

Overview of Public Housing, HUD Federally Subsidized Housing, and Section 8 Housing Voucher Programs

By Fred Fuchs

The new housing advocate needs to be familiar with three federal housing programs for low-income families: public housing, privately owned housing that the U.S. Department of Housing and Urban Development (HUD) subsidizes, and Section 8 housing voucher programs.

Public Housing

Congress enacted the conventional public housing program in 1937.¹ Under this program, housing is owned by a local public housing authority (PHA), which manages the housing. HUD enters with the PHA into an annual contributions con-

tract to pay the debt service on bonds used to build the housing.² HUD also provides operating subsidies under a performance funding system.³ In turn, for receipt of the subsidies, PHAs are subject to HUD regulations on

- applicant eligibility,⁴
- tenant selection,⁵
- rent computation,⁶
- leases and evictions,⁷ and
- grievance procedure.⁸

PHA actions constitute government action within the meaning of the Four-

¹ See 42 U.S.C.A. §§ 1437 *et seq.* (West 1994 & Supp. 2002). The regulations governing public housing are set forth in 24 C.F.R. pt. 5 and scattered parts of 900. See pages 235–36 of 24 C.F.R. pts. 700–1699 (2001) for the table of contents for part 900. Although the U.S. Department of Housing and Urban Development (HUD) has no current handbook governing tenant rights in the public housing program, HUD is reportedly drafting such a handbook.

² *Id.* § 1437b(a).

³ 24 C.F.R. pt. 990 (2001) (regulations establishing standards on the distribution of operating subsidies).

⁴ 24 C.F.R. § 5.400, 5.403, 5.500–5.528 (2001), *as amended at* 66 Fed. Reg. 28776, 28791–96 (May 24, 2001) (screening and eviction for drug abuse and other criminal activity) (to be codified at 2002 C.F. R. § 5.100, 5.850–5.905).

⁵ 24 C.F.R. § 960.101–.208 (2001), *as amended at* 66 Fed. Reg. 28776, 28799–802 (May 24, 2001) (screening and eviction for drug abuse and other criminal activity) (to be codified at 2002 C.F.R. § 960.200–.208).

⁶ 24 C.F.R. §§ 5.609–.634, 960.253–960.261 (2001).

⁷ *Id.* § 966.1–.7, *as amended at* 66 Fed. Reg. 28776, 28802–4 (May 24, 2001) (lease and eviction requirements) (to be codified at 2002 C.F.R. § 966.1–.4); *id.* § 966.50–.57, *as amended at* 66 Fed. Reg. at 28804 (grievance procedure requirements) (to be codified at 2002 C.F.R. § 966.51).

⁸ *Id.*

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teenth Amendment.⁹ Therefore, when a PHA acts arbitrarily, discriminates in its treatment of applicants or tenants, denies an applicant, or takes adverse action against a tenant without notice or an opportunity for a hearing, potential First Amendment, due process, and equal protection claims may arise.¹⁰

Eligibility and Tenant Selection. Applicants must meet at a minimum the definition of family and meet the definition of a low-income family.¹¹ Single persons and remaining members of a tenant family are included within the definition of family.¹² HUD had not established any asset test for eligibility.¹³ Applicants must also be citizens or noncitizens who have eligible immigration status under 42 U.S.C. § 1436a(a).¹⁴ Mixed families—families with members including those with citizenship or eligible immigration status and those without citizenship or eligible immigration status—are also eligible.¹⁵ However, mixed families pay a higher rent since

assistance is prorated to take into account the presence of persons in the household with ineligible immigration status.¹⁶

PHAs are not required, however, to admit every eligible applicant. They may screen applicants and apply their tenant-selection policies.¹⁷ PHA tenant-selection criteria must be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons.¹⁸ The courts have struck down PHA tenant-selection policies that sweep too broadly.¹⁹ With the enactment of new regulations on May 24, 2001, HUD has instructed PHAs on screening policies for criminal conduct and drug-related conduct.²⁰ PHAs may access the criminal conviction records of adult applicants for tenant screening.²¹ PHA policies on tenant selection should be carefully scrutinized to ensure that the PHA is not overstepping the parameters of its discretion and illegally denying applicants.²²

⁹ See, e.g., *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1002 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003, 91 S. Ct. 1228 (1971) (Clearinghouse No. 1957); *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 264–65 (2d Cir. 1968) (Clearinghouse No. 386).

¹⁰ See, e.g., *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586 (11th Cir. 1993) (First Amendment); *Chavez v. Santa Fe Hous. Auth.*, 606 F.2d 282 (10th Cir. 1979) (due process requires notice and opportunity to challenge public housing authority (PHA) damage charges); *Escalera v. N.Y. City Hous. Auth.*, 425 F.2d 853, 863–64 (2d Cir. 1970), *cert. denied*, 400 U.S. 853, 91 S. Ct. 54 (1970) (due process requires notice and opportunity to challenge PHA damage charges) (Clearinghouse No. 832). HUD requires PHAs to notify tenants of the specific grounds for any proposed adverse actions and to inform the tenant of the right to request a hearing. 24 C.F.R. § 966.4 (e)(8) (2001).

¹¹ See 24 C.F.R. § 5.403 (2001) (definition of “family”); 42 U.S.C.A. § 1437a(b)(2), (3); 24 C.F.R. § 960.202 (2001).

¹² 24 C.F.R. § 5.403 (2001) (definition of “family”).

¹³ See *id.* § 960.202(a).

¹⁴ 42 U.S.C.A. § 1436a (West Supp. 2002); 24 C.F.R. § 5.500–528 (2001).

¹⁵ 42 U.S.C.A. § 1436a(b)(2); 24 C.F.R. § 5.506(b) (2001); see also 65 Fed. Reg. 58301 (Sept. 28, 2001) (U.S. Department of Justice notice delineating obligation of federal agencies to report individuals to the Immigration and Naturalization Service when the agency “knows” the individual is unlawfully present in the United States).

¹⁶ 42 U.S.C.A. § 1436a(b)(2); 24 C.F.R. § 5.506(b), 5.520(d).

¹⁷ 42 U.S.C.A. § 1437d(c) (West 1994 & Supp. 2002); 66 Fed. Reg. 28776, 28779–28802, § 960.201–.208 (May 24, 2001) (to be codified at specified sections in Title 24 of 2002 C.F.R.).

¹⁸ 66 Fed. Reg. 28799, § 960.203 (May 24, 2001).

¹⁹ See, e.g., *Gholston v. Hous. Auth. of Montgomery*, 818 F.2d 776, 782 (11th Cir. 1987); *Hann v. Hous. Auth. of Easton*, 709 F. Supp. 605 (E.D. Pa. 1989); *James v. N.Y. City Hous. Auth.*, 622 F. Supp. 1356 (S.D. N.Y. 1985).

²⁰ 66 Fed. Reg. 28776, 28779–802, § 960.201–.208 (May 27, 2001).

²¹ 42 U.S.C.A. § 1437d (q), (s)–(t) (West Supp. 2002); 66 Fed. Reg. 28776, 28794–96 (May 24, 2001) (to be codified at 24 C.F.R. § 5.901–.905 (2002)).

²² E.g., a PHA should not deny applications merely because of an arrest. The PHA should look at the conduct to determine whether the conduct is such that the PHA has a legitimate basis to deny an application. The mere fact that one has been arrested has little, if any, probative value in showing that one has engaged in any misconduct. *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957).

