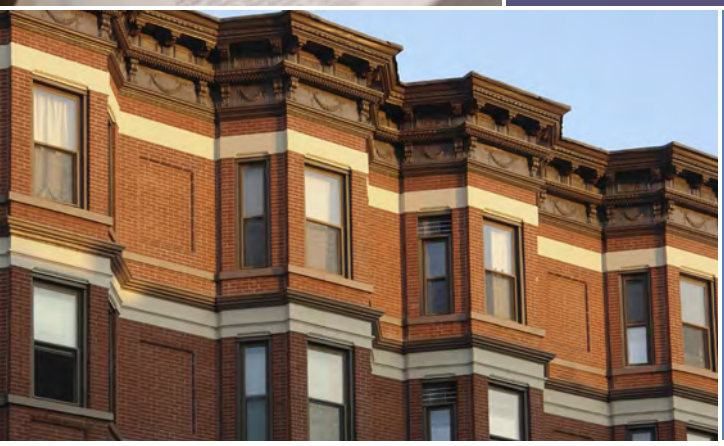
2010 National Edition
Prepared by Goldfarb & Lipman LLP

Between the Lines

A Question & Answer Guide on Legal Issues in Supportive Housing



Corporation for Supportive Housing

About Goldfarb & Lipman LLP

Goldfarb & Lipman is a California law firm with special strengths in affordable housing and redevelopment. For over thirty years, Goldfarb & Lipman has worked on a broad spectrum of affordable housing programs, including multifamily rental, public housing, cooperatives, condominium, single family, and mobile home park conversions, as well as a broad range of housing finance programs such as federal, state and local housing subsidy programs, tax credit syndications, and Section 8. In particular, Goldfarb & Lipman has significant experience advising clients who create supportive housing for people who are homeless, at risk of homelessness, or who have other special needs. Goldfarb & Lipman's work includes advising and training organizations on fair housing issues which may arise during program design, rent up, tenant selection, and occupancy. Goldfarb & Lipman advises counties, social services providers, and housing developers on the legal issues raised by California's Mental Health Services Act. In addition, they help clients navigate the laws, rules, and regulations governing public funds used in the financing of transitional and permanent housing developments. Their practice also extends to areas of general real estate, land use, tax, nonprofit corporate and public law which enhance our ability to provide comprehensive program and project-related services to nonprofit housing sponsors and public agencies. The firm also represents public agencies, nonprofit housing development, and management corporations in fair housing disputes.

About the Corporation for Supportive Housing

The Corporation for Supportive Housing (CSH) is a national nonprofit organization and community development financial institution that helps communities create permanent housing with services to prevent and end homelessness. Founded in 1991, CSH advances its mission by providing advocacy, expertise, leadership, and financial resources to make it easier to create and operate supportive housing. CSH seeks to help create an expanded supply of supportive housing for people, including single adults, families with children, and young adults, who have extremely low-incomes, who have disabling conditions, and/or face other significant challenges that place them at on-going risk of homelessness. For more information regarding CSH, please visit www.csh.org or contact CSH at info@csh.org.

This Guide does not provide and does not substitute for legal advice. While the Guide suggests reasonable approaches, the suggestions do not indicate that the approach is one that would be upheld by a court of law in an individual case. Furthermore, the approaches are based on laws, regulations, and interpretations at the time this publication was drafted in January 2010.

BETWEEN THE LINES: A QUESTION AND ANSWER GUIDE ON LEGAL ISSUES IN SUPPORTIVE HOUSING (NATIONAL EDITION)

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Chapter One: *Why Read This Guide?*

This National edition of *Between the Lines* is an update to the first edition published in 2001. *Between the Lines* offers insight into and information about some of the laws and regulations that govern supportive housing. The Guide clarifies how supportive housing providers can comply with laws governing their work, while realizing the goal of providing housing stability for as many people as possible.

For purposes of this Guide, supportive housing is defined as housing that is affordable and offers support services on- and off-site to formerly homeless people and others with special needs to help them maintain housing stability.

The rewards and risks of developing and operating supportive housing are significant. By understanding legal and regulatory issues, housing providers will be able to make more informed decisions about the implications of their policies and practices. This Guide provides information and analytical tools to make sound and reasonable assessments and decisions that promote tenant housing stability.

This Guide was designed primarily to assist supportive housing providers--groups that develop, own, manage, and provide services in supportive housing--and their attorneys. The purpose of *Between the Lines* is to help supportive housing providers make informed decisions related to their policies, practices, and legal positions. Therefore, it will be most useful for executive directors, program managers, administrators and other policy makers within organizations. *Between the Lines* will also be useful to government agency staff responsible for funding and monitoring supportive housing. It will be useful to tenants and advocates as well, although it has not been tailored to address disability rights or tenants' rights strategies.

This National edition of *Between the Lines* primarily covers federal law. Readers should be aware that laws in their states may change the analysis given in this Guide. Before applying any of the information contained in *Between the Lines*, readers should consult state and local laws.

SECTION A. THE DILEMMA OF FINDING THE "RIGHT ANSWER"

For decades, advocates have fought to establish laws to protect the individual rights of people traditionally discriminated against on the basis of, among other characteristics, race, color religion, national origin, sex, disability, and familial status. These laws essentially mandate *fair treatment of every person*. The concept of “fair treatment” for people with disabilities includes the requirement to “reasonably accommodate” people with disabilities. Reasonable accommodations promote integration of people with disabilities and, with certain exceptions, prohibit segregation or “separate but equal” treatment.

While fair housing laws promote equal treatment, other programs and laws intend to “level the playing field” by serving people who have low incomes, who have special needs, or who have traditionally been discriminated against. These programs affirmatively seek out and offer assistance to people based on demonstrated need and/or because the individuals fit within categories of people who traditionally face discrimination. The United States Department of Housing and Urban Development (HUD) administers many of these programs. HUD's programs focus on increasing and preserving affordable housing options,

and include McKinney-Vento Homeless Assistance Programs that target people who are homeless (many of whom may have disabilities), the Section 811 program for people with disabilities, the Section 202 program for people who are elderly, and the Housing Opportunities for Persons with AIDS program (HOPWA). Some states also offer programs to house individuals who historically have had a difficult time obtaining housing.

Contradictions exist among the laws that seek to establish equal protection and fair treatment and the laws that seek to assist people who are in need or who have experienced discrimination. In addition to contradictions among laws state legislatures and Congress pass, agencies set forth *rules and regulations* that lay out parameters of what can and cannot be done. Program administrators and agency attorneys also issue *interpretations* about day-to-day issues. Understanding the implications of different laws and funding programs is even more daunting when considering that different people from a single agency, or multiple agencies, are interpreting the same laws and regulations in different ways. Needless to say, providers sometimes have a hard time figuring out the "right answer."

This National edition of *Between the Lines* offers a framework to analyze specific issues and situations where housing providers may face conflicting legal requirements or program goals. It also highlights which federal laws and regulations are clear, and which remain vague. *Between the Lines* is designed to help housing providers make the best decisions possible in light of applicable laws and the goal of providing stable housing to people with the greatest barriers.

SECTION B. HOW *BETWEEN THE LINES* CAME ABOUT

As the number of homeless people has increased, federal and state governments, as well as private organizations, sought solutions to homelessness. Over the course of developing solutions to homelessness, supportive housing, which combines affordable housing with supportive services, has become a widely adopted model across the country based on data demonstrating that it is a cost-effective solution to ending homelessness among people experiencing chronic homelessness.

As these successful supportive housing programs have become more widespread, however, supportive housing providers face complicated questions about how to comply with applicable laws and regulations. Working with developers, operators and tenants to increase supportive housing opportunities for homeless people and people at risk of homelessness, the Corporation for Supportive Housing (CSH) realized that confusion about housing laws raises obstacles to tenant access to housing and housing stability, causes significant variation in the ways that housing providers operate, and opens some supportive housing providers up to considerable legal risks that can threaten the long-term viability of their housing programs.

CSH initially provided guidance to supportive housing providers by conducting training sessions designed to provide a forum for issues in supportive housing. The training sessions, however, often raised more questions than provided answers. In an effort to answer the questions repeatedly raised, CSH engaged the services of Debbie Greiff Consulting and the law firm of Goldfarb & Lipman to write the first edition of *Between the Lines*. An advisory committee comprised of representatives of HUD, and various other government regulatory agencies and supportive housing providers offered significant guidance in developing the approaches and articulating the issues in *Between the Lines*. Since the first edition of

Between the Lines was released, the field of supportive housing has continued to evolve. New funding programs have also emerged. To keep supportive housing providers up to date, CSH commissioned Goldfarb & Lipman LLP to update this National edition of *Between the Lines*.

