities

subsumed within the Act's terms of coverage. The rental assistance provided by respondent's Section 8 program has as its very purpose the effort to make rental housing available to persons deemed by Congress otherwise unable to obtain access to decent housing. 42 U.S.C. § 1437f(a)(1) (2003). The scope of the Act is not limited to the activities of discrete industries or actors associated with the procurement of housing; rather, it extends to any action that might make the sale or rental of dwellings unavailable. Acquisition of housing free from discrimination is the goal the Act strives to insure, but it does not limit its reach to those directly on either side of the transaction.

The District Court in *Massachusetts Housing Finance Agency v. U.S.*, 910 F. Supp. 21 (D. Mass. 1996), for example, examined the question whether the Fair Housing Act covered actions of a state agency providing conduit bond financing between developers of housing for young persons with mental health disabilities and mortgage lenders. The Massachusetts Housing Finance Agency did not take title to the housing and did not provide funds to acquire land or funds to purchase services or materials for housing construction. At most, it issued bonds used by the developer to participate in the tax-exempt financing market, thus insuring a lower cost for financing construction of its housing. The Court found that the scope of coverage under the Fair Housing Act extended to this practice, noting that the question was not so much "whether one type of conduct exactly parallels another type already explicitly proscribed by the FHAA," 910 F. Supp. at 27, but rather holding that "the conduit bond financing agency makes housing unavailable no less than other actors with the power to block the sale or rental of

housing.” *Id.* at 28; *see also McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) (holding that lien placed on home after yard clean-up by City made dwelling sufficiently unavailable under Fair Housing Act).

The Sixth Circuit, in *Heights Community Congress v. Hilltop Realty*, 774 F.2d 135 (6th Cir. 1985), reviewed the question whether a person engaged in acts of racial “steering” could also be held liable under Section 3604(a) of the Fair Housing Act. The real estate agents employed by the defendant there were not necessarily agents of the sellers of the real estate in question, rather they were agents contacted by buyers or testers interested in acquiring property listed for sale. Thus, the issue was not the direct sale or provision of housing but, rather, whether the agents’ actions made housing for sale “otherwise unavailable” to plaintiffs because of their race. 774 F.2d, at 139. The Court upheld the District Court’s holding that the agents’ actions were covered under the Act, noting that the effect of each incident of the agents’ conduct, if made with intent to steer persons away from purchase of housing, based on their race, was actionable under Section 3604. As stated by the Court, “If a statement or act would have a discriminatory effect and is made with the intent to steer, it violates § 3604 (a).”³ *Id.* at 140. The Court upheld, for example, the District Court’s determination that even the real estate agent’s

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It is important to also note that the Court reference here to effect does not call upon notions of proof of discrimination by discriminatory impact, *see Town of Huntington v. Huntington Branch, NAACP*, 844 F.2d 926 (2nd Cir), *aff*, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 180 (1988), *reh denied* 488 U.S. 1023, 109 S. Ct. 82 (1989). Rather, the Court use of the word effect refers to a statement or conduct would have an untoward effect on a reasonable person under the circumstances who is seeking housing[.] Or, in other words, the action that makes housing unavailable. *Heights Community Congress*, 774 F.2d at 140.

failure to act, in neglecting to return a call for service from a tester because of her race, was a violation of the Act. *See also Essling's Homes Plus Inc. v. City of St. Paul*, --- F. Supp. 2d ---, 2004 WL 3190050 (D. Minn. 2004) (finding a refusal to waive application of rules defining kitchens under City zoning codes actionable under the FHAA); *Tsombandinis v. West Haven*, 180 F. Supp. 2d 262 (D. Conn. 2001), *aff'd in part* 352 F.3d 565 (2nd Cir. 2003).

This notion of making housing unavailable is further illustrated by other cases dealing with insurance under the Fair Housing Act. In *Wai v. Allstate Ins. Co.*, 75 F. Supp. 1 (D.D.C. 1999), defendants were held liable under Section 3604(f) for their refusal to provide casualty and liability property insurance to the owners of homes *who intended to then lease them, as landlords*, for use by disabled residents. The remoteness of defendant's conduct from persons with disabilities was not so important as the conduct's relationship to the availability of housing, which the Court had little trouble in finding. *Id.* at 5-7.

