Memorandum

To: Wayne Dawson

From: Michael Allen, Senior Staff Attorney, Bazelon Center for Mental Health Law

Re: Patricia Spence v. Brencor Management

Date: August 6, 2003

Complainant is a woman with a mental impairment who requested a reasonable accommodation to keep a cat as an emotional support animal without having to pay a $300 "pet deposit." The matter was investigated by Joan Anderson of the Georgia Commission on Equal Opportunity. Ms Anderson's investigation concluded that Complainant had met her burden of establishing that she had a disability and that respondent knew or should have known of her disability. Her Summary of Findings—Revised concludes that she has not met her burden of establishing that the accommodation is necessary to afford her an equal opportunity to use and enjoy the premises. Further, although the Summary of Findings—Revised has a notation that she has met her burden with respect to establishing that Respondent denied or unreasonably delayed her request, the discussion of this topic leads me to believe that Ms. Anderson's conclusion is that she did not meet this requirement.

Before addressing the controlling law and facts in this particular case, I wanted to express to you my profound dismay in reading the Summary of Findings. It appears to have been prepared without reading the recent decisions of federal courts and HUD's own ALJ decisions. The Summary is sloppy and internally inconsistent. This appears to be another example of lack of quality control in investigations and findings that deprive people with disabilities of full enforcement of their rights. To the extent you are interested in taking this matter to the U.S. Department of Housing and Urban Development to ask for a review, or to complain about the manner in which it was handled, I would be your active partner.

Advocates and professionals have long recognized the benefits of assistive animals for people with physical disabilities, including seeing eye dogs or hearing dogs who are trained to perform simple tasks such as carrying notes and alerting their owners to oncoming traffic or other environmental hazards. Recent research suggests that people with psychiatric disabilities can benefit significantly from assistive animals, too. Emotional support animals have been proven extremely effective at ameliorating the symptoms of these disabilities, such as depression and post-traumatic stress disorder, by providing therapeutic nurture and support.

The Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act protect the right of people with disabilities to keep emotional support animals, even when a landlord's policy

explicitly prohibits pets. Because emotional support and service animals are not "pets," but rather are considered to be more like assistive aids such as wheelchairs, the law will generally require the landlord to make an exception to its "no pet" policy so that a tenant with a disability can fully use and enjoy his or her dwelling. In most housing complexes, so long as the tenant has a letter or prescription from an appropriate professional, such as a therapist or physician, and meets the definition of a person with a disability, he or she is entitled to a reasonable accommodation that would allow an emotional support animal in the apartment.

Establishing that the support animal is necessary in order to use and enjoy the residence is critical. Courts have consistently held that a tenant requesting an emotional support animal as a reasonable accommodation must demonstrate a relationship between his or her ability to function and the companionship of the animal. *See, e.g., Majors v. Housing Authority of the County of Dekalb*, 652 F.2d 454 (5th Cir. 1981); *Housing Authority of the City of New London v. Tarrant*, 1997 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 14, 1997); *Whittier Terrace v. Hampshire*, 532 N.E.2d 712 (Mass. App. Ct. 1989); *Durkee v. Staszak*, 636 N.Y.S.2d 880 (N.Y.App.Div. 1996); *Crossroads Apartments v. LeBoo*, 578 N.Y.S.2d 1004 (City Court of Rochester, N.Y. 1991).

The Housing & Urban-Rural Recovery Act of 1983 protects the right of tenants in federally assisted housing for the elderly or persons with disabilities to have a pet, and further provides that the landlord is entitled to charge a deposit for that pet to cover any resulting damage to the property. However, if a pet is more properly characterized as a "service animal," the tenant should be exempt from the deposit. According to HUD's internal regulations:

> Service animals that assist persons with disabilities are considered to be auxiliary aids and are exempt from the pet policy and from the refundable pet deposit. Examples include guide dogs for persons with vision impairments, hearing dogs for people with hearing impairments, and emotional assistance animals for persons with chronic mental illness.

Occupancy Requirements of Subsidized Multifamily Housing Programs, HUD, No. 4350.3, 4-13(b) (1998).