PHAs must consider the time, nature, and extent of the applicant's conduct, including evidence of rehabilitation.²³

Applicants denied admission are entitled to written notice of the grounds for denial and an opportunity for an informal hearing.²⁴ The denial notice must be factually specific.²⁵ It must inform the applicants that they have the right to a hearing, not merely that they may discuss the denial with the PHA.²⁶ An individual other than the initial decision maker must conduct the hearing.²⁷ An applicant denied admission in violation of the federal regulations or because of the PHA's arbitrary action may seek judicial review.²⁸ Such a lawsuit may be maintained under 42 U.S.C. § 1983.²⁹ Although suit may be filed in federal or state court, PHAs may remove state court actions to federal court.³⁰

Rent Computation. Public housing tenants must pay as rent the highest of the following amounts: (1) 30 percent of the family's monthly adjusted income; (2) 10 percent of the family's monthly income; (3) the portion of any welfare payments designated for housing costs; or (4) the minimum rent (an amount

between \$0 and \$50 as the PHA sets),³¹ unless the family chooses to pay a flat rent—a PHA-determined rent not based on income but on the apartment's rental value.³² The total tenant payment includes utilities and other essential housing services when the PHA furnishes them.³³ In other words, if utilities are not PHA-supplied and are not included in the rent amount, the tenant rent equals the amount calculated under the regulations minus the PHA utility allowance.³⁴ Resident utility allowances must be reasonable and advocates should closely examine them to ensure that tenants are not paying amounts that the PHA should be paying.³⁵ Public housing tenants may enforce their right to reasonable utility allowances under 42 U.S.C. § 1983.³⁶

Families paying the minimum rent may request a hardship exemption.³⁷ A family choosing to pay a flat rent may at any time request to switch to an income-based rent, and the PHA must grant the request if the family cannot pay the flat rent because of financial hardship.³⁸

In determining the family's income, the PHA is to use anticipated annual

²³ 66 Fed. Reg. 28799–800, § 960.203(d) (2001).

²⁴ 42 U.S.C.A. § 1437d(c)(3) (West 1994); 66 Fed. Reg. 28802, § 960.208. If the denial is based on a criminal record, the PHA must supply the applicant with a copy of the record. 42 U.S.C.A. § 1437d(q)(2) (West Supp. 2002); 66 Fed. Reg. 28776, 28794–28796, § 5.901–905 (May 24, 2001) (to be codified at specified sections in 2002 C.F.R. for Title 24).

²⁵ *Billington v. Underwood*, 613 F.2d 91, 94–95 (5th Cir. 1980) (Clearinghouse No. 28,992).

²⁶ *McNair v. N.Y. City Hous. Auth.*, 613 F. Supp. 910, 914–15 (S.D. N.Y. 1985) (Clearinghouse No. 40,757).

²⁷ *Singleton v. Drew*, 485 F. Supp. 1020, 1025 (E.D. Wis. 1980); see also *Billington*, 613 F.2d at 95 n.4 (hearing officer should have no marked personal feelings about the result but is not required to have had no involvement in the case before the postdenial hearing) (Clearinghouse No. 26,231).

²⁸ S. REP. NO. 91-392, reprinted in 1969 U.S.C.C.A.N. 1525, 1539.

²⁹ *Billington*, 613 F.2d at 91; *McNair*, 613 F. Supp. at 910; *Singleton*, 485 F. Supp. at 1020.

³⁰ See 28 U.S.C.A. § 1441(b) (West 1994) (lawsuits founded on rights under the Constitution or federal laws are removable to federal court).

³¹ 42 U.S.C.A. § 1437a(a)(1) (West 1994 & Supp. 2002); 24 C.F.R. § 5.628(a) (2001).

³² See 42 U.S.C.A. § 1437a(a)(1), (2); 24 C.F.R. § 960.253 (2001). Instead of flat rents, PHAs may retain ceiling rents until October 2002 if the ceiling rents were authorized and established before October 1, 1999. 24 C.F.R. § 960.253(d).

³³ See 24 C.F.R. §§ 5.601, 5.603, 5.609–.617; 5.628–.634; 960.253 (2001).

³⁴ See *id.*

³⁵ On reasonable utility allowances see 24 C.F.R. § 965.501–.508 (2001).

³⁶ *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 107 S. Ct. 766 (1987); *Dorsey v. Hous. Auth. of Baltimore City*, 984 F.2d 622 (4th Cir. 1993) (Clearinghouse No. 48,242); *Brown v. Hous. Auth. of McRae, Ga.*, 820 F.2d 350 (11th Cir. 1987) (en banc) (Clearinghouse No. 38,258). Of course, a tenant may also have a claim against a PHA under the lease agreement for utility overcharges; see *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 408–9 (11th Cir. 1986).

³⁷ 42 U.S.C.A. § 1437a(a)(3)(B) (West Supp. 2002); 24 C.F.R. § 5.630(b) (2001).

³⁸ 42 U.S.C.A. § 1437a(a)(2)(C); 24 C.F.R. § 960.253(f) (2001).

income.³⁹ Annual income includes gross income anticipated to be received by the head of the household and spouse and each additional household member who is at least 18 and not a full-time student.⁴⁰ HUD requires, however, that certain income be excluded in determining a family's anticipated annual income.⁴¹ Congress has further provided that PHAs disregard for a specified time increases in the earned income of tenants who were either previously unemployed or previously on welfare.⁴² Under these provisions, PHAs must disregard all earned income for one year and must disregard 50 percent of the earned income for the second year.⁴³ Advocates should take care to screen cases with public housing tenants for the earned income disregard because PHAs have been very slow in implementing this significant change in the law (the change became effective October 1, 1999).⁴⁴ Congress has also mandated that HUD give a family certain deductions from annual income in computing the family's adjusted income: \$400 for any elderly or disabled family; child care expenses; \$480 for each minor under 18 or other family member attending school on a full-time basis or a family member who is 18 and disabled; any earned income of any family member who is under 18 and is not the head of the household or the spouse of the head of the household; the amount by which the medical expenses for an elderly family or disabled family exceed 3 percent of the annual family income; and the amount by which attendant care

expenses for a disabled family member necessary to allow any member of the family to be employed exceed 3 percent of annual family income.⁴⁵

PHAs often fail to give families the proper deductions from annual income; thus one should as a matter of course check rent to ensure that the family is receiving the legally required deductions. Common mistakes include (1) failure to count the Medicare premium that the Social Security Administration deducts from the tenant's benefits as part of an elderly tenant's deductible medical expense; (2) failure to deduct \$480 for a family member who is over 18 and disabled or a full-time student; (3) failure to give a \$400 deduction to a disabled single person; and (4) failure to give the family a deduction for child care expenses.⁴⁶ PHAs have discretion to grant permissive deductions besides the mandatory deductions.⁴⁷ The PHA's annual plan should be examined to determine what, if any, permissive deductions, the PHA has agreed to grant families.⁴⁸

A family consisting of a nonelderly, nondisabled head of household and three children under 18 and having no day care expenses and a gross annual income of \$16,000 pays a monthly rent equal to 30 percent of monthly adjusted income since that figure is higher than 10 percent of monthly gross income and more than the minimum rent.

When a family's income decreases, it is entitled to a decrease in rent.⁴⁹ The PHA should decrease the rent effective

³⁹ 24 C.F.R. § 5.609(a) (2001).

⁴⁰ *Id.*

⁴¹ *Id.* § 5.609(c) (exclusions from income); see also 66 Fed. Reg. 20318 (Apr. 20, 2001) (notice of additional federally mandated exclusions from income).

⁴² 42 U.S.C.A. § 1437a(d) (West Supp. 2002); 24 C.F.R. § 960.255 (2001).

⁴³ 42 U.S.C.A. § 1437a(d); 24 C.F.R. § 960.255.

⁴⁴ See *PHAs Are Slow to Heed Earned Income Disregard Program*, HOUS. L. BULL. (National Housing Law Project, Oakland, Cal.) Feb. 2002, at 37.

⁴⁵ 42 U.S.C.A. § 1437a(b)(5) (West Supp. 2002); 24 C.F.R. § 5.611 (2001). The statute also provides for annual deductions for child support payments of up to \$480 and \$550 for spousal support payments. However, those deductions were made contingent on congressional appropriations, and the U.S. Congress has not appropriated sums to fund them. 42 U.S.C.A. § 1437a(b)(5)(A)(v)-(vi) (West Supp. 2002).

⁴⁶ This statement is based on my observations over the years.

⁴⁷ 42 U.S.C.A. § 1437a(b)(5) (West Supp. 2002); 24 C.F.R. § 5.611 (2001).

⁴⁸ See 42 U.S.C.A. § 1437c-1 (West Supp. 2002); 24 C.F.R. § 903.7 (2001).

⁴⁹ 24 C.F.R. § 960.257(b) (2001); cf. *McGhee v. Hous. Auth. of Lanett*, 543 F. Supp. 607, 608 (M.D. Ala. 1982) (public housing tenants have a legitimate claim that they should receive the benefits of low-cost housing at the rental rate that Congress prescribed).

