U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

ASSISTANT SECRETARY FOR
PUBLIC AND INDIAN HOUSING

February 10, 2011

MEMORANDUM FOR: All Field Offices and Public Housing Agencies (PHAs)

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

SUBJECT: Medical Marijuana Use In Public Housing and Housing Choice Voucher Programs

Overview

The Department has recently received numerous inquiries regarding the use of medical marijuana[1] in the Public Housing (PH) and Housing Choice Voucher (HCV) programs[2]. This memorandum intends to serve as guidance for field offices and PHAs on admissions, continued occupancy, and termination policies in states that have enacted laws that allow the use of medical marijuana. Currently fourteen states (Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia have laws that legalize medical marijuana use.

New Admissions

Based on federal law, new admissions of medical marijuana users are prohibited into the PH and HCV programs. The Controlled Substances Act (CSA) lists marijuana as a Schedule I drug, a substance with a very high potential for abuse and no accepted medical use in the United States. The Quality Housing and Work Responsibility Act (QHWRA) of 1998 (42 U.S.C. §13661) requires that PHAs administering the Department's rental assistance programs establish standards and lease provisions that prohibit admission into the PH and HCV programs based on the illegal use of controlled substances, including state legalized medical marijuana. State laws that legalize medical marijuana directly conflict with the admission requirements set forth in QHWRA and are thus subject to federal preemption.

Current Residents

For existing residents, QHWRA requires PHAs to establish occupancy standards and lease provisions that will allow the PHA to terminate assistance for use of a controlled substance. However, the law does not compel such action and PHAs have discretion to determine continued occupancy policies that are most appropriate for their local communities. PHAs can also determine whether to deny assistance to or terminate individual medical marijuana users, rather than entire households, for both applicant and existing residents when appropriate. PHAs have discretion to determine, on a case-by-case basis, the appropriateness of program termination of existing residents for the use of medical marijuana.

[1] The Department defines medical marijuana as marijuana which, when prescribed by a physician to treat a serious illness such as AIDS, cancer, or glaucoma, is legal under State law.
[2] Housing Choice Voucher programs include tenant-based vouchers and project-based vouchers.

PHAs in states that have enacted laws legalizing the use of medical marijuana must therefore establish a standard and adopt written policy regarding whether or not to allow continued occupancy or assistance for residents who are medical marijuana users. The decision of whether or not to allow continued occupancy or assistance to medical marijuana users is the responsibility of PHAs, not of the Department.

Food and Drug Administration Approved Drugs

PHAs should also be aware that the Food and Drug Administration (FDA) has approved drugs for medical uses which are comprised of marijuana synthetics, such as Marinol and Cesamet. These drugs are not medical marijuana and are legal under federal laws. These products have been through the FDA's rigorous approval process and have been determined to be safe and effective for their indications. They are therefore allowed in the public housing and voucher programs.

Thank you for your partnership and participation in the Department's programs, and for your attention to this important issue in providing quality housing and communities for all residents of public housing and voucher programs. Questions regarding this memorandum may be directed to Ms. Diane Yentel at 202-402-6051 or Diane.E.Yentel@hud.gov.

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

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

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

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

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

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

1. "Illegal" use of drugs

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

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

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

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

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

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

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

2. Acting "on the basis of such use"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Other marijuana-related conduct that is not reasonable

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

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

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

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

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

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

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

V. *Conclusion*

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

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

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