Few courts have addressed the imposition of pet deposits on the vast majority of tenants who are not protected by the Housing and Urban-Rural Recovery Act. The only case to specifically consider the legality of charging a pet deposit for an assistive animal involved a service dog belonging to a tenant with a physical disability. *See HUD v. Purkett*,1990 WL 547183, FH-FL ¶ 19,372 (HUDALJ July 31, 1990), in which a HUD administrative law judge issued an injunction barring the owner and manager of an apartment complex from charging a tenant a deposit for her service dog. It could be argued that a landlord would be likewise prohibited from imposing such a deposit for an emotional support animal. Generally, under the FHA, ADA, and § 504, landlords are

required to incur some expenses in making reasonable accommodations, so long as those costs are not an undue financial burden. *See United States v. California Mobile Home Park Management Co.,* 29 F.3d 1413, 1416 (9th Cir. 1994), in which the Court of Appeals of the Ninth Circuit held that, "the history of the FHAA clearly establishes that Congress anticipated that landlords would have to shoulder certain costs involved [in making reasonable accommodations], so long as they are not unduly burdensome."

When a tenant requests an emotional support or other assistive animal, the landlord should not assume, without justification, that the animal will cause excessive, financially burdensome damage. In the event that a tenant's assistive animal does cause significant damage, that tenant should certainly be held financially liable. However, it would contravene the purpose of the statutory protections afforded people with disabilities to allow a landlord to charge a deposit at the outset, in the absence of any significant damage. Just as it would be inappropriate to charge a tenant who uses a wheelchair a deposit for potential damage to carpeting, it would be similarly imprudent to demand a deposit from a tenant who uses an assistive animal.

Turning to the two issues which appear to justify the "no cause" holding in this case, the underlying reasoning is troublesome for a number of reasons:

1. Although the "Jurisdiction" section indicates that "[t]he respondent(s) receive no federal funding," (Summary, p. 1), the penultimate paragraph (Summary, p. 5) says "[t]his high-rise receives federal funding through Section 8…" If that latter finding is true, then this matter must be analyzed for violation of Section 504.
2. With respect to whether the accommodation was "necessary," the investigation and Summary have ignored clear precedent, s*ee HUD v. Purkett*, *supra* and potentially binding statutory and regulatory requirements under 504 and, perhaps, the Housing & Urban-Rural Recovery Act of 1983, *see* Occupancy Requirements of Subsidized Multifamily Housing Programs, HUD, No. 4350.3, 4-13(b) (1998). governing the matter of deposits for service or emotional support animals.
3. The Summary suggests Complainant did not meet her burden of demonstrating necessity because her doctor did not initially recommend that she get an animal to assist with her mental impairment. The fact that her doctor treated her for some period of time before recommending the animal does not diminish the necessity of that animal. The Summary failed altogether to consider the very persuasive reasoning in *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) which establishes that: "[N]ecessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."
4. The Summary says: "The evidence showed that the cat is not an 'assistive animal' because of the nature [sic]that Complainant acquired the cat." (p. 5). So long as Complainant can meet that burden, it does not matter whether the idea for the animal was hers, her doctor's or that of another person. Once she had the cat, the ameliorative effect became clear to her doctor.
5. Finally, the Summary concludes: "Each of the two accommodations, the request to be allowed to keep the assistive animal and the request for waiver of a pet

deposit, were each found to be unreasonable. This would have created an undue financial burden on the Respondent, and would have cause [sic] an alteration in the fundamental nature of the program." The burden on a landlord to establish that a requested accommodation is not reasonable has been articulated in a number of Circuit Court cases. *See, e.g., Shapiro v. Cadman Towers*, 51 F.3d 328 (2d Cir. 1995) and *United States v. California Mobile Home Park*, 29 F.3d 1413 (9th Cir. 1993). Both clearly establish that a landlord may have to assume some financial cost in making accommodations for people with disabilities, and that each case must be assessed individually. The Summary is devoid of any description of the Respondent's assets, rental income stream or capital reserves. Without this, no adequate assessment can be made about whether granting either accommodation would impose an undue burden. The waiver of the "pet deposit" is not the equivalent of money out of the Respondent's pocket. Because of its refundable nature, it is only there as security against damage. Complainant did not request to be relieved of financial responsibility for damage the cat may do, but simply not to be required to pay a deposit, particularly in light of her very limited means. The fact that Respondent may be required to make an accommodation for Complainant does not, as Respondent claimed, require him to do it for other residents, and cannot establish undue burden. There is absolutely no discussion in the Summary of how granting the accommodations would work a fundamental alteration in Respondent's program.