Resource Materials on Public Housing

Statutes and Regulations

Anyone representing clients on housing issues must, of course, have access to 42 U.S.C.A. §§ 1436a *et seq.* and Title 24 of the Code of Federal Regulations. Title 24 can be obtained from the Government Printing Office at 202.512.1800.

HUD Handbooks

The U.S. Department of Housing and Urban Development (HUD) issues guidance on tenant rights and management responsibilities through handbooks. You must have as part of your housing library the following HUD handbooks:

- Public housing program: Although HUD does not have a handbook for the public housing program, it is reportedly drafting such a handbook.
- HUD-subsidized housing programs: HUD HANDBOOK 4350.3, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS (1981), with changes 1 through 28 (HUD is rewriting this handbook and may have completed it by the time you read this); SECTION 8 RENEWAL POLICY: GUIDANCE FOR THE RENEWAL OF PROJECT-BASED SECTION 8 CONTRACTS (containing HUD guidance on Section 8 opt-outs and prepayments). Both these handbooks may be obtained from HUD and may also be available through HUD's Web site.
- Section 8 housing voucher program: HOUSING CHOICE VOUCHER GUIDEBOOK 7420.10G. This can be obtained from HUD and may also be available on HUD's Hudclips Web site, www.hudclips.org/cgi/index.cgi.

Manuals

The best resource material available on federal housing programs is the National Housing Law Project's *HUD Housing Programs: Tenants' Rights*. The project published an updated manual in 1994 and a supplement in 1998. (The project is updating the manuals.) The 1994 manual costs \$165 and \$3.00 for postage and handling; the 1998 supplement, \$120 and \$3.00 for postage and handling. They are available from the National Housing Law Project, Attention: Publications Clerk, 614 Grand Ave., Suite 320, Oakland, CA 94610; 510.251.9400; fax 510.451.2300. They are essential to the practice of housing law. Please order them and read them. Do not wait for the updated manuals.

Newsletter

The National Housing Law Project publishes *Housing Law Bulletin*, a newsletter, ten to twelve times a year (annual subscription: \$150.00). It is the best available timely publication on federal housing issues affecting rights of tenants in public housing, federally subsidized housing, and the Section 8 voucher program. Insist that your program order a subscription and read it each month.

Web Sites

- Statutes and regulations: *Code of Federal Regulations*, www.access.gpo.gov/nara/cfr-table-search.html; *Federal Register*, www.access.gpo.gov/su_docs/aces/aces140.html; *United States Code*, www.access.gpo.gov/congress/cong013.html (Government Printing Office, www.access.gpo.gov) HUD: www.hud.gov; Huduser, www.huduser.org; Hudclips, www.hudclips.org/cgi/index.cgi.
- National Housing Law Project: www.nhlp.org.
- Others: For a listing of a number of Web sites on housing issues, see Gwendelyn Daniels, *Legal Resources on the Internet: Housing*, 34 CLEARINGHOUSE REV. 233 (July–Aug. 2000).

List Serves

The National Housing Law Project maintains several list serves on various federal housing programs. Advocates can post questions and reply to questions. It is an excellent additional resource. Call the project and get on one or more of the list serves that it maintains.

no later than the month following the loss of income.⁵⁰

Evictions. PHAs must have good cause to terminate a family's tenancy both during the lease term and at the end of the lease term.⁵¹ HUD has more specifically provided that the tenancy may be terminated only for serious or repeated violation of material lease terms of the lease or other good cause.⁵² Other good cause would include (1) criminal activity or alcohol abuse; (2) discovery after admission of the tenant of facts that make the tenant ineligible; (3) discovery of the tenant's material false statements or fraud in connection with the initial public housing application or with reexamination of income; (4) failure of a family member to comply with the community service requirement of 24 C.F.R. § 960.600–960.609; (5) failure of a family to accept the PHA's offer of a lease revision of an existing lease, with written notice of the offer of the revision at least sixty days before the lease revision is effective.⁵³ (Because Congress suspended the community service requirement for fiscal year 2002, failure to comply with the requirement may not serve as a basis for eviction during the current fiscal year.)⁵⁴ Criminal activity includes drug-related criminal activity in which any tenant, member of the tenant's household, or guest engages

on or off the premises and any such activity in which any other person under the tenant's control engages on the premises.⁵⁵ HUD defines "guest" and "other person under the tenant's control" differently.⁵⁶ In any case premised on an eviction for conduct of an alleged guest, determining whether one falls within the definition of a "guest" is crucial.

HUD's May 24, 2001, regulations follow the congressional mandate that PHAs use leases that allow for eviction for criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or for any drug-related criminal activity in which a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control engages on or off the premises.⁵⁷ Whether this language in the lease compels the eviction of innocent tenants has been the source of much litigation.⁵⁸ The U.S. Supreme Court holds in *HUD v. Rucker* that 42 U.S.C. § 1437d(l)(6) "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."⁵⁹

The *Rucker* decision does not prevent

⁵⁰ See *id.*; see also *Maxton Hous. Auth. v. McLean*, 328 S.E.2d 290 (N.C. 1985). If the PHA does not promptly reduce the tenant's rent share, the family will be paying in excess of the rental amounts that Congress established.

⁵¹ 42 U.S.C.A. § 1437d(l)(5) (West Supp. 2002); 24 C.F.R. § 966.4(l)(2), as amended at 66 Fed. Reg. 28776, 28802, § 966.4(l)(2) (to be codified at this section in 24 C.F.R. for 2002).

⁵² 66 Fed. Reg. 28776, 28802, § 966.4(l)(2) (to be codified at 24 C.F.R. § 966.4(l)(2) (2002)).

⁵³ *Id.*

⁵⁴ Department of Veterans Affairs and Housing and Urban Development and Independent Agencies: Appropriations Act, Pub. L. No. 107-73, § 432, 115 Stat. 651, 699 (Nov. 26, 2001).

⁵⁵ 66 Fed. Reg. 28776, 28802, § 966.4(l)(5) (to be codified at 24 C.F.R. § 966.4(l)(5) (2002)).

⁵⁶ *Id.* at 28791, § 5.100 (to be codified at 24 C.F.R. § 5.100 (2002)).

⁵⁷ 42 U.S.C.A. § 1437d(l) (West Supp. 2002).

⁵⁸ Two law review articles discuss and cite the various relevant cases. See Barclay Thomas Johnson, *The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 A.B.A. J. AFFORDABLE HOUS. 234 (Spring 2001); Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495 (1998).

⁵⁹ *HUD v. Rucker*, 122 S. Ct. 1230 (2002), reversing *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (en banc) (Clearinghouse No. 52,806). The fallout from *Rucker* has been immediate. See *Hous. Auth. of Joliet v. Chapman*, 2002 Ill. App. LEXIS 393 (Ill. App. Ct. May 17, 2002). For a discussion of *Rucker*, see *U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law*, HOUS. L. BULL. (National Housing Law Project, Oakland, Cal.), Apr. 2002, at 95; *In Congress' Hands—the Aftermath of the Rucker Decision*, *id.*, May–June 2002, at 122; *Rucker*, 122 S. Ct. 1230, slip op. at 11.

tenants from raising any legal or equitable defenses that they may have. It merely upholds the authority of Congress to mandate that PHAs use such leases. In defending innocent-tenant cases, advocates should push PHAs to exercise their discretion and not proceed with eviction.⁶⁰ If the PHA does proceed, then advocates should raise any legal and equitable defenses in the state eviction courts. The advocate should argue that *Rucker* is a very narrow holding and merely affirms the authority of Congress to require that PHAs use lease terms giving the PHA discretion whether to proceed with eviction. *Rucker* does not require the eviction courts to ignore legal or equitable defenses, such as waiver, illegal discrimination, failure to grant a reasonable accommodation, unclean hands, failure to provide an opportunity to cure, and other defenses under the lease, state law, or common law.