Finally, the coverage of the Fair Housing Act with respect to sales of several different types of insurance coverage was examined recently in *Nevels v. Western World Ins. Co.*, --- F. Supp. 2d ---, 2004 WL 3221580 (W.D. Wash. 2004). There, insurers denied renewal of both property and business liability insurance to operators of group homes for disabled residents. The Court easily found the sale of property insurance to be covered by the Fair Housing Act, citing *NAACP v. American Family Mutual Ins.*, *ibid.* at 4. However, though it insures against risk in home operations rather than loss arising

from the property itself, the Court also held Section 3604(f)(1) applicable to defendant's cancellation of liability insurance. Pointing out that plaintiffs in the case continued to operate their homes for disabled persons even *after* insurance coverage was cancelled, the Court found that defendant's action caused a disincentive to make housing available, and that this was enough to be actionable. *Id.* at 6.

Against these analyses of the reach of the Fair Housing Act's scope of coverage, there are a number of cases finding no Fair Housing Act coverage in situations related to a person's use or acquisition of housing, but not bearing on the sale or rental of housing. Defendants in *Michigan Protection & Advocacy Service v. Babin*, 799 F. Supp. 695 (E.D. Mich. 1992), discussed by the Court of Appeals, were engaged in an effort to prevent the use of a home in their neighborhood for use as a home for developmentally disabled persons. Not successful in stopping the progress of the project, the neighbors finally purchased the home out from under the Michigan Department of Mental Health, offering the owner more money than she had spent to purchase the home and, what seemed more important to the owner, an immediate sale. Persons eligible to live in the home, along with others, sued.

The District Court found that defendants, and those assisting them in the purchase of the home, were not liable under the terms of Section 3604(f)(1). As stated by the Court, "By its terms, [Section 3604(f)(1)] is limited to those individuals who are in a position to make a dwelling unavailable. To be in this position, a person must be able to exercise influence over or control the disposition of the dwelling." *Id.* at 711. On appeal,

the Circuit Court affirmed, pointing again to the position of the person with regard to the dwelling:

The entire language of the act, as well as the evils the act is aimed at as described in hearings and debates, was designed to target those who owned or disposed of property, and those who, in practical effect, assisted in those transactions of ownership and disposition.

Michigan Protection & Advocacy Service v. Babin, 18 F.3d 337, 345 (6th Cir. 1994). The “crucial issue” for the Court was whether “normal economic *competition* (emphasis added),” by parties outside a relation to the seller, could ever come within the scope of the Act’s prohibition against discrimination. *Id.* at 344-345. The outcome may well have been different had the seller simply increased the price beyond the reach of the group home users.

In *Clifton Terrace Associates v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991), owners of a rental high-rise building sued an elevator repair and maintenance company which had refused to maintain elevators. The building was occupied chiefly by members of racial minorities. The Court refused, however, to find liability under Section 3604. The relationship of the acts alleged against defendant, even if true, were not related to the sale or rental of these dwellings to apartment occupants; defendant’s actions were related instead to elevator services that had no bearing upon the “availability” of dwellings to them. *Id.* at 719. And, in *Lawrence v. Courtyards at Deerwood Ass’n Inc.*, 318 F. Supp. 2d 1133 (S.D. Fla. 2004), the Court rejected a homeowner’s attempt to reach racially discriminatory conduct engaged in by a bigoted neighbor, *along with* the refusal of the homeowner’s association to take action against the conduct, under 42 U.S.C.

§ 3604(a) and (b). The Court drew the distinction that neither defendant's actions there were associated with the sale or rental of housing but, rather, related to plaintiffs' enjoyment or use of the property after purchase. *Cf. Heights Cmty. Cong. v. Hilltop Realty*, 774 F.2d at 140 (regarding the failure of the real estate agent, Liff, to provide continued service to the housing seeker, Johnson, in accordance with Liff's usual practice).

The Court of Appeals failed to acknowledge the point, apparent in the case law regarding the coverage of the Fair Housing Act, that discrimination in the sale or rental of residential housing focuses upon the relation of activities or assistance to the availability of housing. The point of coverage is not the remoteness of the defendant's conduct from the acquisition of a dwelling, or some notion of primary or principal agency in the provision of housing. Rather, the measure of coverage is the relation affecting the availability of housing for sale or rental by a person protected under one or more sections of the Act. *NAACP v. American Family Mut. Ins.*, 978 F.2d 287 (7th Cir. 1992); *Heights Cmty. Cong. v. Hilltop Realty*, 774 F.2d 135 (6th Cir. 1985); *Massachusetts HFA v. U.S.*, 910 F. Supp. 21 (D. Mass. 1996).