SECTION C. HOW THE GUIDE CAN HELP WITH DECISION-MAKING

This Guide provides basic information needed to understand some of the legal and regulatory issues and risks involved in supportive housing. While some readers may browse through the questions and answers, others may want to thoroughly review the entire Guide, and yet others will pick up the Guide to find answers to a burning issue or problem at hand. The Guide will be most useful to providers when contemplating and beginning to design programs. It could also assist with complicated and confusing legal issues that arise while operating a supportive housing development. The Guide was not written to provide legal guidance for every situation, and, as such, the guidance may not always be of use to project developers and front-line property management and services staff attempting to obtain answers to specific immediate dilemmas. Nonetheless, staff members are encouraged to review *Between the Lines* to help identify issues and acquire some understanding of relevant laws. We advise front-line and agency staff to obtain legal counsel to address immediate legal issues. Legal counsel should also be consulted about state and local laws that may add additional complexity to the issues being addressed in this Guide.

Between the Lines provides background information and a framework for making good decisions. While written in a question and answer format, the Guide provides principles to use for decision-making purposes, rather than a single "right answer." Readers may need to review the answers to several questions in order to apply the information and underlying laws to particular development or operating situations.

Though some readers will use the Guide to find answers to specific legal issues, the answers provided in *Between the Lines* should be read only after reading Chapter Two: Legal Overview. Understanding the laws and regulations impacting specific issues is essential to understanding the risks of a decision. The Guide is not intended to make the reader an expert in the law; instead the Guide is intended to provide a solid conceptual framework of how laws are organized, the role of regulations and interpretations, and how to develop strategies to deal with inconsistencies among laws. Chapter Two: Legal Overview will provide context and background on federal law necessary to understand specific questions and answers.

This Guide does not provide and does not substitute for legal advice. While the Guide suggests reasonable approaches, the suggestions do not indicate that approach would be upheld by a court of law in an individual case. Furthermore, the approaches are based on federal laws, regulations, and interpretations at the time this publication was drafted in January 2010.

SECTION D. HOW THE GUIDE IS ORGANIZED

The Guide is organized chronologically from a supportive housing program concept to development, lease-up, and occupancy. It begins with program planning issues related to setting aside targeted units, screening criteria, marketing, tenant selection, and reasonable accommodation in tenant selection. It also discusses post-occupancy issues in the operation and management of housing, including licensing, service

provision and service participation requirements, clean and sober requirements, reasonable accommodation in occupancy, guest and overnight policies, and other issues. The last part focuses on some crucial land use and zoning concepts and issues involved in the siting of supportive housing.

Between the Lines also offers additional resources in its appendices. Appendix One is a listing of Federal and State Fair Housing Laws. Appendix Two provides summaries on other key categories of laws that apply to supportive housing, mainly pertaining to physical accessibility. Appendix Three provides a summary of Federal Fair Housing Laws. Appendix Four provides a primer on reading laws and statutes. Appendix Five contains DOJ/HUD joint statements on reasonable accommodations and modifications. Appendix Six includes citations and information about the Fair Housing Act and regulations. Appendix Seven provides legal definitions for "disability" and other related terms. Appendix Eight is a HUD memo on the use of medical marijuana. Appendix Nine shows how to obtain HUD information and understand federal citations. Appendix Ten is a glossary of commonly used legal terms.

We recognize that the material in this Guide is dense and will require time to digest. The information may save you time and money in the long run, and we hope it will improve access to quality supportive housing so that all people with chronic health challenges who are homeless or at risk of homelessness can live with stability, autonomy and dignity.

Chapter Two: *Legal Overview*

This Chapter describes how the law is organized and outlines the major federal fair housing laws affecting supportive housing projects. Other laws relevant to supportive housing are outlined in Appendix Two to this Guide. Both this Chapter and Appendix Two provide important background for the questions and answers included in Chapters Three through Six.

SECTION A. HOW THE LAW IS ORGANIZED

A law is a rule the government establishes that the government or a private party can enforce in accordance with a government-established process. The three key concepts for analyzing a law are duties, rights, and remedies.

When a law imposes a *duty* on a person (defined broadly to include a governmental actor, a private artificial person such as a corporation, and a natural living person), the law requires the person to act in a specified way or to refrain from acting in a specified way. For example, fair housing laws impose a duty on housing providers not to discriminate based on certain personal characteristics, and so require specific people to refrain from acting in a specified way.

When a law grants a *right* to a person, the law permits that person to obtain a certain benefit. One person's right to obtain a certain benefit usually matches another person's duty to provide that benefit. For example, fair housing laws grant individuals the right to obtain housing without discrimination based on certain personal characteristics. The flip side of that right is the duty imposed on housing providers not to discriminate based on those personal characteristics.

Rights also include rights to be free from governmental interference in a specified area. For example, the federal Constitution establishes a freedom from interference in religious practice. Stated differently, this freedom is a right to stop the government from interfering in an individual's religious practice. This constitutional right, freedom of religious practice, imposes a corresponding duty on the government not to interfere in one's religious practice.

The last key concept in analyzing laws is the law's mechanism to make victims whole and to punish wrongdoers, or the *remedy* imposed by the law. Remedies are sometimes the payment of monetary damages, and sometimes governmental orders for remedial actions to be undertaken. An example of money damages is that fair housing laws allow victims of illegal discrimination to recover money damages from a discriminating housing provider to compensate for the injury the violation caused. An example of a remedial order is an order to admit into a housing project a victim of illegal discrimination wrongfully excluded, in accordance with fair housing laws. The government administers the remedy process either through administrative agencies or courts.

Three levels of government exist in the United States: federal, state, and local. Governments at all three levels establish laws. The interaction among the different levels is discussed below in Question Two.

There are also three branches of government in the United States: legislative, executive, and judicial. All three branches establish laws: the legislative branch establishes statutes; the executive branch (through the different administrative departments of government) establishes regulations and executive orders, and enforces laws; and the judicial branch issues judicial decisions interpreting and enforcing the laws, also known as "case law." The judicial branch also is responsible for ensuring laws and regulations do not conflict with a constitutional protection or requirement. For example, a court can invalidate a federal statute adopted by Congress if the statute violates the United States Constitution. Each of the fifty states has a constitution that establishes the legal framework for all other laws adopted at the state level of government. Many cities also have city charters that are constitutions for the city.

Many of the laws affecting supportive housing are federal statutes that the United States Congress adopted to establish federal housing programs. These statutes require the United States Department of Housing and Urban Development (HUD) to administer the housing programs. As part of this program administration, HUD adopts regulations, publishes handbooks, and issues notices.

Between the Lines is a self-help tool for working with the specific laws that affect supportive housing. *The Guide is not a substitute for consulting a lawyer, nor is it a substitute for consulting the staff at the regulatory agencies involved in a project*. The Guide was drafted in February 2010, and is accurate as of that time. However, the laws described in this Guide are constantly changing and expanding, and this Guide does not address state and local laws. A lawyer can assist in finding changes to the law since publication of this Guide, finding relevant state and local laws, and applying the law to specific situations.

Question 1. What is the relationship between federal housing statutes, federal legislative history, HUD regulations, HUD handbooks, HUD notices, and HUD NOFAs?

When Congress passes a federal housing statute to adopt a housing program, the history of the passage process is reported in congressional committee reports, hearing transcripts, and similar archival materials collectively known as "legislative history." When an administrative agency interprets and implements a statute, or when a court interprets a statute, the agency or court will often use legislative history to determine what Congress intended when it passed the statute.

Federal statutes that adopt housing programs usually call for HUD to administer the program, and they usually also call for HUD to adopt regulations to clarify the details of the program in a manner consistent with the statute. If HUD's regulations are inconsistent with the authorizing statute, then a court may invalidate the regulations as outside of HUD's authority.

Statutes and HUD regulations are clearly "laws." Additional HUD publications sometimes state rules without rising to the level of enforceable laws. For example, HUD summarizes statutory and regulatory requirements by publishing handbooks. HUD also issues notices announcing specific HUD interpretations of the law or new developments in HUD programs. Finally, HUD issues Notices of Funding Availability ("NOFAs") to invite applications for individual projects to receive HUD program funds; NOFAs often include special program requirements that are not found elsewhere in HUD regulations or the applicable authorizing statute. While HUD handbooks, notices, and NOFAs are not officially "laws" they are given great weight by courts that interpret statutes and regulations because they represent official HUD

interpretations of the statutes and regulations. Additionally, the handbooks, notices, and NOFAs, are the primary reference used by HUD staff in implementing and interpreting statutes and regulations.