Before filing suit to evict, the PHA must

- give written notice of lease termination⁶¹ and
- offer an opportunity for a grievance hearing

unless the eviction is premised on (1) criminal activity that threatens other residents' or PHA employees' health, safety, or right to peaceful enjoyment of the premises, (2) violent or drug-related criminal activity on or off the premises, or (3) criminal activity that resulted in a felony conviction of a household mem-

ber.⁶² The lease termination notice must give fourteen days' notice in the case of failure to pay rent; a reasonable period of time not to exceed thirty days in those instances when the PHA is not required to offer an administrative grievance hearing; and thirty days in other cases, except that if state or local law allows a shorter notice period, the shorter period applies.⁶³ The notice must contain certain information, such as the specific grounds for the eviction, whether the tenant is entitled to a grievance hearing, and the tenant's right to review relevant PHA documents.⁶⁴ Vacate notices that state law requires may run concurrently with the termination notice.⁶⁵ Because PHAs often fail to comply with notice requirements, advocates should always carefully read notices for compliance with the regulations. Defective-notice defenses often lead to preliminary hearing victories, which may lead to a favorable resolution.⁶⁶ The termination period should be treated as a cure period, and the tenant should cure any alleged lease violation. This sets up an argument that the tenant may not be evicted because the lease violation has been cured.⁶⁷ When the tenant is mentally disabled and the eviction is premised upon conduct tied to the tenant's disability, advocates should look to the reasonable accommodation provision of the Fair Housing Act.⁶⁸ The advocate may request that the PHA reasonably accommodate the tenant's disability and not evict the tenant. Upon the tenant's request, the

⁶⁰ 66 Fed. Reg. 28776, 28803, § 966.4(l)(5)(vii) (May 24, 2001) (to be codified at specified section in 24 C.F.R. (2002)); see *Oakwood Plaza Apartments v. Smith*, 2002 N.J. Super. LEXIS 332 (N.J. Super. Ct. App. Div. July 2, 2001) (*Rucker* does not mandate eviction; it is the responsibility of the court to determine whether the landlord has exercised its discretion in a manner consistent with the federal statute).

⁶¹ 66 Fed. Reg. at 28803, § 966.4(l)(3).

⁶² *Id.* at 28804, § 966.51.

⁶³ *Id.* at 28803, § 966.4(l)(3).

⁶⁴ See 24 C.F.R. § 966.4(l)(3) (2001).

⁶⁵ *Id.*

⁶⁶ See, e.g., *Hous. Auth. of Salt Lake v. Snyder*, 44 P.3d 724 (Utah 2002); *Hous. Auth. of Newark v. Raindrop*, 670 A.2d 1087 (N.J. Super. Ct. App. Div. 1996).

⁶⁷ See, e.g., *Cheek v. Hernandez-Pinero*, 603 N.Y.S.2d 831 (N.Y. App. Div. 1993), *appeal denied*, 617 N.Y.S.2d 135, 641 N.E.2d 156 (1994) (tenant should not be evicted because tenant removed persons violating the lease and did not participate in any of the undesirable acts) (Clearinghouse No. 49,857).

⁶⁸ See, e.g., *Roe v. Hous. Auth. of Boulder*, 909 F. Supp. 814 (D. Colo. 1995); *Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636 (D. N.H. 1993).



PHA must allow the tenant to review all documents that are in the PHA's possession and directly relevant to the eviction.⁶⁹

Grievance Procedure. PHAs must establish grievance procedures that give tenants an opportunity for a hearing if they dispute the PHA action or failure to act within a reasonable time.⁷⁰ All individual disputes, with the exception of certain evictions, are subject to the grievance process.⁷¹ Class grievances and policy issues are not within the scope of the grievance procedure.⁷² The grievance procedure regulations create rights that are enforceable under 42 U.S.C. § 1983.⁷³ PHAs must comply with a hearing decision unless the PHA determines either that the grievance does not concern PHA action or failure to act in accordance with the tenant's lease and PHA regulations or that the decision is contrary to applicable law or HUD regulations.⁷⁴ The hearing officer may order all necessary remedies, including equitable relief and money damages.⁷⁵ A PHA may not, however, nullify a hearing officer's

decision simply because the PHA determines that it is not practicable or economical to implement.⁷⁶ To ensure that tenants are aware of the grievance process, advocates must insist that PHAs comply with their obligation to notify tenants of the specific grounds for any proposed adverse action and inform tenants of the right to request a grievance hearing.⁷⁷

HUD Federally Subsidized Housing

In this section on HUD federally subsidized housing, I address nonpublic housing—multifamily housing projects that have HUD-insured, HUD-assigned, or noninsured mortgages and are subsidized under the following programs:⁷⁸

- Section 221(d)(3) Below-Market Interest Rate,
- Section 236,
- Section 8 Project-Based Assistance,
- Section 202 with Project Rental Assistance Contracts, and

⁶⁹ 24 C.F.R. § 966.4(m) (2001).

⁷⁰ 42 U.S.C.A. § 1437d(k) (West 1994 & Supp. 2002); 24 C.F.R. § 966.50–.57, *as amended at* 66 Fed. Reg. 28776, 28804, § 966.51 (May 24, 2001).

⁷¹ *See id.*

⁷² 24 C.F.R. § 966.51(b) (2001).

⁷³ *See* Farley v. Phila. Hous. Auth., 102 F.3d 697, 702–4 (3d. Cir. 1996); Samuels v. Dist. of Columbia, 770 F.2d 184 (D.C. Cir. 1985) (Clearinghouse No. 39,840); Imes v. Phila. Hous. Auth., 928 F. Supp. 526, 531 (E.D. Pa. 1996).

⁷⁴ 24 C.F.R. § 966.57(b) (2001).

⁷⁵ Samuels v. Dist. of Columbia, 650 F. Supp. 482 (D.D.C. 1986).

⁷⁶ Samuels v. Dist. of Columbia, 669 F. Supp. 1133, 1143–44 (D.D.C. 1987).

⁷⁷ *See* 24 C.F.R. § 966.4(e)(8) (2001).

⁷⁸ In this article I do not address the rights of tenants in tax credit complexes constructed with tax credits under 26 U.S.C. § 26; the rights of tenants in housing with HOME (Home Investment Partnership Program) funds (*see* 42 U.S.C.A. §§ 12741 *et seq.* (West 1995 & Supp. 2002); 24 C.F.R. pt. 92); or the rights of tenants in Section 515 rural rental housing (*see* 7 C.F.R. pt. 1930, subpart C, exhibit B (2001)).

■ Section 811 with Project Rental Assistance Contracts.⁷⁹

These programs are all similar because the apartment complexes are privately owned and either have insured mortgages or receive rental subsidies. (Beyond the scope of this article are the Section 8 moderate rehabilitation program and the project-based certificate program.⁸⁰ Both have regulations that vary slightly in certain aspects and would need to be separately addressed.)

Initially courts held that the actions of these subsidized owners constituted government action subject to the restrictions of either the Fifth Amendment or the Fourteenth Amendment.⁸¹ However, as the government action doctrine evolved

through Supreme Court decisions, many courts held that the actions of the owners did not constitute governmental action.⁸² Moreover, in the past few years a number of courts held that applicants for subsidized housing had no entitlement or property interest and thus could not state a due process claim.⁸³ As will be noted in this section, however, HUD has provided applicants and tenants with some due process protections through regulations and handbook guidelines.

Eligibility and Tenant Selection. Eligibility criteria for subsidized housing are essentially the same as the eligibility requirements for public housing since the regulations defining family, income, citizenship and eligible immigration status all apply.⁸⁴ Specific regulations do exist

⁷⁹ The statute governing the Section 8 programs is 42 U.S.C.A. § 1437f (West Supp. 2002). Regulations for these programs are found in 24 C.F.R. pt. 880 (Section 8 new construction); pt. 881 (Section 8 substantial rehabilitation); pt. 883 (Section 8 state housing agencies); pt. 884 (Section 8 set-aside for Section 515 rural rental housing); pt. 886 (Section 8 for projects with HUD-insured and HUD-held mortgages and for the disposition of HUD-owned projects); pt. 891 (Section 8 supportive housing for the elderly and persons with disabilities). HUD also has a handbook that governs tenant rights and management practices. See HUD, HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS (1981) (as amended by CHANGE 1–28) [hereinafter HANDBOOK 4350.3]. HUD is issuing a new HANDBOOK 4350.3 that will replace the existing one and apply to all these programs. (HUD solicited comments for the new handbook in May 2002; by the time you read this, it may have issued the new handbook.) The new handbook gives a brief description of all these programs. See HUD, DRAFT HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS ¶ 1.3 (2002) [hereinafter DRAFT HANDBOOK]. HUD also has a handbook on tenant rights and management responsibilities in Section 8 opt-outs and mortgage prepayments: HUD, SECTION 8 RENEWAL POLICY: GUIDANCE FOR THE RENEWAL OF PROJECT-BASED SECTION 8 CONTRACTS 1–19 (2001).