In the case of rental housing, the primary factor that makes housing available, or not, is rent. Where a program's purpose is to make housing available for low-income people through the use of financial assistance for rent, as it is in the case of Section 8 assistance sought by appellant, 42 U.S.C. § 1437f(a), the terms under which the program makes assistance available also bears on the "availability" of housing for rental. To

borrow the reasoning from *American Family Insurance*, for a Section 8 household seeking to rent an apartment, no subsidy means no apartment. The Fair Housing Amendments Act applies to respondent and the Court of Appeals erred in holding otherwise.

b. The Fair Housing Amendments Act requires respondent to reasonably accommodate appellant's disabilities.

The Fair Housing Amendments Act also makes it clear that a refusal to make accommodations to disability by modifying program policies is prohibited discrimination under the Act.

For purposes of this subsection [(f)], discrimination includes—

.....

(B) a refusal to make reasonable accommodation in rules, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]

42 U.S.C. § 3604 (f)(3) (2003); *see also* 24 C.F.R. § 100.204 (a) (2004). Thus, a provider of housing has a duty to reasonably accommodate when reasonably necessary.

The disabled tenant in *Giebler v. M & B Associates Inc.*, 343 F.3d 1143 (9th Cir. 2003) was unable to earn enough income, as a result of his disability, to qualify for an apartment with M & B Associates under its minimum income credit policies. He therefore submitted an application that included the income of another person, his mother, as a responsible party for the rent, and asked the landlord to approve his application for admission. His mother did not, however, expect to live there. Finding that this request contravened its policy against co-signors on dwelling leases, the landlord rejected the applicant on the ground that he did not have sufficient income alone, under the landlord's

creditworthiness rules, for approval. *Id.* at 1145. The Ninth Circuit Court readily acknowledged that the landlord had a “considerable interest” in its creditworthiness and cosigner policies, noting the importance of financial assurance in payment of rent. However, it held that modification of the cosignor policy was required under the Fair Housing Act because the request for modification of the policy was reasonable under the circumstances. As Mr. Giebler’s disability prevented him from obtaining additional income himself, and because his co-applicant, his mother, was eminently creditworthy, the landlord’s interest in being assured of payment of rent was adequately assured. *Id.* at 1157-1158. The accommodation in *Giebler* did not mean that the landlord’s cosignor policy was not lawful, even for disabled persons. But, for disabled persons unable to earn money to rent as a result of their disability, and with assistance from others able to pay, the policy might need to be modified.

The distinction between following otherwise legitimate rules or policies and responding to the circumstances of a disabled person was also made in *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002). The City of Milwaukee in that case was asked to grant a variance in its group home spacing ordinance as a reasonable accommodation under the Fair Housing Act. *Id.* at 787. Even though the Court held that the City was required to modify application of its ordinance in plaintiff’s case, it declined to decide whether the ordinance was pre-empted by the Fair Housing Act. *Id.* at 788. The Court also noted that the District Court had declined to enjoin enforcement of the ordinance. *Id.* at 781. The fact that the City had the legal

power to adopt and enforce its spacing ordinance was not thought an issue in the case, but application of the ordinance remained subject to modification as a reasonable accommodation. *See also Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565 (2nd Cir. 2003); *Avalon Residential Care Homes v. City of Dallas*, 130 F. Supp. 2d 833 (N.D. Tex. 2000) (holding that, even if plaintiffs could not show that spacing ordinance discriminatorily applied only to disabled persons, City must consider and, if needed, grant reasonable accommodation request); *United States v. Village of Marshall, Wisc.*, 787 F. Supp. 872 (W.D. Wisc. 1991).

The Minnesota Court of Appeals has also ruled that legitimate policies must sometimes be modified for purposes of reasonable accommodation. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13 (Minn. App. 2003). Plaintiffs in that case opposed issuance of a Conditional Use Permit (CUP) and related variances allowing the development of a housing facility for disabled persons situated near other, similar facilities. Operation of such facilities within certain spatial proximity was prohibited under City ordinance. The City nevertheless granted variances to the housing developers, citing its obligation to provide reasonable accommodation to persons with disabilities under the Fair Housing Act. *Id.* at 17.