Question 2. What is the relationship between federal law, state law, and local law?

In any given situation, a housing provider may be subject to federal law alone, state law alone, local law alone, or any combination of these laws.

As a general rule (with several exceptions), a hierarchy exists among the three levels of government. The laws of the federal government generally take precedence over any conflicting laws of a state and the laws of a state generally take precedence over any conflicting laws of a local government. When higher-level laws are inconsistent with lower-level laws, the higher-level laws can "pre-empt" the lower-level laws, rendering the lower-level laws' inconsistencies invalid. However, pre-emption does not occur simply by the existence of inconsistencies. Instead, the higher-level government must intend to pre-empt lower-level laws.

An example of intended pre-emption is where a state statute limits local government rent control measures. If a city council passes a rent control ordinance that goes beyond what the state statute permits, the ordinance will be valid only to the extent permitted by the pre-empting state statute.

In contrast, federal fair housing laws do not usually provide for pre-emption of state fair housing laws if the state laws add protections or populations entitled to protection. Therefore, if a state's fair housing laws are more protective than the federal government's fair housing laws, housing providers must usually comply in all respects with both sets of fair housing laws.

A higher-level government's intention regarding pre-emption is sometimes stated in the text of an applicable law. Moreover, legislative history can evidence pre-emptive intent even where the applicable law is silent on pre-emption.

Question 3. What must be done when different laws have mutually inconsistent requirements?

Sometimes, one law imposes a set of requirements on an activity and another law imposes another set of requirements. In this situation, the provider must comply with both sets of requirements. A provider can often comply with all of the requirements by complying with the most restrictive requirements. For example, if one applicable law says that rents must not exceed 30% of household income and another applicable law says that rents must not exceed 25% of household income, then a provider can comply with both requirements by setting rents that do not exceed 25% of household income.

The "comply with the most restrictive requirements" solution, however, does not work where the different laws have requirements that are mutually inconsistent. For example, if one applicable law says that rents must not exceed 20% of household income, but another applicable law says that rents must be not be less than 25% of household income, then a provider cannot comply with both requirements. Where different laws governing an activity have requirements that are mutually inconsistent, the only possible courses of action are: (a) to obtain an interpretation of a requirement by an administrative agency that eliminates the

inconsistency; (b) to obtain a valid waiver of a requirement so that an inconsistent requirement no longer applies; (c) to eliminate use of a funding source that triggers one of the conflicting requirements; (d) to stop pursuing the activity; or (e) to continue pursuing the activity and fail to comply with an applicable law. Supportive housing providers sometimes face this dilemma because certain supportive housing activities trigger violations of one law in pursuit of applying another. For example, some supportive housing funding programs limit occupancy in funded projects to homeless single adults; however, fair housing laws prohibit discrimination in housing based on marital status or due to the presence of children in a family. If a provider rejects an applicant household because it is composed of a parent and a minor child in order to comply with funding regulations, the provider will violate the Fair Housing Act.

Question 4. How much discretion does HUD have in interpreting its regulations and waiving the requirements of its regulations?

HUD has much discretion in applying its regulations because courts generally defer to administrative agencies when they interpret their own regulations. However, courts are unlikely to uphold an interpretation that is inconsistent with the plain meaning of a regulation. Similarly, a court will not uphold an interpretation that is inconsistent with the authorizing statute under which the regulation was adopted.

When seeking a HUD interpretation of HUD regulations, it is helpful to review the following: (a) the precise language of the regulation; (b) the precise language of the authorizing statute under which the regulation was adopted; and (c) which branch of HUD is responsible for implementing the regulation (HUD representatives should be able to identify the appropriate branch).

HUD is sometimes able, upon request, to waive regulatory requirements. Just as HUD cannot interpret a regulation in a way that is inconsistent with the authorizing statute under which the regulation was adopted, HUD cannot waive requirements the authorizing statute required. Only a statutory amendment can alter such a requirement. In addition, a waiver is not enforceable unless in writing and signed by the person authorized to make this determination (in some cases, the Secretary of HUD).

Question 5. What is "case law" and how does it apply?

Case law is the body of written, court-published decisions of a particular jurisdiction. These decisions are called “opinions.” Court opinions are developed on a case-by-case basis. Although cases typically arise from a dispute between specific parties, they sometimes require a court to interpret the law in a way that affects more people than the parties to that particular lawsuit. When this happens, a court will issue a published opinion that has binding effect within the jurisdiction. These opinions, along with statutes, regulations, and local ordinances, comprise binding law of a given jurisdiction. A court's ability to establish binding precedence means court opinions are as important as legislative action.

Each state has its own court system, and the federal government also has a court system. Each court system is divided into trial courts, which are the first courts to consider a dispute, appeals courts, which consider appeals of trial court decisions, and courts of last resort, which consider appeals of appeals court decisions (but have wide discretion to decline to consider an appeal).

Federal courts generally have jurisdiction to interpret federal statutes and regulations and the United States Constitution, while state courts generally have jurisdiction to consider issues involving state and local laws. However, exceptions to these general rules exist.

The federal trial courts are called "district" courts, and each district court has jurisdiction over a small region of the country (known as a district). Individual states have one or more federal districts, depending on their population.

What state trial courts are called depends on the state. Trial courts are often called "superior" courts. In general, trial court decisions do not bind other trial courts, although rules may vary from state to state.

The federal appeals courts are called "Circuit Courts of Appeals," and each circuit court has jurisdiction over a region consisting of several districts (known as a circuit). Federal district courts must follow the precedents of federal circuit court decisions in that circuit, but federal district courts in other federal circuits are not required to follow these decisions. Furthermore, state courts are not required to adopt federal circuit court decisions, even if within the federal circuit court's jurisdiction.

What state appeals courts are called depends on the state. In California, for example, the appeals court is called the "Court of Appeal." The jurisdiction of a state appeals court covers the territories of multiple trial courts. All of the state trial courts within an appeals court's jurisdiction must follow that appeals court's decisions.

What state courts of last resort are called again depends on the state. In California, for example, the court of last resort is called the California Supreme Court. The decisions of state courts of last resort bind all lower level courts in the state, but do not bind any federal court.

The federal court of last resort is the United States Supreme Court, located in Washington, DC. When the United States Supreme Court issues a decision, all state and federal courts must follow the Supreme Court decision. However, state courts remain free to interpret and apply the law of their own states as long as the courts do not violate a decision of the United States Supreme Court.

In general, appellate decisions have greater persuasive force than trial court decisions. Decisions designated for publication likewise have greater persuasive force than decisions that are not published. Courts often consider non-binding decisions for guidance.

SECTION B. FAIR HOUSING LAWS

Fair housing law is a vast area of law involving the United States Constitution, executive orders, federal statutes and regulations, the constitutions and fair housing laws of individual states, local anti-discrimination ordinances, and a myriad of federal and state court decisions interpreting these requirements. Most fair housing law is designed to prevent housing providers from discriminating against protected groups of people. Supportive housing providers must negotiate, interpret, and comply with this body of law in order to serve any subgroup of people (like persons with disabilities or persons in particular age groups). This Section outlines the major provisions of federal fair housing law. Individual state laws are not discussed in

this National edition of *Between the Lines*, but readers should determine whether their state has any laws that may impact their decisions.

Question 1. What is the Equal Protection Clause of the 14th Amendment to the United States Constitution?

The Equal Protection Clause of the 14th Amendment prohibits the government from denying to any person "the equal protection of the laws." The Equal Protection Clause applies to all "state action," which has been held to include actions by private parties receiving government funding, such as owners of housing receiving financial assistance from the government.

If a governmental agency or a private party acting in concert with a governmental agency (such as some owners of subsidized housing) creates any type of classification that is "suspect" (e.g., tenant selection based on race or national origin) or which violates a "fundamental right" (like the right to vote or the right to travel), and such action is challenged in court, the court will subject that action to "strict scrutiny." For example, a public assistance program that is made available only to people of a particular race or national origin will be subject to strict scrutiny. A classification can withstand strict scrutiny only if it is required to further a "compelling governmental interest" (such as national security) and if there is no less restrictive alternative means for the state to achieve its objectives. The strict scrutiny test is a difficult standard to satisfy.