⁸⁰ On the Section 8 moderate rehabilitation program see 24 C.F.R. pt. 882 (2001) (regulations for Section 8 moderate rehabilitation programs). On the project-based certificate program see 42 U.S.C.A. § 1437f(o)(13) (West Supp. 2002); 24 C.F.R. pt. 983 (Section 8 project-based certificate program).

⁸¹ See, e.g., *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973) (Clearinghouse No. 10478); *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) (Clearinghouse No. 4084); *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971) (Clearinghouse No. 4473); *Bloodworth v. Oxford Village Townhouses Inc.*, 377 F. Supp. 709 (N.D. Ga. 1974) (Clearinghouse No. 13,221); *Anderson v. Denny*, 365 F. Supp. 1254 (W.D. Va. 1973) (Clearinghouse No. 11,526).

⁸² See, e.g., *Miller v. Hartwood Apartments Ltd.*, 689 F.2d 1239 (5th Cir. 1982); *Overton v. John Knox Retirement Tower Inc.*, 720 F. Supp. 934, 940–42 (M.D. Ala. 1989). When the government merely establishes the guidelines for a private party's action, the courts are unlikely to find government action; the government must authorize or encourage the particular action that the private party takes. See *American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (Clearinghouse No. 51,920).

⁸³ See, e.g., *Price v. Pierce*, 823 F.2d 1114, 1123 (7th Cir. 1987), *cert. denied* 485 U.S. 960 (1988) (Clearinghouse No. 35,228); *Hill v. Group Three Hous. Dev. Corp.* 799 F.2d 385, 389–93 (8th Cir. 1986) (Clearinghouse No. 37,741); *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (Clearinghouse No. 32,097); *but see Ressler v. Landrieu*, 692 F.2d 1212 (9th Cir. 1982) (Clearinghouse No. 25,595).

⁸⁴ See 24 C.F.R. § 5.403, 5.601–.661, 5.500–.528 (2001); see also DRAFT HANDBOOK ¶¶ 3.1–3.29 (eligibility for assistance and occupancy).

on income eligibility, income targeting, and tenant-selection preferences.⁸⁵

The owner is responsible for selecting tenants and must develop reasonable tenant-selection procedures.⁸⁶ HUD has given owners discretion in selecting tenants, but this discretion is somewhat limited.⁸⁷ For example,

- owners may not use lack of credit history as a basis to reject an applicant,⁸⁸ and
- owners may not reject an applicant for lack of a rental history.⁸⁹

HUD requires owners to notify rejected applicants of the reasons for the denial and to afford applicants an opportunity to meet with the owner and discuss the denial.⁹⁰ The notice must give the applicant the specific reasons for the rejection and fourteen days to respond in writing or request a meeting.⁹¹ Someone who did not participate in the initial decision to reject the applicant must conduct the meeting.⁹² The owner has five days after the meeting to advise the applicant whether the owner's position has changed.⁹³ An applicant denied admission has a basis to challenge the denial if it is based on erroneous information or is not in compliance with the owner's tenant-selection policies. In some cases the owner's selection policies may violate the Fair Housing Act or Section 504 of the Rehabilitation Act of 1973.⁹⁴ The policies may be overly broad and run afoul of the owner's limited dis-

cretion under Handbook 4350.3 or possibly conflict with state deceptive or unfair trade practices acts.

Rent Computation. Tenants living in subsidized housing and receiving a project-based Section 8 subsidy pay rent in an amount computed in the same manner as under the public housing program, except that the minimum rent is set at \$25; the earned income disregard does not apply to subsidized tenants; and the flat rent provisions applicable to public housing tenants are inapplicable. (See the discussion in the public housing section on rent computation above.) Thus, for example, a nondisabled, nonelderly tenant who has a gross annual income of \$12,000, two minor children, and annual day care expenses of \$2,400 and is living in a complex in which all utilities are paid by the owner will pay a monthly rent equal to 30 percent of monthly adjusted income since that amount is higher than 10 percent of gross monthly income and also higher than the \$25 minimum rent.⁹⁵ This family is entitled to an annual deduction of \$480 for each minor child and an annual deduction of \$2,400 in day care costs.⁹⁶ This computes to an adjusted annual income of \$8,640 (\$12,000 – \$3,360), or an adjusted monthly income of \$720. The family must pay 30 percent of this amount for rent and utilities—a total of \$216.00 per month.⁹⁷

However, if the tenant lives in Section 221(d)(3), 236, or 202 housing without a Section 8 rental subsidy, the tenant has to pay at least the minimum rent established

⁸⁵ *Id.* § 5.653 (income eligibility and income targeting), 5.655 (owner tenant selection and preferences in tenant selection).

⁸⁶ *Id.* § 5.655(b); HANDBOOK 4350.3 at CHANGE 24, 27, ¶¶ 2-24 to 2-30; DRAFT HANDBOOK ¶¶ 4.1 to 4.8.

⁸⁷ HANDBOOK 4350.3 ¶¶ 2-25 to 2-27; DRAFT HANDBOOK, *supra* note 79, ¶¶ 4.7, 4.8.

⁸⁸ HANDBOOK 4350.3 ¶ 2-21. The DRAFT HANDBOOK contains no such absolute prohibition but cautions owners to have a sound basis for rejection on the basis of a credit rating. See ¶ 4.7.E.2.

⁸⁹ DRAFT HANDBOOK ¶ 4.7.E.3. (This is not specifically prohibited in HANDBOOK 4350.3.)

⁹⁰ HANDBOOK 4350.3 at CHANGE 27, ¶ 2-30; DRAFT HANDBOOK ¶ 4.8.

⁹¹ HANDBOOK 4350.3 at CHANGE 27, ¶ 2-30; DRAFT HANDBOOK ¶ 4.8.

⁹² HANDBOOK 4350.3 at CHANGE 27, ¶ 2-30; DRAFT HANDBOOK ¶ 4.8.

⁹³ HANDBOOK 4350.3 at CHANGE 27, ¶ 2-30; DRAFT HANDBOOK ¶ 4.8.

⁹⁴ Fair Housing Act, 42 U.S.C.A. §§ 3601 *et seq.* (West 1994), 24 C.F.R. pt. 100 (2001); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West 1999 & Supp. 2002), 24 C.F.R. pt. 8 (2001).

⁹⁵ See 24 C.F.R. § 5.628 (2001).

⁹⁶ See *id.* § 5.611.

⁹⁷ See *id.* § 5.628.

for that apartment unit. For example, a tenant living in a Section 236 complex without a Section 8 subsidy has to pay at least the basic rent regardless of income.⁹⁸ Thus, if the same family described above lives in a Section 236 apartment, without a Section 8 subsidy, and the fair market rent is \$800 and the basic rent is \$650, the family has to pay at least the basic rent of \$650, regardless of income.⁹⁹

Tenants in subsidized housing receiving a Section 8 subsidy are entitled to a rent reduction following a decrease in income or an increase in family size.¹⁰⁰ However, unlike PHAs, subsidized owners may refuse to process an interim adjustment if the tenant's reported income decrease is due to the tenant's deliberate action to avoid paying rent, or if the owner confirms that the decrease will last less than one month.¹⁰¹ If the owner confirms that the tenant's income will be partially or fully restored within two months, the owner may delay processing an interim recertification but may not evict the tenant for nonpayment during the period of delay.¹⁰² Any reduction in rent after a delay in processing must be made retroactive.¹⁰³ The decrease in rent should be effective on the first of the month after

the decrease in income rather than on the first of the month after the month in which the tenant reports the decrease.¹⁰⁴ If the family is paying the \$25 minimum rent and experiences a financial hardship, the tenant may seek a hardship exemption from payment of the minimum rent.¹⁰⁵

Evictions. Subsidized landlords may not terminate a tenancy except for material noncompliance with the rental agreement, material failure to carry out obligations under any state landlord-tenant act, criminal activity, alcohol abuse or other good cause.¹⁰⁶ Material noncompliance includes one or more substantial violations of the lease or repeated minor violations.¹⁰⁷ A tenant's, household member's, or guest's drug-related criminal activity on or near the premises is grounds for eviction.¹⁰⁸ On-the-premises drug-related activity of any person under the tenant's control is grounds for eviction.¹⁰⁹ Criminal activity which threatens the health, safety, or right to peaceful enjoyment of the premises and in which other residents or management employees or persons residing in the immediate vicinity of the premises engage is grounds for termination of the tenancy.¹¹⁰ The owner may terminate a tenancy if a tenant (not

⁹⁸ See 12 U.S.C.A. § 1715z-1(f) (West 2001).