The Court of Appeals cited an extensive body of findings, developed in public hearings held by the City, showing that grant of the CUP and variance allowing development of the housing was “necessary to afford Lydia House’s proposed residents an equal opportunity to use and enjoy a dwelling.” Pointing specifically to those facts,

the Court held that the City's modification of its spacing ordinance was justified and lawful. *Id.* at 21-22.⁴

Appellant's request in this case to use portability measures to accommodate her disabilities was similarly well-documented. She submitted written opinions and recommendations of several professional persons to respondent in support of her request for reasonable accommodation. Each person was familiar with and knowledgeable about her particular disabling conditions. Though the recommendations supported her request to reside near her medical providers and psychosocial supports, Supp. Rec. 16-17, 19, 20, 21, 25, respondent refused to modify its non-resident portability policy to permit appellant to continue to receive needed treatment and support. Respondent was, however, required to consider modification of its non-resident policy in order to reasonably accommodate appellant's disabilities. 42 U.S.C. § 3604(f)(3)(B) (2003); 24 C.F.R. § 100.204(a) (2004).

2. **Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973 covers housing authority programs providing subsidies to non-resident disabled persons.**

Section 202 of Subchapter II of the Americans with Disabilities Act prohibits discrimination in the provision of public services to persons with disabilities:

⁴ The Court of Appeals reference in this case, *Hinneberg*, slip op. at 9, to City participation in development of the housing project in *Plymouth Congregational Church* does not bear on the issue of the duty to reasonably accommodate and coverage under the Fair Housing Act. The *Plymouth* opinion did not reveal the extent of the City involvement in development of the project, but the City determination that it must waive the spacing requirement under the circumstances of the case was clear: The City ordinance required reasonable accommodation under the Fair Housing Amendments Act. *Plymouth* at 21 (citing Minneapolis Code of Ordinances 536.20 (2003)). The holding in *Plymouth* thus had little to do with whether the City was a direct provider of housing. *Hinneberg*, slip op. at 10.

Subject to the provision of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1995). "Public entities" are broadly defined to include any state or local government, including their departments, agencies or instrumentalities. 42 U.S.C. § 12131(1) (1995). Respondent HRA, a department or agency of Big Stone County, is clearly included as a public entity, the programs of which are covered under Title II.

The Court of Appeals' opinion focused, however, on the question whether the particular definition of Section 8 benefits provided in respondent's housing portability policy excluded or discriminated against appellant. Citing to the decision of the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 661 (1985), the Court of Appeals held below that respondent's portability policy provided "a Section 8 housing voucher with the opportunity to port after 12 months." Determining that appellant had "meaningful access" to the program under this policy, the Court of Appeals held that respondent had no duty to modify this policy to accommodate her disability. *Hinneberg*, slip op. at 7.

The *Alexander v. Choate* case relied upon by the Court of Appeals involved amendments to a State Plan filed by the State of Tennessee under the federal Medicaid Act. The Plan reduced the number of hospital days offered under Tennessee's Medicaid hospitalization benefit plan, from twenty to fourteen days. Disabled Medicaid recipients in the state, claiming that the limitation reduction did not provide sufficiently for their

health needs, because of their disability, challenged the Plan as a violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The recipients also challenged the imposition of a limit itself as having a discriminatory effect also prohibited by the Act. 469 U.S. at 290, 105 S. Ct. at 714-715.

The Supreme Court began its review in *Alexander* by discussing the “starting point” in its interpretation of the meaning of Section 504, *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 980 (1979). As stated in *Alexander*, the definition of a program’s benefit requires examination of the accommodation mandates of Section 504:

The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.

Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720 (footnote omitted). Though this was the “starting point” for its review, *Alexander* defined the benefit offered under Tennessee’s Medicaid program as a fourteen-day period of reimbursed hospitalization coverage. It found that disabled recipients were not denied meaningful access to this benefit; though there might be some reason to believe that disabled persons might on average need more hospitalization care than others, making a reduction in service potentially disadvantageous, the definition of the benefit offered did not exclude them from using the hospitalization services made available. 469 U.S. 302, 105 S. Ct. 721.

It is important to note that Medicaid Act provisions setting standards for benefits in *Alexander* gave states flexibility to choose among various coverage factors, including the amount of coverage, scope of conditions covered, *and* durational limitations in hospitalization care; the only categorical standard required was that the plan of services be in recipients' "best interests." Because evidence showed that Tennessee's Plan would meet the needs of ninety-five per cent of Tennessee recipients, the Court determined that this categorical standard for defining the benefit had been met. 469 U.S., at 303, 105 S. Ct., at 721. This does not, of course, mean that full access by ninety-five per cent of recipients is meaningful access; it simply means that the benefit defined in the State's Medicaid Plan was lawful under the standard set out in the Medicaid Act. It was lawful, too, under the Rehabilitation Act, because it did not discriminate among disabled and non-disabled persons in access to hospitalization services.