Some classifications are "quasi-suspect" (including gender, non-citizen status, or illegitimacy) and can be justified if needed to further an "important governmental interest," which is a lesser standard than a "compelling governmental interest." For example, courts may find the governmental interest in conserving limited public resources to be an "important government interest," justifying programs that are available to citizens but not to noncitizens (a quasi-suspect class); however, conserving limited public resources would not rise to the level of a "compelling governmental interest" to justify a program that is available to one racial group (a suspect class) but not to another.

Other state actions that distinguish between different groups of people but do not affect a suspect classification or a fundamental right need only be justified by a "rational basis," which means that the action need only be reasonably related to furthering a legitimate state interest. The rational basis test is a relatively easy standard for a housing provider to meet. For example, a welfare program that is available only to homeless people can readily be shown to be reasonably related to the legitimate governmental interest of ending homelessness.

Anyone who files a complaint alleging violation of the Equal Protection Clause must prove the state intended to discriminate and that intent caused the discriminatory effect. A state action does not violate the Equal Protection Clause simply because it results in a discriminatory impact on different groups of people, although other fair housing laws prohibit discriminatory impact, even if the state (or other party perpetuating the discrimination) did not intend to discriminate (see Question Two of this Section).

Section Five of the 14th Amendment grants power to Congress to legislate against discriminatory conduct. It is pursuant to this Section that Congress has adopted many civil rights laws, including the Fair Housing Act.

Question 2. What are the Fair Housing Act and the Fair Housing Act Amendments?

The Fair Housing Act (42 U.S.C. 3601, *et seq.*) - also known as Title VIII of the Civil Rights Act of 1968 - prohibits discrimination in the sale, rental, financing, or advertising of housing on the basis of race, color, religion, or national origin. Gender was added as a protected classification in 1974. The Fair Housing Act Amendments of 1988 added handicap (disability) and familial status and significantly strengthened enforcement mechanisms. The "familial status" provision prohibits discrimination against pregnant women and families with children ("children" means persons under the age of 18 who reside with a parent, guardian, or other person with written permission of the parent or guardian). Housing for seniors that meets certain criteria is exempt from the Act's prohibition of discrimination against families with children, as discussed in more detail in Chapter Three: Serving Designated Populations.

The Fair Housing Act Amendments also impose an affirmative duty on all housing providers to provide "reasonable accommodation" to persons with disabilities. This duty requires a housing provider to make changes to its rules, policies, and procedures to allow persons with disabilities equal access to housing. A provider, however, is not required to undergo undue financial and administrative hardship or make a fundamental alteration in the nature of its program. As examples, courts have found that requiring installation of an elevator or requiring a landlord to accept a Section 8 voucher each constitutes an unreasonable financial and administrative burden. The duty to provide reasonable accommodation also requires providers to allow tenants with disabilities to make reasonable, necessary physical modifications to their units at the tenant's expense.[1]

The Fair Housing Act also imposes accessibility/adaptability requirements on the new construction or rehabilitation of all residential buildings of four or more units first occupied after March 13, 1991.[2] (See Appendix Two, Summary of Physical Accessibility and Other Supportive Housing Laws).

The Fair Housing Act applies to projects receiving public funds, but also reaches the private housing market. Government funding is not required for the Act to apply.

A policy or law that discriminates against a class of persons protected by the Fair Housing Act "on its face" can violate the Fair Housing Act ("facial discrimination"). For example, a requirement that limits the number of housing developments for people with disabilities in a particular neighborhood is facially discriminatory.

Different courts have produced varying interpretations of the Fair Housing Act. For example, the federal Court of Appeals for the Ninth Circuit (which covers the western states) may uphold a facially discriminatory law or policy if the law or policy achieves either of the following: (1) the policy benefits the protected class of people; or (2) the requirement responds to legitimate safety concerns related to the people affected that are not based on stereotypes.[3] However, a facially discriminatory policy usually will not withstand a court's scrutiny and other courts may interpret the Fair Housing Act differently.

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[1] 42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 100.203.
[2] 42 U.S.C. § 3604(f)(3)(C); 24 C.F.R. § 100.205.
[3] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

Even when a policy does not on its face discriminate against a protected class, a plaintiff may be able to prove that an entity (government or private) violated the Fair Housing Act by providing direct or circumstantial evidence of discriminatory intent or by showing that the defendant treated members of a protected class differently from people who were not members of the protected class, also known as "disparate treatment." For instance, if a housing provider rejects applicants for housing, the applicants may be able to show disparate treatment by demonstrating that they are members of a class protected by the Fair Housing Act, that they applied for and were qualified to obtain the housing they were rejected from, and that vacancies remained. If a plaintiff proves disparate treatment, the housing provider must then articulate a legitimate, nondiscriminatory reason for rejecting the applicants. The applicants may still prevail by showing, by a preponderance of the evidence, that the reason the housing provider offered is a mere pretext for discrimination.[4]

In addition, a protected class of persons may prove that a policy or practice violates the Fair Housing Act if that policy or practice results in a "disparate impact" on the protected class of persons, even when the policy or practice is not facially discriminatory and does not include disparate treatment. A disparate impact occurs when there are outwardly neutral practices that have a significantly adverse or disproportionate impact on a class of persons the Fair Housing Act protects. For example, a policy to give preference in affordable housing developments to persons who already live in the community may lead to the exclusion of persons of a particular race or ethnicity because the existing community is already predominately composed of one particular race or ethnicity. Courts often require a plaintiff to present statistical evidence to show disparate impact and frequently find insufficient evidence to prove a disparate impact occurred. If a plaintiff proves disparate impact, the housing provider then has the burden of justifying the practice that caused the disparate impact. Different courts describe the standard a housing provider must meet in different ways, but generally a private housing provider must show the practice fulfills a "business necessity." If the plaintiff alleges that a policy or practice perpetuates a disparate impact, the housing provider may be able to justify the practice by showing "legitimate, non-discriminatory reasons"[5] justified the policy. Some state laws may place a greater burden on a housing provider.

The Fair Housing Act applies to zoning and land use decisions by local governments that restrict access to housing by people with disabilities and members of other protected groups. The Fair Housing Act prohibits zoning for discriminatory purposes, and zoning actions that have a disparate impact require additional justification. The Fair Housing Act also requires local governments to grant reasonable accommodations to disabled persons, for example, by granting an exception to local zoning that would allow a group home to locate in an area where the facility normally would not meet a zoning requirement.

HUD has issued regulations implementing the Fair Housing Act, which are located at 24 CFR Part 100. These regulations include detailed provisions related to disability discrimination. All housing providers should regularly review the regulations. A copy is included as Appendix Six to this Guide.

A person who has been discriminated against under the Fair Housing Act can recover attorneys' fees and punitive damages, as well as other relief.

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[4] Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008); *See* Cmty. House v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).
[5] Pfaff v. U.S. Dep't of Housing & Urban Dev., 88 F.3d 739 (9th Cir. 1996); *see also* Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008); Affordable Housing Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006).

Question 3. What is Section 504 of the Rehabilitation Act of 1973?

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) prohibits discrimination on the basis of disability in programs receiving federal funding, including Community Development Block Grants, HOME, HOPWA, Section 202, Section 811, Section 8, and McKinney-Vento Act programs. Under Section 504, federal funding does not currently include low income housing tax credits or tax-exempt bond financing. Section 504 was the first federal legislation to recognize the rights of persons with disabilities to be free from discrimination, and was widely hailed as major civil rights legislation when adopted in 1973. Section 504 and the HUD regulations that implement it reflect a strongly "integrationist" mandate: persons with disabilities, to the greatest extent possible, are to be integrated into the mainstream of society and not isolated into separate "disabled-only" institutions.

HUD has issued implementing regulations at 24 CFR Part 8 that apply to housing programs receiving federal financial assistance, whether publicly or privately owned. HUD's regulations establish accessibility requirements for newly constructed or rehabilitated housing and require access for people with disabilities to non-housing programs operated with federal funds, the integration of people with disabilities, and auxiliary aids and services necessary for communication with people with disabilities.

Section 504 states that a recipient of federal financial assistance may not discriminate on the basis of disability in providing housing and services in its programs or activities.[6] Recipients of federal funds may not deny a qualified person with a disability the opportunity to participate in or benefit from housing or services provided. Such discrimination occurs when a recipient's facilities are inaccessible or unusable by individuals with disabilities, thus denying them access to the housing or services provided.[7] Consequently, Section 504 requires that a specific percentage of newly constructed or substantially rehabilitated units must be accessible, if federal funding helps pay for the project. (See Appendix Two, Summary of Physical Accessibility and Other Supportive Housing Laws).