⁹⁹ See *id.*

¹⁰⁰ 24 C.F.R. § 5.657(c) (2001); HANDBOOK 4350.3 at CHANGE 21, ¶ 5-11; DRAFT HANDBOOK ¶¶ 7.11, 7.12.

¹⁰¹ 24 C.F.R. § 5.657(c) (2001); HANDBOOK 4350.3 at CHANGE 21, ¶ 5-11; DRAFT HANDBOOK ¶¶ 7.11, 7.12.

¹⁰² 24 C.F.R. § 5.657(c) (2001); HANDBOOK 4350.3 at CHANGE 21, ¶ 5-11; DRAFT HANDBOOK ¶¶ 7.11, 7.12.

¹⁰³ 24 C.F.R. § 5.657(c) (2001); HANDBOOK 4350.3 at CHANGE 21, ¶ 5-11; DRAFT HANDBOOK ¶¶ 7.11, 7.12.

¹⁰⁴ See HANDBOOK 4350.3 at CHANGE 21, ¶ 5-12.b; DRAFT HANDBOOK ¶ 7.13. The HANDBOOK seems clear on this but the regulation merely specifies that "[t]he owner must make the interim reexamination within a reasonable time after the family request." 24 C.F.R. § 5.657(c) (2001).

¹⁰⁵ See 24 C.F.R. § 5.630 (2001); DRAFT HANDBOOK ¶ 5.26.D.3.

¹⁰⁶ 24 C.F.R. § 247.3(a) (2001), *as amended at* 66 Fed. Reg. 28776, 28797, § 247.3 (May 24, 2001) (to be codified at specified section in 2002 C.F.R.).

¹⁰⁷ Repeated minor violations such as late payment of rent constitute material noncompliance, but the landlord must show that the minor violation also disrupts the livability of the project, adversely affects health or safety of other tenants, interferes with management, or has an adverse financial effect on the project. 24 C.F.R. § 247.3(c)(2) (2001); *Oak Glen of Edina v. Brewington*, 624 N.W.2d 481 (Minn. Ct. App. 2002) (in eviction for repeated late payments or any repeated minor violation of the lease, the landlord must also satisfy one of the preconditions of section 247.3(c)(2)).

¹⁰⁸ 24 C.F.R. § 247.3(a) (2001), *as amended at* 66 Fed. Reg. 28776, 28793, 28797, § 247.3, § 5.858 (May 24, 2001) (to be codified at specified sections in 2002 C.F.R.).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, *as amended*, §§ 247.3, 5.859.

household member, guest, or person under the tenant's control) is either fleeing to avoid prosecution or confinement after conviction for a crime or violating a condition of probation or parole.¹¹¹

The phrase "other good cause" is undefined in the regulations.¹¹² However, the tenant's conduct may not constitute other good cause for eviction unless the landlord gives the tenant prior notice that such conduct constitutes a basis for termination of the tenancy.¹¹³ An eviction premised on other good cause may occur only at the end of the lease term and only after at least thirty days' notice to the tenant of lease termination.¹¹⁴ Tenants may rely on state or local law governing eviction procedures where such law has provisions for the tenant's procedural rights in addition to those HUD provides unless HUD preempts state or local law.¹¹⁵ Thus, for example, when state law provides a right to cure, the tenant should be able to utilize that law.¹¹⁶

A landlord must give notice of termination stating (1) when the tenancy is terminated, (2) why the tenant is being evicted, the reasons for the eviction being with sufficient specificity to enable the tenant to prepare a defense, (3) that, if a judicial proceeding for eviction is instituted, the tenant may present a defense, (4) that the landlord may seek to enforce the termination only by bringing a judicial action,

and (5) that the tenant has ten days in which to discuss the proposed termination of tenancy with the landlord.¹¹⁷ Thirty days' notice of termination is required for terminations based on good cause; in material noncompliance evictions, the rental agreement and state law determine the notice period.¹¹⁸ The landlord may not rely on any grounds in court that are different from the reasons set forth in the termination notice, unless the landlord has no knowledge of the violations when the landlord sends the termination notice.¹¹⁹ When termination notices fail to comply with the requirements of the federal regulations, the court should dismiss the case.¹²⁰

Grievance Procedure. HUD has not established a formal grievance administrative grievance procedure for tenants to resolve disputes with owners. However, tenants have specific tenant protections with respect to the right to organize.¹²¹ Applicants denied admission do have a complaint and appeal procedure.¹²² Tenants threatened with eviction have a right to meet with the owner to discuss the proposed termination.¹²³ Tenants threatened with a rent increase or termination of their subsidy have a right to a conference prior to the termination.¹²⁴ Former tenants with a dispute over refund of a security deposit have a right to a meeting.¹²⁵ Tenants with a pet problem in

¹¹¹ *Id.*

¹¹² See 24 C.F.R. § 247.3 (2001).

¹¹³ *Id.* § 247.3(b).

¹¹⁴ *Id.* § 247.4(c).

¹¹⁵ *Id.* § 247.6(c).

¹¹⁶ E.g., *Hous. Auth. of Everett v. Terry*, 789 P.2d 745 (Wash. 1990) (en banc) (holding that federal regulations creating administrative grievance procedure for public housing tenants do not preempt a state statutory requirement of an opportunity to cure a lease default).

¹¹⁷ 24 C.F.R. § 247.4(a); HANDBOOK 4350.3 at CHANGE 22, ¶ 4-21; DRAFT HANDBOOK, ¶ 8.13.B.2. The requirement that the tenant be given ten days in which to discuss the proposed termination of tenancy with the landlord is not codified in the federal regulations but is a requirement under the HANDBOOK.

¹¹⁸ 24 C.F.R. § 247.4(c) (2001).

¹¹⁹ *Id.* § 247.6(b).

¹²⁰ See, e.g., *Moon v. Spring Creek Apartments*, 11 S.W.3d 427 (Tex. App. 2000); *Hedco Ltd. v. Blanchette*, 763 A.2d 639 (R.I. 2000) (Clearinghouse No. 53,709).

¹²¹ 24 C.F.R. § 245.100-.135 (2001).

¹²² HANDBOOK 4350.3 at CHANGE 27, ¶ 4-30; DRAFT HANDBOOK ¶ 4.8.

¹²³ HANDBOOK 4350.3 at CHANGE 22, ¶ 4-21; DRAFT HANDBOOK ¶ 8.13.B.2.

¹²⁴ HANDBOOK 4350.3 at CHANGE 21, ¶¶ 5-13, 5-15, 5-18; DRAFT HANDBOOK ¶¶ 7.1-13, 8.6.

¹²⁵ HANDBOOK 4350.3 at CHANGE 21, ¶ 4-9; DRAFT HANDBOOK ¶ 6.18.