The portability benefit available under the Section 8 Voucher program is defined by 42 U.S.C. § 1437f(r)(1)(A) (2003). The benefit is the ability to use the program's financial assistance for rent in the jurisdictional area of any housing authority. There can also be a limitation, elected by housing authorities, limiting the use of the benefit by territory, for a durational period of twelve months:

(B)(i) Notwithstanding subparagraph (A) and subject to any exception established under clause (ii) of this subparagraph, a public housing agency may require that any family not living within the jurisdiction of the public housing agency at the time the family applies for assistance from the agency shall, during the 12-month period beginning on the date of initial receipt of housing assistance made available on behalf of the family from such agency, lease and occupy an eligible dwelling unit located within the jurisdiction served by the agency.

(ii) The Secretary may establish such exceptions to the authority of public housing agencies established under clause (i).

42 U.S.C. § 1437f(r)(1)(B) (2003) (*sic*). The portability benefit thus can include a limitation on the territorial use of voucher assistance for non-resident applicants, when elected.

However, unlike the durational limitation in Tennessee's Medicaid Plan in *Alexander v. Choate*, the portability benefit described in 42 U.S.C. § 1437f(r)(1) (2003) is defined solely by non-residence, without relation to disability, or relation to the more encompassing "best interests" standard applicable under the Medicaid Act. The requirement for "meaningful access," found at the heart of Section 504 nondiscrimination measures in *Davis* and *Alexander*, is violated by defining the benefit offered to non-residents in ways that deny the benefit to disabled persons. Refusal to consider accommodations necessary to make the benefit available to persons with a disability in individualized cases is one form of impermissible public services discrimination under Title II. In this case, it is appellant's contention *not* that the offered use of the Section 8 subsidy within Big Stone County is less than she ultimately needs but, rather, that she is unable to use the subsidy in Big Stone County *at all* because she has a need, based on the particular circumstances of her disability, to reside nearer her specialized medical providers and psychosocial support network. In other words, as a disabled non-resident applicant, the program access offered to appellant discriminates against appellant because of her disability, not because of the permissible election of residence. She is both "excluded" and "discriminated" against in the provision of this public service.

Respondent defines the benefit to require twelve months of residency, regardless of a need to reside elsewhere. It is this definition of the benefit that impermissibly discriminates against disabled persons, because it denies access to certain disabled non-resident persons who may request reasonable accommodation based on their disability. 42 U.S.C. § 12132 (1995).

The election for non-residence authorized by subparagraph 1437f(r)(1)(B)(i) does not mean that all disabled persons are denied access to the benefit. It is possible, for example, that some disabled persons would not need services related to their disability not available within the territory of the HRA. Thus, the ADA does not require an exception to the non-resident applicant limitation for all disabled persons.

Secondly, it is important to note that the challenge to Tennessee's Medicaid Plan in *Alexander v. Choate* did not address issues of reasonable accommodation. The plaintiffs' challenge there was a broad claim that the twelve-day limit on hospitalization coverage, by its effect, directly discriminated against handicapped persons under the Rehabilitation Act (as well as a claim that any limit at all constituted discrimination). Rather than reading the holding in *Choate* to mean that disabled persons are to be treated the same as non-disabled persons, regardless of the individualized circumstances of their disability, *Choate* can be taken only for the much more limited reading that the hospitalization benefit defined in Tennessee's Medicaid Plan did not discriminate against disabled recipients. The question of reasonable accommodation of the individualized circumstances of disabled persons presented to the provider of a public service under

Title II of the ADA, or accommodation under the Fair Housing Act, was not an issue in *Choate*. *Choate* was a discrimination case; it was not a reasonable accommodation case.

Unlike the Rehabilitation Act, Title II clearly provides, of course, that the ascertainment of a “qualified individual with a disability” must include inquiry into reasonable accommodation measures, such as modifications of public entity service provider policies:

The term “qualified individual with a disability” means an individual with a disability who, *with or without reasonable modifications to rules, policies, or practices*, the removal of architectural, communication, or transportation barrier, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (1995). Thus, where reasonably necessary to permit access, the refusal to consider and modify policies bearing on the service or benefit provided by a public entity to an individual requesting reasonable accommodation can constitute discrimination under the ADA. 42 U.S.C. § 12132 (1995). The U.S. Attorney General has also promulgated regulations requiring consideration of reasonable accommodation under Title II. The regulation mandates consideration of reasonable accommodation:

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 modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7) (2004). Respondent’s refusal to consider the portability rule modification proposed by appellant violates this requirement. The Court of Appeals erred in finding otherwise.