Section 504 generally prohibits a project receiving federal funds from limiting occupancy to people with disabilities or with one particular type of disability unless such a restriction is authorized by a federal statute or executive order that applies to the project. For example, a federal statute authorizes a project receiving funding under the Section 811 program to serve people with disabilities or certain classes of disabilities. Similarly, a federal statute authorizes a project receiving funding under the Housing Opportunities for Persons with AIDS (HOPWA) program to serve people with HIV/AIDS exclusively. These programs reflect congressional authorization to discriminate in favor of people with specific disabilities. In addition, the Section 504 regulations specifically permit distinctions based on disabilities if such distinctions are necessary to provide persons with disabilities with equal access to housing. This latter exception, in limited instances, allows providers to restrict units to persons with particular disabilities even though no specific federal statute or executive order authorizes such restrictions.

For housing providers receiving federal funds, Section 504 also imposes a more demanding duty to provide reasonable accommodations than the Fair Housing Act imposes. Section 504 requires the owner to pay for

[6] 24 C.F.R § 8.4.
[7] 24 C.F.R. § 8.20.

physical modifications to a disabled tenant's unit under certain circumstances. The Fair Housing Act only requires the owner to permit the tenant to make physical changes at the tenant's cost.

The Section 504 regulations further state that housing providers must operate housing programs or activities to be readily accessible to persons with disabilities when viewed *in their entirety*. Housing providers must make non-substantial alterations to the maximum extent feasible. Section 504 does not require a recipient of federal funding to make each of its *existing* facilities accessible or undertake alterations that would result in a fundamental alteration in the nature of its program or in an undue financial and administrative burden.[8]

Because Section 504 was the first major federal statute to prohibit discrimination against people with disabilities, many court rulings on disability discrimination include interpretations of Section 504. Many of the definitions in Section 504 are included in the Fair Housing Act Amendments and the Americans with Disabilities Act, and court interpretations of Section 504 are useful in interpreting the Fair Housing Act and the Americans with Disabilities Act.

Question 4. What is the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) (42 U.S.C. 12101, *et seq.*), adopted in 1990 and amended in 2008, gives broad federal civil rights protection to people with disabilities. The ADA's provisions extend far beyond activities of the federal government or programs receiving federal funds. Title II and Title III of the ADA are of greatest relevance to supportive housing providers. The ADA has three other parts, or titles, that are not very relevant to supportive housing providers: Title I of the ADA prohibits discrimination against individuals with a disability in connection with employment; Title IV addresses telecommunications issues; and Title V includes miscellaneous provisions.

Title II of the ADA prohibits discrimination against individuals with disabilities by state and local public entities (including all of their departments or agencies) in all government programs and services, regardless of whether the government program receives federal funding. Under Title II, discrimination against a person with a disability occurs when a public entity's facilities are inaccessible. A public entity must operate its services, programs and activities so that, when viewed in their entirety, they are readily accessible. Title II requires public facilities to be designed, constructed and altered (at the expense of the public entity) in compliance with certain accessibility standards. In addition, Title II requires reasonable modification to rules, policies, and procedures to allow persons with disabilities equal access to public programs, unless the modifications would fundamentally alter the nature of the affected service, program, or activity.

The application of Title II to a private entity (like a nonprofit housing provider) that receives state or local funds under contract with a public entity is an unclear and evolving issue. While private entities are not directly subject to Title II, public entities must ensure that a facility receiving public funds is operated in a manner that enables the public entity to meet its Title II obligations. Therefore, many government funders of supportive housing require, in the loan or grant documents governing the funding, "compliance with the ADA." Under certain circumstances, "compliance with the ADA" means that the private recipient of government funds must act as though it is a government entity for ADA purposes. For example, one

[8] 24 C.F.R. §§ 8.21 and 8.24.

federal court found that a private housing development constructed with significant local redevelopment agency assistance should have been constructed in compliance with Title II accessibility requirements.[9] On the other hand, a federal circuit court found (in an unpublished opinion) that a private clinic receiving federal grant monies was not subject to Title II. Consequently, the line between a private entity that receives government funds that must act as though it is a government entity and a private entity that receives government funds but has no duty to act as though a government entity is not clear under the ADA. Given this lack of clarity, a housing provider that is newly constructing or rehabilitating a building with public agency involvement should comply with Title II and act as though it is a government entity (Appendix Two, Summary of Physical Accessibility and Other Supportive Housing Laws, includes a detailed discussion of the accessibility requirements imposed by the ADA).

Title III of the ADA prohibits disability-based discrimination in commercial establishments. It requires places of "public accommodation" and commercial facilities to be designed, constructed and altered in compliance with certain accessibility standards. "Public accommodation" includes the following privately-owned and run activities, so long as their operation affects commerce: hotels and other places of lodging except owner-occupied buildings of fewer than six rooms; restaurants and bars; movie theaters and other places of exhibition or entertainment; auditoriums and other places of public gathering; grocery stores and other sales establishments; laundromats, banks, professional offices, and other service establishments; stations used for public transportation; museums and other places of public displays; parks, zoos, and other places of recreation; nursery schools and other places of education; day care centers, homeless shelters, and other social service centers; and gyms, golf courses, and other places of exercise or recreation.

"Public accommodation" under Title III does not include the portions of privately owned rental housing used exclusively as residences, but does include areas within such facilities that are available to the general public, such as rental offices and community rooms available to non-residents for rent or use. Social service programs a housing provider operates that are available to non-residents of the provider's facility would be considered a public accommodation subject to Title III of the ADA. However, even if the provider offers social services to residents only, if offering intense services to residents, the services portion of the premises may be regarded as a social service center (which *is* a public accommodation) and therefore would be subject to Title III of the ADA. No clear guidance exists on what level of services is significant enough to cause resident-only services to be considered a "public accommodation."

Like Title II, Title III of the ADA requires a provider of a public accommodation to make reasonable modifications to its rules, policies, and procedures to allow persons with disabilities equal access to the public accommodation, unless the modification would fundamentally alter the nature of the provider's facilities or services. The owner must remove all architectural barriers in existing facilities at the owner's cost where such removal is readily achievable (that is, easily accomplished and able to be carried out without much difficulty). Examples of providing "readily achievable" modifications or additions include adding grab bars, providing a ramp to bypass a few steps, and lowering telephones. If a provider cannot remove barriers to accessibility in a readily achievable manner, then the provider must offer services through alternative methods, such as relocating activities to accessible locations or providing services to individuals in their homes.

[9] Independent Housing Services v. Fillmore Center Associates, 840 F. Supp. 1328 (N.D. Cal. 1993).

The U.S. Department of Justice issued regulations implementing Title II and Title III of the ADA. The Title II regulations are published at 24 CFR Part 35 and the Title III regulations are published at 24 CFR Part 36.

The United States Department of Justice Civil Rights Division also publishes Technical Assistance Manuals that are useful in understanding the application of Title II and Title III of the ADA (and that are available at *http://www.usdoj.gov/crt/ada*).

Question 5. What are Fair Housing Executive Orders?

Before Congress passed the major civil rights laws in the 1960s, discrimination was prohibited in many federal programs by order of the President. Those orders are called "executive orders." Affected federal agencies and any public or private entity receiving assistance from an affected federal agency must comply with an executive order. These include Executive Order No. 11063, issued by President Kennedy in 1962, prohibiting discrimination based on race, religion, or national origin in housing owned, operated or assisted by the federal government; Executive Order No. 12259, issued by President Carter in 1980, extending President Kennedy's executive order to sex-based discrimination; Executive Order No. 12892, issued by President Clinton in 1994, extending the order to disability and familial status and creating a cabinet-level Fair Housing Council; Executive Order No. 12898, issued by President Clinton in 1994, addressing governmental activities that affect human health or the environment and have a disparate impact on minority or low income populations; Executive Order No. 13166, issued by President Clinton in 2000, improving access to fair housing protections for persons with limited English proficiency; and Executive Order No. 13217, issued by President Bush in 2001, requiring that various federal agencies revise their policies to improve the availability of non-institutional community-based living arrangements for persons with disabilities.

Question 6. What are other housing discrimination ordinances?