Overview of HUD Federal Housing Programs and Tax Credit Program				
	Public Housing Program	Privately owned HUD Subsidized Housing Program	Section 8 Voucher Program	Tax Credit Program
1. Government action?	1. Yes	1. Probably no—unless government participates in the action	1. PHA—yes Landlord—no	1. Probably no—unless government participates in the action
2. Denial of admission—notice and hearing?	2. Yes	2. Yes (informal meeting)	2. PHA—yes Landlord—no	2. No
3. Rents based on Income? (rent amount must factor in utility allowance)	3. Yes, subject to minimum rent (\$0–\$50) and flat rent (hardship exemption on minimum rent)	3. Yes, subject to \$25 minimum rent (hardship exemption on minimum rent)	3. Yes, subject to payment standard and minimum rent (\$0–\$50) (hardship exemption on minimum rent)	3. No, but required to accept applicants with Section 8 vouchers
4. Rent decreases if income decreases?	4. Yes, subject to minimum rent (hardship exemption on minimum rent) and flat rent	4. Yes, subject to \$25 minimum rent (if only subsidy is § 236, rent decreases only to basic level)	4. Yes, subject to payment standard and minimum rent (hardship exemption on minimum rent)	4. No, unless tenant's rent subsidized under Section 8
5. Formal grievance procedure for complaints?	5. Yes, but evictions for violent and drug-related criminal conduct excluded from grievance procedure	5. No, but right to meet with owner on evictions, rejections subsidy, terminations, security deposit refunds	5. PHA—yes Landlord—no	5. Not required unless state agency mandates
6. End of lease—cause required to nonrenew and to evict?	6. Yes	6. Yes	6. No, but tenant gets voucher to move elsewhere	6. Arguable. See 26 U.S.C. § 42(h)(6)(E)(ii) (West 2002). (required if restrictive covenant mandates)
7. Subject to Section 504 of Rehabilitation Act of 1973 and 24 C.F.R. Part 8?	7. Yes	7. Yes	7. PHA—yes Landlord—no	7. Yes (restrictive covenant may mandate compliance)
8. Main sources of law on tenant rights?	8. 42 U.S.C. §§ 1437 <i>et seq.</i> ; 24 C.F.R. pts. 5, 903, 960, 963, 964, 965, 966, 968, 969, 970, 971, 984, 990, and Fair Housing Act, 42 U.S.C. §§ 3601 <i>et seq.</i> ; HUD tenant rights handbook is purportedly being drafted	8. 42 U.S.C. § 1437f; 12 U.S.C. § 1715z–1, § 1715l(d)(3); 24 C.F.R. Parts 5, 245, 246, 247; 248; HUD Handbook 4350.3; Section 8 Renewal Guidebook; Fair Housing Act, 42 U.S.C. §§ 3601 <i>et seq.</i>	8. 42 U.S.C. § 1437f(o); 24 C.F.R. pts. 5, 982, 984; Housing Choice Voucher Guidebook 7420.10G; Fair Housing Act, 42 U.S.C. §§ 3601 <i>et seq.</i>	8. 26 U.S.C. § 42; Low-Income Housing Tax Credit Owner's Compliance Manual (state agency overseeing tax credit owners publishes); Fair Housing Act, 42 U.S.C. § 3601

an elderly or disabled complex have grievance procedure rights.¹²⁶ Tenants have a right to notice and an opportunity to comment when an owner seeks

- a rent increase from HUD,¹²⁷
- a conversion of a project from project-paid utilities to tenant-paid utilities, or
- a reduction in tenant utility allowances.¹²⁸

Section 8 Housing Choice Voucher Program

Congress created the Section 8 housing voucher program in 1983.¹²⁹ This rental subsidy program is a modified version of the Section 8 housing certificate program enacted in 1974.¹³⁰ HUD has merged the programs through a series of regulations now found in 24 C.F.R. part 982.¹³¹ HUD contracts with PHAs to operate the program.¹³² Applicants apply to the PHA for vouchers.¹³³ When an applicant is issued a voucher, generally after many years on a waiting list, the applicant is responsible for finding housing in the private market that meets the PHA's housing quality stan-

dards and rent guidelines.¹³⁴ The PHA enters into a contract with the landlord to make housing assistance payments.¹³⁵ The landlord and the tenant sign a lease.¹³⁶ After the initial lease term, the landlord is free to terminate the tenancy without cause.¹³⁷ If either the tenant or the landlord terminates the lease, the PHA issues the tenant another voucher to rent elsewhere.¹³⁸ Vouchers are portable in that the voucher holder may move anywhere with the voucher, except that if the voucher holder does not live within the geographical boundaries of the PHA at the time the holder applies, the holder must live within those geographical boundaries for the first year after leasing a unit with the voucher.¹³⁹ Tenants have a property interest in the voucher, and thus the arbitrary termination of a voucher may be a constitutional violation.¹⁴⁰

Eligibility and Tenant Selection. The eligibility requirements of the Section 8 voucher program are basically the same as those of the public housing program.¹⁴¹ But assistance is targeted to extremely low-income families.¹⁴² The PHA selects eligible families for participation in the

¹²⁶ 24 C.F.R. § 5.300–.363 (2001).

¹²⁷ *Id.* § 245.305–.330.

¹²⁸ *Id.* § 245.405.

¹²⁹ *See* 42 U.S.C.A. § 1437f(o) (West Supp. 2002). The regulations for the Section 8 voucher program are published in 24 C.F.R. pt. 982 (2001). The regulations for the voucher program, before the merger with the certificate program, were located at Part 887. HUD has removed Part 887 since the merger regulations are now found at Part 982. *See* 66 Fed. Reg. 42731 (Aug. 15, 2001) (correcting Title 24 of the Code of Federal Regulations to remove Part 887). HUD has issued a handbook governing tenant rights and PHA responsibilities in administering the Section 8 voucher program. *See* HUD, HOUSING CHOICE VOUCHER GUIDEBOOK 7420.10G [hereinafter HUD GUIDEBOOK]. It elaborates on the regulations and is an important source of information to consult.

¹³⁰ *See* 42 U.S.C.A. § 1437f (West Supp. 2002).

¹³¹ 24 C.F.R. pt. 982 (2001).

¹³² *See generally* 42 U.S.C.A. § 1437f(o) (West Supp. 2002); 24 C.F.R. § 982.1 (2001).

¹³³ 24 C.F.R. § 982.202 (2001).

¹³⁴ *Id.* § 982.1(a)(2).

¹³⁵ *Id.* § 982.451.

¹³⁶ *Id.* § 982.308.

¹³⁷ *Id.* § 982.310.

¹³⁸ *Id.* § 982.314.

¹³⁹ *Id.* § 982.353.

¹⁴⁰ *See, e.g.,* Davis v. Mansfield Metro. Hous. Auth., 751 F.2d 180, 185 (6th Cir. 1984) (Clearinghouse No. 24,568); Simmons v. Drew, 716 F.2d 1160, 1162 (7th Cir. 1983) (Clearinghouse No. 30,930); Chesir v. Hous. Auth. of Milwaukee, 801 F. Supp. 244, 247–48 (E.D. Wis. 1992).

¹⁴¹ *See* 42 U.S.C.A. § 1437f(o)(4) (West Supp. 2002); 24 C.F.R. § 982.201 (2001) (eligibility and targeting).

¹⁴² 24 C.F.R. § 982.201(b)(2) (2001).

voucher program.¹⁴³ PHAs are free to establish local preferences in the selection of applicant families.¹⁴⁴ The PHA may not deny eligible applicants except on limited grounds identified in the federal regulations.¹⁴⁵ Permissible grounds for denial include eviction from federally assisted housing in the previous five years, fraud in connection with any federal housing program, indebtedness to any PHA, abusive or violent behavior toward PHA personnel, drug-related criminal activity, violent criminal activity, other criminal activity which may threaten residents' or neighbors' health, safety, or right to peaceful enjoyment of the premises, and abuse of alcohol if the abuse may threaten other residents' health, safety, or right to peaceful enjoyment of the premises.¹⁴⁶ However, PHAs may not reject otherwise eligible applicants on the basis of credit, references, or other grounds not specified in the regulations.¹⁴⁷ Private landlords, using these grounds, may apply their own screening criteria. Applicants denied admission are entitled to notice of the grounds for rejection and must be given an opportunity for an informal hearing.¹⁴⁸ PHAs have authority to consider any mitigating circumstances and evidence of rehabilitation.¹⁴⁹

Rent Computation. The family's monthly adjusted income and annual income are determined in the same manner as under the public housing program.¹⁵⁰ The exclusions and deductions from annual income are also identical, except that the earned income disregard

is limited to persons with disabilities.¹⁵¹ As in public housing and the subsidized housing programs, the family's total tenant payment is the highest of 30 percent of monthly adjusted income, 10 percent of the family's monthly income, the portion of any welfare payments designated for housing costs, or the PHA's minimum rent of between \$0 and \$50.¹⁵² But, unlike the public housing and federally subsidized housing programs, the tenant may pay more than the total tenant payment in rent because of the way the PHA's housing assistance payment is calculated.¹⁵³

The maximum housing assistance payment that the PHA may pay on behalf of the family is equal to the lower of (1) the payment standard for the family minus the total tenant payment or (2) the gross rent minus the total tenant payment.¹⁵⁴ Gross rent consists of the contract rent to be paid to the landlord and a utility allowance that the PHA calculates under a formula considering the utilities for the payment of which the family is responsible.¹⁵⁵ Congress provides, however, that at the time of the initial lease the total amount that a family may be allowed to pay for rent may not exceed 40 percent of the family's monthly adjusted income.¹⁵⁶ This limits where some families are able to rent. As the following example illustrates, with the cost of utilities, the family can fairly quickly exceed 30 percent of its monthly adjusted income:

Assume the following facts: total tenant payment equals \$300; pay-

¹⁴³ *Id.* § 982.202.