The question of *requiring* modification of otherwise valid rules or policies is critically one of individualized or particular circumstances of the accommodation request made. In *Wisconsin Community Service v. City of Milwaukee*, 309 F. Supp. 2d 1096 (E.D. Wis. 2004), a provider of mental health services sought a zoning variance from the City of Milwaukee in order to build and provide services to its clients in a larger facility. The City, however, refused to modify zoning provisions for this clinic, arguing that variance of the code provision for Wisconsin Community Service would require that it modify the code for every provider of services to persons with mental disabilities, and was, thus, a “fundamental alteration” of its zoning program under the ADA and Rehabilitation Act. 309 F. Supp. 2d at 1102. The Court, however, rightly analyzed Community Service’s accommodation request in terms of the “reasonableness” and “necessity” of the particular request made. Germane issues were, therefore, costs and benefits to the City and the Wisconsin Community Service’s clients, respectively, and the ameliorative value of the new facility’s services for Community Service’s disabled clients. The Court easily found the variance request reasonable and justified in the case. *Id.*, at 1105-1108, *see also Tennessee v. Lane*, 541 U.S. 509, slip op. at 1-2 (J. Ginsburg, *concurring*), 124 S. Ct. 1978, 1996, 158 L. Ed. 2d 820 (2004) (“Congress understood . . . [the ADA] would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.”).

In this case, appellant is entitled as a disabled person to consideration and modification of respondent’s elected territorial limitation rule as a reasonable

accommodation. Even though the rule may have justification, whether by consideration of legitimate program interests or because otherwise allowed by the terms of the Section 8 program, appellant was entitled to have her request considered by respondent as a reasonable accommodation. Because her disability reasonably requires the modification of the rule she sought, it should have also been granted.

Additionally, the portability benefit limitation authorized by Section 1437f(r)(B)(i) is limited under its own terms by exceptions adopted by the Secretary of the Department of Housing and Urban Development. 42 U.S.C. § 1437f(r)(1)(B)(ii) (2003). In 24 C.F.R. § 8.33 (2004), the Secretary of HUD has established a general requirement for modification of program policies and practices that discriminate based on handicap. This regulation, promulgated to effectuate the Rehabilitation Act, 24 C.F.R. § 8.1(a) (2004), requires recipients of assistance received from HUD to modify policies which discriminate based on handicap. It states:

§ 8.33 Housing adjustments.

A recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps. The recipient may not impose upon individuals with handicaps other policies, such as the prohibition of assistive devices, auxiliary alarms, or guides in housing facilities, that have the effect of limiting the participation of tenants with handicaps in the recipient's federally assisted housing program or activity in violation of this part. Housing policies that the recipient can demonstrate are essential to the housing program or activity will not be regarded as discriminatory within the meaning of this section if modifications to them would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens.

24 C.F.R. § 8.33 (2004); *see also* 24 C.F.R. § 8.4(a) (2004). The Secretary has also directed a number of civil rights obligations that apply to all programs assisted by the Department. These requirements include the Rehabilitation Act and the Americans with Disabilities Act. 24 C.F.R. § 982.53 (2004) (equal opportunity requirements for Voucher program); 24 C.F.R. § 5.105(a) (2004). These requirements also serve, therefore, as limitations upon the election authorized in Section 1437f(r)(1)(B) in cases of disability and reasonable accommodation.

Finally, the Secretary has provided direction to housing authorities in the form of the HUD's HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK. The GUIDEBOOK makes a distinction between limitations on portability for disabled and non-disabled non-residents:

A non-resident family may be required to initially lease a unit with its housing choice voucher in the issuing PHA's jurisdiction. However, the initial PHA has the authority but no obligation to allow a new voucher holder that was not living in its jurisdiction at the time of application to exercise portability. The initial PHA may decide to allow portability for a family new to its jurisdiction in certain instances, such as when the move would respond to a special family need but not allow such moves in other instances. It is important for the PHA to document the reasons for discretionary decisions to avoid any perception of discrimination.

HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, ¶ 13.3, at <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>. This guidance notes the election allowed to housing authorities to limit territorial use of the voucher subsidy but also notes the circumstances which might arise in cases of disability, where exception to the limitation can be allowed.