Some states, cities, and counties have passed laws or adopted local ordinances prohibiting discrimination in housing, which include protections for groups not specifically protected by federal housing law (See Appendix One for a partial listing of state anti-discrimination laws). For example, some local ordinances prohibit discrimination based on gender identity, physical appearance, or weight. Additional interplay between these non-federal protections may exist. The California Fair Employment and Housing Act, for example, pre-empts local jurisdictions from protecting additional groups not named in the California anti-discrimination legislation. Therefore, anti-discrimination protections for these additional groups of people are probably not enforceable against private owners of housing who are not receiving financial assistance from the local government. If a local government is providing financial assistance to a project, the local government will have additional authority to regulate the operation of the project and, in this context, may be able to impose non-discrimination requirements that protect additional classes of people who are not specifically protected under state law.

Chapter Three: *Serving Designated Populations*

SECTION A. INTRODUCTION

Many supportive housing providers seek to serve a designated special needs population, such as people who have been homeless, people with disabilities, or people with substance use problems. Chapter Three discusses the legal issues related to limiting tenancy to a specific group of people.

Before restricting housing to a specific population, housing providers should ask the following questions: (1) What funding is financing the project and does the funding source prohibit or authorize reserving the housing for a specific population of tenants? and (2) What fair housing laws apply to this project?

The federal Fair Housing Act prohibits discrimination in the renting, selling, and advertising of dwelling units on the basis of race, color, religion, sex, familial status, national origin, or disability ("handicap"). The Fair Housing Act also provides that it is unlawful to "make, print, publish or cause to be made, printed or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation, or discrimination."[10] State fair housing laws may expand on these anti-discrimination provisions.

Section 504 of the Rehabilitation Act of 1973 prohibits any program receiving federal funding from discriminating against people with disabilities. Generally, Section 504 also prohibits reserving housing for people with disabilities, or people with particular disabilities, unless authorized by federal statute or an executive order. However, exceptions exist to the Section 504 prohibition on reserving housing for people with disabilities which are discussed in the succeeding questions.

Finally, the 14th Amendment of the U.S. Constitution prohibits discriminatory "state action" which includes the action of private housing providers receiving public funds. Under the 14th Amendment, a compelling state interest is required to justify discrimination against a protected group and all distinctions between groups of people made by governmental programs must at least have a rational basis to be constitutional.

Federal anti-discrimination laws explicitly prohibit discrimination against certain groups of people ("protected" classes or groups). Case law supports an interpretation of these laws that allows housing providers to establish reasonable criteria for occupancy, as long as the criteria are rationally related to the services performed and the facilities provided. In other words, if a provider limits occupancy to a designated group for a good reason, the limitation may avoid running afoul of fair housing laws. Although housing providers may establish reasonable criteria, no laws specify acceptable criteria. Courts analyze each situation based on the facts involved.

For example, a housing provider may design and develop housing for people with chemical sensitivities (which is considered to be a disability) by installing air filters and limiting the use of chemicals and other materials in the construction process. Limiting occupancy in that housing to people with chemical

[10] 42 U.S.C. § 3601(c); California Government Code §12955(c).

sensitivities would be reasonable and legal under the Fair Housing Act. In contrast, if a provider restricted occupancy to people with multiple sclerosis, yet the housing did not include any special accessibility features or programs designed to serve this population, the restriction would not be reasonable under the Fair Housing Act and could subject the provider to liability for housing discrimination. If either of these projects received federal funding, Section 504 would not permit a limitation on occupancy to people with a particular disability unless either a federal statute or an executive order specifically authorized such limitation or if other special circumstances exist. In addition certain state funded projects may require state or local legislative or programmatic authority (see Question Three in Section B of this Chapter).

Even if a housing provider has a reasonable basis for limiting the housing to a specific population, the provider may be violating fair housing laws if, as a consequence a population is excluded from the housing disproportionately. Restrictions which are not intended to discriminate against a protected class of people, but that result in exclusion of a protected class of people, are considered to have a "disparate impact," which can be considered a violation of fair housing laws. Thus, for example, if the housing provider establishes a program that does not intentionally discriminate against a certain ethnic group, but results in the exclusion of the vast majority of the members of that ethnic group from the housing, the program requirements have a disparate impact on that ethnic group and therefore may be illegally discriminatory. Disparate impact claims usually require statistical data demonstrating a disparate impact for a court to find discrimination unlawful.

Determining whether an occupancy restriction with a disparate impact constitutes illegal discrimination is not easy. In fact, federal courts have applied different standards in disparate impact cases. Although the federal courts, in interpreting the federal Fair Housing Act, use a variety of tests to determine whether a restriction or preference with a disparate impact is illegally discriminatory, most of the tests boil down to whether the housing provider has a business necessity for the exclusionary rules and whether the practice that results in the disparate impact advances that business necessity.

Housing providers should consider whether occupancy restrictions that may result in a disparate impact will further a business purpose. For example, if a non-profit's mission is to provide services to people with a mental illness, housing that is restricted to this population and that provides services to assist people with mental illness would further the organization's business purpose and should meet the business necessity requirements, even if the restriction excludes people with other types of disabilities or disproportionately affects members of one racial group over another. Some federal courts require a provider to prove that the challenged practice is the least discriminatory alternative to meet the purported business necessity. No reported cases involving occupancy limitations to a special needs population (or on the "business necessity" of nonprofit organizations) exist, so courts have not yet provided a definitive conclusion about whether such an occupancy restriction would survive a challenge.

SECTION B. RESERVING HOUSING FOR PEOPLE WITH DISABILITIES

Question 1. May housing be reserved for people with disabilities?

Housing may be reserved for people with disabilities. However, if a project receives federal funds it may be limited to people with disabilities only in certain circumstances. ***[Additional analysis is needed and is discussed in Question 3 of this Section.]***

If a project does not receive federal funding, the Fair Housing Act, as well as the state and local fair housing laws, govern whether a housing provider may reserve housing for people with disabilities. If a state or local governmental housing program is involved Title II of the Americans with Disabilities Act will apply.

The Fair Housing Act, in a section separate from other anti-discrimination provisions, prohibits discrimination against disabled people. This separation of disability-based discrimination from other types of discrimination in the Act, as well as the language of the section itself, emphasizes that, with respect to disability-based discrimination, prohibited acts include discrimination *against* persons with disabilities, rather than all discrimination in favor or against persons with disabilities. The preamble to the Fair Housing Act reinforces this interpretation, as it specifically states that a housing provider "may lawfully restrict occupancy to persons with handicaps."[11]

Additionally, the federal regulations implementing the federal Fair Housing Act imply that designating units or entire developments for people with disabilities or particular types of disabilities is permissible. The regulations allow housing providers to ask an applicant questions to determine whether that applicant meets the requirements for a disabled unit, including questions regarding whether the applicant has a particular type of disability if the unit or development is targeted to people with that type of disability. The Fair Housing Act also provides people with disabilities the right to receive reasonable accommodations that may be necessary for these individuals to enjoy the full benefits of the housing, further evidence that Fair Housing Act provisions regarding disability-based discrimination were not intended to negate the responsibility of housing providers to meet the needs of people with disabilities.

Under Title II of the ADA, a public entity is authorized to provide services, benefits or advantages to persons with disabilities or people with specific disabilities, if a federal, state or local law or program authorizes such action, or if such action is necessary to provide people with disabilities, or people with a particular type of disability, with benefits or services that are as effective as those provided to others.[12] If a public entity provides housing reserved for persons with disabilities or for persons with a particular disability, the public entity should confirm that a federal, state or local law or program permits the reservation of housing units for people with disabilities. In the alternative, the public entity should make findings that, in fact, people with the targeted disability face barriers that inhibit equal access to housing and that reserving units for people with that specific disability is necessary to offer equal access to housing.

[11] Preamble II 24 C.F.R Chapter One, Subchapter A, Appendix I, 54 Fed. Reg. § 3246 (Jan. 23, 1989).
[12] 28 C.F.R. § 35.130(c); Appendix A 29 C.F.R. Chapter One, page 487 (7-1-99 Edition); 28 C.F.R. § 35.130(b)(iv).