¹⁴⁴ *Id.* § 982.207.

¹⁴⁵ *Id.* § 982.552, as amended at 66 Fed. Reg. 28776, 28805 (May 24, 2001) (to be codified in 2002 C.F.R.).

¹⁴⁶ *Id.* § 982.552–553, as amended at 66 Fed. Reg. 28776, 28805–6 (May 24, 2001).

¹⁴⁷ *See id.*

¹⁴⁸ 24 C.F.R. § 982.554 (2001).

¹⁴⁹ 66 Fed. Reg. 28776, 28805, § 982.552(c)(2) (May 24, 2001).

¹⁵⁰ 24 C.F.R. § 5.601 (2001).

¹⁵¹ *See* 24 C.F.R. § 5.617 (2001). The earned-income-disregard rule for persons with disabilities and participating in the Section 8 voucher program became effective April 20, 2001 (66 Fed. Reg. 8175 (Jan. 30, 2001) (notice delaying effective date from February 20, 2001, to April 20, 2001)).

¹⁵² *Id.* § 5.628.

¹⁵³ *See* 42 U.S.C.A. § 1437f(o)(2) (West Supp. 2002); 24 C.F.R. 982.505(b) (2001) (amount of monthly housing assistance payment).

¹⁵⁴ *Id.*

¹⁵⁵ 24 C.F.R. § 982.4 (2001) (definitions).

¹⁵⁶ 42 U.S.C.A. § 1437f(o)(3) (West Supp. 2002); 24 C.F.R. § 982.508 (2001).

ment standard equals \$850; contract rent to owner equals \$875; utility allowance equals \$75. The housing assistance payment that the PHA will pay on these facts is \$550—the difference between the payment standard for the family and the total tenant payment ($\$850 - \$300 = \$550$)—since this amount is less than the gross rent minus the total tenant payment ($\$950 - \$300 = \$650$). Since the PHA will pay \$550 on the rent of \$875, the tenant must pay the difference—\$325 plus utilities.

A family may request a redetermination of the amount of rent it is paying any time its income or composition changes.¹⁵⁷ The PHA should decrease the tenant's rent share effective on the first day of the month following the date of the reported change.¹⁵⁸ If the family fails to report the change timely, the PHA has the discretion to implement the change retroactively.¹⁵⁹

Evictions and Terminations. Evictions are the landlord's responsibility in the Section 8 voucher program.¹⁶⁰ During the term of the lease, the owner may not terminate the tenancy except for serious lease violations; violation of laws imposing obligations on the tenant in connection with the use of the premises; drug-related criminal activity that any tenant, household member, or guest engages in, on, or near the premises; or such activity in which any other person under the ten-

ant's control engages; any criminal activity that threatens residents' or neighbors' health, safety, or right to peaceful enjoyment of the premises; any tenant's, household member's, or guest's violent criminal activity on or near the premises; or any such activity of any other person under the tenant's control on the premises.¹⁶¹ During the initial lease term, the owner may not terminate the tenancy for "other good cause," unless it is premised on the tenant's action or inaction.¹⁶² Thus an owner's desire to sell the unit or remodel the unit is not a basis for termination during the initial lease term.¹⁶³ At the end of the lease term, the owner may terminate the tenancy without cause.¹⁶⁴ In all cases, the landlord may evict only on grounds listed in the lease agreement between the landlord and the tenant. Advocates must carefully review the tenant's lease to ensure that the landlord is not attempting to evict on a ground not set forth in the lease.

An owner must give the tenant a written notice specifying the grounds for termination of the tenancy; the notice may be included in either the notice to vacate or the complaint filed in court.¹⁶⁵

A PHA may not terminate a family's participation in the voucher program without first giving notice of the reason for the proposed termination and an opportunity for a hearing.¹⁶⁶ The PHA is limited to terminating assistance only on one of the grounds listed in the regulations.¹⁶⁷ For example, a PHA may not terminate assistance merely because, in its view, the

¹⁵⁷ 24 C.F.R. § 982.516(b),(c) (2001).

¹⁵⁸ HUD GUIDEBOOK ¶ 12.6.

¹⁵⁹ *Id.*

¹⁶⁰ 24 C.F.R. § 982.310(a) (2001).

¹⁶¹ *Id.* § 982.310, *as amended at* 66 Fed. Reg. 28776, 28804–5, § 982.310 (May 24, 2001).

¹⁶² 24 C.F.R. § 982.310(d) (2001).

¹⁶³ *Id.*

¹⁶⁴ *See id.* § 982.310(a) (limiting by its terms the termination requirement for cause to the term of the lease).

¹⁶⁵ *Id.* § 982.310(e).

¹⁶⁶ *Id.* § 982.555(c); *see also* Colvin v. Hous. Auth. of Sarasota, 71 F.3d 864 (11th Cir. 1996) (holding that evicted Section 8 participant is entitled under the regulations to an administrative hearing on the issue whether she should be terminated from the program) (Clearinghouse No. 50,239).

¹⁶⁷ *See* 24 C.F.R. § 982.552(a)(1) (2001) ("[A] PHA may deny assistance for an applicant or terminate assistance for a participant under the programs because of the family's action or failure to act as described in this section or § 982.553."); Ellis v. Ritchie, 803 F. Supp. 1097, 1106 (E.D. Va. 1992); Holly v. Hous. Auth. of New Orleans, 684 F. Supp. 1363, 1367–68 (E.D. La. 1988) (Clearinghouse No. 43,452).

participant is not a good tenant. PHAs often overreach and assert grounds when no underlying facts support the termination. For example, PHAs frequently allege fraud when only tenant omission or error exists.¹⁶⁸ The PHA may always consider mitigating circumstances and evidence of rehabilitation.¹⁶⁹ Terminations may be challenged in court under 42 U.S.C. § 1983 when the PHA decision is arbitrary or not in accordance with law or constitutional requirements.¹⁷⁰

Grievance Procedure. PHAs are required to give applicants and participants adversely affected by PHA action an opportunity for an informal hearing.¹⁷¹ Hearings are not required, however, in a number of instances, including actions based on discretionary administrative decisions by the PHA and general policy issues.¹⁷² The PHA designates the hearing officer.¹⁷³ As noted above, the hearing

officer must be someone who did not participate in the decision under review.¹⁷⁴ PHAs must allow the family an opportunity to review the PHA file documents relevant to the hearing.¹⁷⁵ Evidence may be considered without regard to admissibility under the rules of evidence.¹⁷⁶ The hearing officer must issue a written decision stating the reasons for the decision.¹⁷⁷ In representing individuals threatened with termination of assistance, competent representation mandates that the advocate (1) require the PHA to give adequate specific notice so that all defenses may be raised and the participant is not blindsided at the hearing and (2) review and copy pertinent parts of the file prior to the hearing. The file will either provide documents valuable to the participant's defense or will allow for better anticipation of the PHA's case.

¹⁶⁸ See HUD GUIDEBOOK § 22.2. (giving examples for PHAs on the differences between fraud and tenant error or omission).

¹⁶⁹ 66 Fed. Reg. 28776, 28805, § 982.552(c)(2) (May 24, 2001) (to be codified at specified section in 2002 C.F.R.).

¹⁷⁰ See cases cited *supra* note 167; *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312 (D. Conn. 1993).

¹⁷¹ 24 C.F.R. § 982.554 (applicants), § 982.555 (participants) (2001).

¹⁷² *Id.* § 982.554 (c); § 982.555(b) (listing instances when a hearing is not required).

¹⁷³ *Id.* § 982.555(e)(4).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* § 982.555(e)(2).

¹⁷⁶ *Id.* § 982.555(e)(5).

¹⁷⁷ *Id.* § 982.555(e)(6).