D. Appellant Is Entitled To Reasonable Accommodation In Respondent's Housing Choice Voucher Program.

1. Modification of respondent's non-resident jurisdictional limitation is a reasonable request reasonably necessary to accommodate her disability.

Appellant's request for modification of Section 8.1 of respondent's Section 8 policies requires only that respondent provide her with a benefit available to all participants of the program after twelve months. Indeed, in addition to any Section 8 voucher holder after twelve months of receiving housing assistance, *resident* applicants issued Vouchers in respondent's program are entitled to use their Voucher assistance immediately anywhere in the nation. 42 U.S.C. § 1437f(r)(1)(A) (2003); 24 C.F.R. § 982.353(b) (2004). So, appellant's proposed accommodation only requires that respondent's policy with respect to non-resident applicants be modified. Appellant has also shown sufficient basis in fact to conclude that she has a reasonable need to reside in the Hopkins area and that proximity to her providers of medical and psychological services are related to a qualifying disability. Supp. Rec. 16-30.

Respondent offered some suggestion that alternate medical and psychological services were available to appellant within the jurisdictional area served by the housing authority. However, respondent provided no information regarding the adequacy of these services to appellant's disability needs. The person with a disability is normally deemed most knowledgeable and familiar with their own needs, and measures for meeting them. Unless facts or circumstances indicate otherwise, an agency should normally defer to the

disabled person's choices if the accommodation requested seems reasonable and possible on its face.

Respondent also made it clear that it denied the accommodation requested by appellant based on its position that the housing authority need not modify its nonresident policy, regardless of whether appellant's proposal for accommodation was reasonable or feasible. Supp. Rec. 3 (3-12), 5 (2-9), 5 (25), 6 (1-3). The Hearing Officer accepted and adopted this erroneous analysis as the legal basis for her decision finding against appellant. A. 2.

2. **Appellant's requested accommodation is reasonable and will not impose undue financial and administrative burden nor fundamentally alter respondent's Section 8 program.**

An agency can avoid a reasonable accommodation only by showing that it will impose "undue" burdens or "fundamentally alter" its program or service. 24 C.F.R. § 8.33 (2004); 29 C.F.R. § 35.130(b)(7) (2004). Because portability is a basic feature in the design of the Section 8 Housing Choice program, significant administrative and financial procedures and systems already exist within HUD for support and administration of housing authority portability operations. See 24 C.F.R. § 982.355 (2004); HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, Chapter 13 (2001), at <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>. Housing authorities are, in addition, required by HUD to manage their finances to insure that portability is available to recipients. 24 C.F.R. § 982.355(e)(6) (2004). Given that the process of portability is common and routine, the only conceivable basis upon which respondent

might decline appellant's requested accommodation is to claim that providing for portability now, rather than later, burdens its program unduly.

Respondent has provided no record evidence or information supporting a claim of undue financial and administrative burden. A housing authority is free, for example, to choose to permit immediate portability to all participants, whether nonresident or not. *Cf.* 24 C.F.R. § 982.353(c)(2)(iii) (2004). Presumably, some or many do. Thus, at most, respondent may claim an undue financial burden in permitting appellant the accommodation she sought but the claim fails.

Housing authorities, like other entities claiming undue financial burden as a defense to granting of an otherwise reasonable and necessary accommodation request, face a significant burden of proof. The Court, for example, in *Frederick L. v. Department of Public Welfare*, 364 F.3d 487 (3rd Cir. 2004), examined a claim by the Commonwealth of Pennsylvania that it was financially unable to assure community placements of persons institutionalized within its psychiatric hospital system. Its claim was that budget appropriations for community placements within the Department of Public Welfare's budget limited the number of such placements available. The Court, however, held that the ADA required the State to consider whether it could fund such placements *beyond* the constraints of its existing budget or other program limitations. While not directly ordering Pennsylvania fund additional placements, it nevertheless required the State to expand the scope of budget resources it would consider for meeting the need, and its

capabilities for deinstitutionalization in the future; its claim of undue burden could not be limited solely to the limited resources made available for institutionalized persons.

The Circuit Court has remained committed to this characterization of the scope of review inherent in a claim of undue burden. In *Pennsylvania Protection and Advocacy v. Department of Public Welfare*, --- F.3d ---, 2005 WL 674500 (3rd Cir. 2005), the Department again cited budgetary limitations as one of several reasons for delays in placement of hospital residents into the community. The Court rejected this position, based on *Frederick L.*, and objected to individual discharge planning that was not integrated into a plan for all persons eligible for deinstitutionalization throughout Pennsylvania. --- F.3d ---, 2005 WL 674500, at p. 6-8.