When designing housing for persons with disabilities, the ADA promotes integration of persons with disabilities. In addition, while the ADA permits separate benefits for persons with disabilities, the separate benefits are only permitted so long as people with disabilities are not then excluded from benefits or services available to the general public.[13]

If a project receives federal financial assistance, Section 504 of the Rehabilitation Act of 1973 applies. As discussed in detail in Question Three of this Section, Section 504 permits federally funded housing to be limited to disabled persons or people with a specific type of disability in certain instances. Low income housing tax credits or loans of the proceeds of tax-exempt bonds are currently not considered federal financial assistance for Section 504 purposes; therefore Section 504 will not affect projects using these programs (and no other federal funds).[14]

Supportive housing providers should also consult with counsel knowledgeable about state and local fair housing laws to determine if these laws may impose additional restrictions.

Question 2. May a provider reserve its housing for people with one particular disability if the development has not received any federal financial assistance?

Generally, yes, so long as the restrictions are reasonable and not arbitrary and the housing provider provides adequate justification for restrictions resulting in a disparate impact on protected classes of people.

Although the Fair Housing Act does not specify whether a housing provider could limit housing to people with a certain type of disability, it allows providers to ask applicants questions about whether an applicant experiences a qualifying disability. This permitted inquiry implies that the Fair Housing Act allows housing providers to limit housing to people experiencing a particular category of disability. Title II of the ADA should permit housing providers to serve people with a particular type of disability, but housing providers located in states with additional anti-discrimination statutes and who are public entities or are operating housing financed with state funding should ensure that a state or local program authorizes or supports the set aside. In the alternative, the public entity should be prepared to make the case that setting aside units for people with that particular type of disability is necessary to afford individuals with that type of disability equal access to housing (see Question One of this Section for further discussion of this issue).

In determining whether housing can be limited to a population with a specific disability, such as people with substance abuse disorders or people with mental disabilities, the housing provider will need to analyze whether that population has a specific set of needs or symptoms that require the services or physical environment the provider is offering. If people with the specific disability present unique characteristics that require particular services or a particular environment, then restricting units or targeting units to people with that particular class of disability should survive a discrimination claim. This analysis applies regardless of the type of disability at issue, although the housing provider should ensure that the targeted population is in fact considered disabled under the Fair Housing Act (see Appendix Seven for definitions of disabled or disability).

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[13] Easley by Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994).
[14] 29 U.S.C. § 794(a).

The housing providers or the public entity restricting the housing should determine whether the action unintentionally results in an exclusion of another protected class of people. For example, if the units are restricted to people with a specific disability, and that disability primarily occurs in Caucasians, the restriction may result in the exclusion of non-Caucasians, leaving the housing provider or public entity vulnerable to a disparate impact claim. If the restriction results in a disparate impact, the provider must be able to justify the restriction by showing a legitimate business necessity, and that the business necessity will be advanced by the restriction. For instance, if the provider's purpose is to offer services to persons with a particular disability and its services and physical facilities are tailored to persons with that disability, the housing provider has a business necessity for restricting occupancy to persons with that disability, and the restriction advances the purpose of providing services for people with that disability.

Question 3. May a provider reserve its housing for people with disabilities or with one particular disability if the development receives federal financial assistance?

In some circumstances, federally-financed housing may be reserved for people with disabilities or with a specific disability.

Housing financed with federal funds is subject to other requirements in addition to the analysis set forth in Questions One and Two of this Section. Section 504 of the Rehabilitation Act of 1973 applies to all federally-funded housing and imposes additional fair housing requirements. With some exceptions, Section 504 does not allow housing to be restricted to people with disabilities or to people with specific disabilities.

Several federal and state funding programs provide funding for housing with a requirement that the project sponsor restrict occupancy to persons with disabilities generally or to people with a specific type of disability. If a housing provider is mixing federal and state funding, the provider should not necessarily assume that a restriction in favor of persons with disabilities is legal simply because a state or local funding source requires the restriction. If a project receives federal funding *and* state or local government funding, limiting occupancy to disabled people or to one category of disabled people must still comply with the requirements of Section 504.

Section 504 clearly permits housing providers to target or restrict units to disabled individuals and to people with specific types of disabilities in federally-financed housing, if a federal statute or executive order authorizes or requires that targeting or restriction. Examples of federal statutes authorizing or requiring restricting housing to disabled people or to people with a particular type of disability include the statutes that created the Housing Opportunities for Persons with AIDS (HOPWA) program, the Section 811 program and the Shelter Plus Care program.[15] HOPWA targets assistance to people with HIV/AIDS and their families. Thus, under this program, housing providers are required to limit assistance to people with

[15] The Homeless Emergency Assistance and Rapid Transition to Housing Act (the HEARTH Act, described in Question Three in Section C below), signed into law on May 20, 2009, combines the Shelter Plus Care, SHP and Moderate Rehabilitation programs into a single "Continuum of Care" program. The HEARTH Act includes a requirement that at least 30% of the funding for new permanent housing be set aside for individuals with a disabling condition or households with an adult member with a disabling condition. Congress previously mandated this latter requirement through language in its annual appropriations for Shelter Plus Care, but the requirement was not codified.

HIV/AIDS and their families.[16] The Section 811 and Shelter Plus Care programs are described in greater detail in Questions Four and Five of this Section.

In addition to authorizing distinctions permitted or required by a federal statute, HUD has stated informally that they will permit a preference for a single category of disability that is not narrower than the following three categories: physical disabilities, mental disabilities, and developmental disabilities. In its Supportive Housing Program Desk Guide, HUD also states it will permit housing providers to target services to people with a particular type of disability. The Supportive Housing Program Desk Guide, however, emphasizes that a housing program may not exclude persons with other disabilities who can benefit from the services.

If there is no specific federal statute, executive order, or HUD authority authorizing restricting housing to people with disabilities or a particular type of disability, but a housing provider wants to so restrict the housing, the Section 504 regulations will restrict that providers' ability to provide housing only to persons with disabilities or to persons with a particular type of disability unless the provider can clearly demonstrate that such reservation is necessary to provide people with disabilities or people with a specific disability with equal access to housing, and that the provider is also fulfilling the principles of integration embedded in the principles of the Fair Housing Act and Section 504.

Section 504 was the first federal legislation to recognize the rights of persons with disabilities to be free from discrimination, and was widely hailed as major civil rights legislation when Congress passed it in 1973. As such, both Section 504 and the HUD regulations that implement it reflect a strongly "integrationist" policy: persons with disabilities, to the greatest extent possible, are to be integrated into the mainstream of society and not isolated into separate "disabled-only" institutions.

However, to be fully integrated into a community and to receive the same access to housing that others enjoy, HUD regulations implementing Section 504 permit and in some instances require distinctions on the basis of disability. Indeed, the regulations specifically permit housing providers to make distinctions for people with disabilities or people with specific disabilities when necessary, "to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to others."[17] Another provision of the regulations states that, in order for housing, aids, benefits, and services, to be equally effective, such housing, aids, benefits, and services, "are not required to produce the identical result or level of achievement for individuals with handicaps and non-handicapped persons, but must afford individuals with handicaps equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement."[18] The Section 504 Regulations also include reasonable accommodation and modification requirements.[19] The concept of reasonable accommodations and modifications recognizes that persons with disabilities, in order to obtain equal opportunity or equal access to benefits that others enjoy, sometimes requires individualized treatment distinct from practices applied to non-disabled persons or persons with other types of disabilities. A housing provider may accommodate a person's disability through physical modifications or through waivers of generally-applicable rules or policies.

[16] 42 U.S.C. § 12901.
[17] 24 C.F.R. § 8.4(b)(iv).
[18] 24 C.F.R. § 8.4(b)(2).
[19] 24 C.F.R. § 8.33.

Housing reserved for people with specific disabilities should generally promote integration and equal access to housing. A housing provider can justify reserving some units for households which include a person with a particular disability in a larger project as necessary to afford such persons equal opportunity for affordable housing. Housing providers who would like to serve a particular category of disabilities should have compelling evidence that the population they intend to serve *requires* preferential treatment in order to be housed and that such evidence is rooted in law, sensible policies, and integrationist goals. Even with strong evidence in support of a preference, housing providers may encounter some initial resistance from HUD for such a policy.

Question 4. May a provider reserve units in a Section 811 housing development for people with one particular disability?

Generally yes, with HUD approval.

The statute authorizing HUD's Section 811 program limits assistance to very low income persons with disabilities. The Section 811 statute further provides that, with the HUD Secretary's approval, housing providers may limit occupancy of housing developed with Section 811 funds to people with similar disabilities who require a similar set of supportive services.[20] In addition, the HUD Section 811 Supportive Housing for Persons with Disabilities Handbook 4571.2 specifically states that, with HUD approval, a housing provider may limit occupancy to any one of the following broad categories of disabilities: chronic mental illness, physical disability, or developmental disability. Approval from HUD to serve a particular category of disabled persons typically comes in the Section 811 reservation of funds letter that HUD delivers to housing providers.