Department of Housing and Urban Development policy regarding financial costs attendant to portability in the Section 8 program follows analogous standards. In PIH Notice (HA) 2005-1, HUD states that a housing authority may deny a move under portability provisions if marginal subsidy costs are too high. PIH NOTICE (HA) 2005-1, at <http://www.hud.gov/offices/pih/publications/notices/05/pih2005-1.pdf>. However, HUD states that a housing authority may deny portability moves only if the authority does not have sufficient funding to meet the higher marginal cost from their entire fiscal year budget. In addition, a housing authority must pursue all other avenues of cost savings before denying portability. *Id.* at p. 7. Respondent has not, of course, presented evidence demonstrating that appellant's accommodation will require more funding nor that, if so, the HRA is unable to afford it, or has attempted other solutions.

E. This Court Should Reverse The Hearing Decision And Remand The Case To The Hearing Officer With Instructions To Find In Favor Of Appellant.

A quasi-judicial proceeding may be reversed on certiorari if the tribunal has committed an error of law. The court may reverse the decision if the evidence offered in support of the respondent's position does not reach the level of substantial evidence sufficient to sustain its position under a corrected theory of law. *Tischer v. Hous. Redevelop. Auth. of Cambridge*, --- N.W.2d ---, No. A03-845, slip op. at 8 (March 24, 2005), citing *Carter v. Olmsted County Hous. Redevelop. Auth.*, 574 N.W.2d 725 (Minn. App. 1998); *Radke v. St. Louis County Bd.*, 558 N.W.2d 282 (Minn. App. 1997).

A remand for further proceedings is inappropriate here because there is no reason to believe that further proceedings will change the outcome of the case. The hearing officer made an error of law by ruling that respondent's portability policy was not subject to modification as a reasonable accommodation under the Fair Housing Amendments Act or the ADA. Once corrected, the result will be a ruling that appellant was entitled to port her Section 8 Voucher when she was admitted to participation in the program. It is true that other issues, of both fact and law, are entailed in the question of appellant's entitlement to reasonable accommodation. However, respondent has already offered its evidence with regard to the "reasonableness" of appellant's proposal for accommodation, suggesting that there might have been alternate sources of care that would meet appellant's needs within the County. Although the hearing officer did not discuss it, respondent's evidence was imprecise and incomplete. It did not make an individualized

assessment of appellant's condition. Even if the hearing officer had credited this evidence, it would not be substantial evidence sufficient to support a finding that appellant's proposed accommodation was unreasonable.

Nor did respondent offer evidence that might support a claim of undue burden. Respondent was well aware that appellant was appealing denial of her request for accommodation, yet respondent did not assert this position in alternate defense of its refusal to grant the request. It would be inappropriate to now offer respondent the opportunity to amend its legal strategy.

Finally, there is no indication that the hearing officer or respondent questioned appellant's qualification as a person with a disability. Appellant has presented substantial and comprehensive evidence documenting her disabilities, as well as her need for use of her Voucher assistance in Hopkins as a result of her disabilities. The outcome of the case at the hearing level was, however, determined instead by the erroneous belief that respondent need not reasonably accommodate appellant.

A remand for further proceedings will only needlessly delay access to subsidy assistance for appellant. Her need for housing assistance continues and her rights to the assistance will be substantially prejudiced by delay for further proceedings.

CONCLUSION

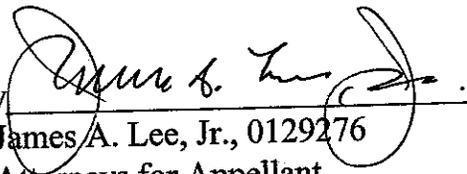
Section 8 Housing Choice Voucher program policies clearly affect the availability of dwellings under the Fair Housing Act, as amended. Such programs must also consider and provide reasonable accommodation to users of their services under the Americans

with Disabilities Act. The hearing officer erred in failing to hold that appellant was entitled to modification of respondent's portability limitation rule as a reasonable accommodation of her disabilities. The Court should reverse the hearing decision and direct the hearing officer to find appellant entitled to the accommodation she sought.

Respectfully submitted:

LEGAL AID SOCIETY OF MINNEAPOLIS

Dated: April 14, 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).