Despite the fact that the HUD Section 811 Handbook permits housing providers to limit occupancy to people with a particular type of disability, HUD's regulations require the housing provider to permit occupancy of *any* qualified person with a disability who could benefit from the housing and/or the services provided, regardless of the person's specific disability.[21] This regulation goes beyond the statutory requirement and thus, could be overturned by a court. To complicate matters further, the HUD Section 811 Handbook appears to require specific approval from HUD if the provider desires to admit a person who does not meet the requirements of the particular category approved by HUD in the Section 811 reservation of funds letter.

In practice, housing providers commonly limit occupancy in Section 811 projects to persons with a particular disability, and rarely authorize occupancy by persons with different disabilities.

Question 5. May a provider restrict occupancy to a particular class of disabled persons in a project receiving Shelter Plus Care funding?

The regulations implementing the Shelter Plus Care program authorize housing providers to establish an admissions preference for one or more of the "statutorily

[20] The Secretary of HUD has delegated the authority to approve targeting of people with a specific disability in Section 811 projects to the Housing Director or the Director of the Multifamily Housing Division in HUD regional offices. Revocation and Redelegation of Authority Notice, 59 Fed. Reg. 62739, 62743, and FR-4274-D-01; 42 U.S.C. § 8013(i)(2).
[21] 24 C.F.R. § 891.410(c)(2)(ii).

targeted populations." However, the regulations also indicate that a housing provider must, in most circumstances, permit occupancy by any disabled person who is not a member of the targeted group.

The Shelter Plus Care program is limited by statute to eligible persons, defined as, "homeless persons with disabilities (primarily persons who are seriously mentally ill, have chronic problems with alcohol, drugs, or both, or who have acquired immunodeficiency syndrome and related diseases)."[22] The regulations implementing the Shelter Plus Care program include the same definition of an eligible person, but also authorize housing providers to establish an admissions preference for one or more of the "statutorily targeted populations" (e.g., people with a serious mental illness, alcohol or substance abuse problems, or persons with AIDS and related diseases). However, the regulation also states that providers cannot prohibit other eligible disabled homeless persons who are not in the housing provider's narrower target group from residing in the housing unless the provider can demonstrate that sufficient demand for the units from the targeted population exists *and* that other eligible disabled persons would not benefit from the primary supportive services provided.[23] In practice, administering jurisdictions report that their contracts with HUD permit housing providers to limit housing to a target group and require additional HUD approval to select additional or different target populations. HUD, in administering Shelter Plus Care, allows the jurisdictions managing Shelter Plus Care certificates or vouchers a fair amount of discretion, allowing project owners to identify individualized referral systems for particular projects.

In practice, administering jurisdictions report that their contracts with HUD require that only the target group occupy the housing and require additional HUD approval to serve disabled persons outside of the target population. Shelter Plus Care also allows the administering jurisdictions a fair amount of discretion in how they distribute Shelter Plus Care certificates or vouchers, allowing project owners to identify individualized referral systems for particular projects.

The Shelter Plus Care program is included in the new Continuum of Care program authorized under the HEARTH Act (described in Question Three in Section C below), adopted in May 2009. HUD had eighteen months to develop regulations to implement the new Continuum of Care program that will replace Shelter Plus Care. Proposed regulations are due in Spring 2010. Under the HEARTH Act, 30% of the funding nationally is for new permanent housing for individuals with a disabling condition or families with an adult member who has a disabling condition. HUD's regulations may or may not include language similar to that currently in effect for the Shelter Plus Care program. Until the 2011 McKinney-Vento Homeless Assistance Grants awards, providers will continue to be subject to the Shelter Plus Care regulations.

[22] 42 U.S.C. § 11403(g).
[23] 24 C.F.R. § 582.330.

Question 6. May a provider limit occupancy to disabled persons or people with a specific disability in a project receiving Project-Based Vouchers?

For a project receiving Project-Based Vouchers, a provider may offer a preference to individuals or families with disabilities. A provider may also advertise units as offering services for people with specific disabilities, but may not refuse tenancy to anyone with a disability who may benefit from the services offered.

To use Project Based Vouchers ("PBV"), a component of the Public Housing Agencies Housing Choice Voucher Program in projects that intend to provide a preference for people with specific disabilities, a provider will need to coordinate with the appropriate Public Housing Authority ("PHA") to ensure that the provider's intended occupancy requirements are compatible with the PHA's Administrative Plan and tenant referral practices.

PBV subsidies are administered through PHAs. Developers of housing intended to serve people with a particular type of disability should contact the appropriate PHA to determine if and how PBV subsidies are being administered within their jurisdiction.

As part of the PBV process, the PHA must consider how to administer waiting lists. HUD regulations concerning PBVs include waiting list requirements that govern the selection of tenants, and provide PHAs with the following options:[24]

- The PHA may use a separate waiting list for admission to PBV units or may use the same waiting list for both tenant-based assistance and PBV assistance. If the PHA chooses to use a separate waiting list for admission to PBV units, the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV assistance.
- The PHA may use separate waiting lists for PBV units in individual projects or buildings (or for sets of such units) or may use a single waiting list for the PHA's whole PBV program. In either case, the waiting list may establish criteria or preferences for occupancy of particular units.
- The PHA may merge the waiting list for PBV assistance with the PHA waiting list for admission to another assisted housing program.
- The PHA may place families referred by the PBV owner on its PBV waiting list.

Given these options, the best course of action for a provider intending to offer units to people with a specific disability will likely be to request a site-based waiting list. A site-based waiting list would allow a provider to give a preference on the waiting list to persons with disabilities and to advertise the project as one offering services to people with a particular type of disability. Depending upon the jurisdiction and the current provisions of its administrative plan, the housing authority may have to amend its administrative plan and obtain HUD approval to allow for site-based waiting lists that permit such preferences. Experience shows that HUD's approval of the amendments will depend upon whether the HUD regional office determines that the site-based waiting list causes people in a protected class under the Fair Housing Act to be segregated in a particular area or to have fewer opportunities to benefit from PBVs.

[24] 24 CFR § 983.251(c).

If the PBVs are issued with an authorization for the owner to establish preferences for disabled households, the owner may establish preferences for disabled households. However, the preference should be based on the need for services offered at the housing as opposed to a preference for (or a reservation of units for) people with a particular type of disability. In addition, the preference must be limited to families and individuals:

- With disabilities that significantly interfere with their ability to obtain and maintain housing;
- Who would not be able to obtain or maintain housing without appropriate supportive services; and,
- For whom the services cannot be provided in a non-segregated environment.

Further, projects cannot require disabled residents to accept services offered—the services must be voluntary and not a condition of tenancy.[25] In advertising the project, the owner may advertise the project as offering services for a particular type of disability. However, the project must still be open to all otherwise eligible persons with disabilities who may benefit from the services provided.[26]

Question 7. May a project be limited to occupancy by people with HIV/AIDS?

A housing provider may limit occupancy to people with HIV/AIDS under certain circumstances, depending on the funding received. Some federal programs require the persons with HIV or AIDS meet more stringent disability requirements than other programs.

In 1998, the United States Supreme Court held that HIV infection, even when it has not progressed to the "symptomatic stage," qualifies as a "disability" under the Americans with Disabilities Act.[27] The ADA defines disability as, "a physical or mental impairment that substantially limits one or more of an individual's major life activities." A record of such an "impairment" or "being regarded as having such an impairment" is identical to the Fair Housing Act definition of "handicap." However, as explained below, the right of an individual to be free from discrimination because he or she has HIV/AIDS does not necessarily translate into a housing provider's ability to limit occupancy to people with HIV/AIDS. Different funding programs treat this issue in different ways.

If a project receives no federal funds, and therefore is not subject to Section 504, the project may be restricted to people with HIV or AIDS under the Fair Housing Act if the provider can show that people with HIV or AIDS require a similar set of support services unique to that population. The existence of the federal Housing Opportunities for People With AIDS program (HOPWA), which limits eligibility to persons with HIV/AIDS and their families, lends support to the view that such people constitute a subset of people with disabilities with distinct needs who may be served in a specifically targeted project.[28] The existence of the HOPWA program, which implies the need for housing designated for persons with HIV/AIDS, may also

[25] 24 CFR § 983.251(d).
[26] 24 CFR 983.251(d).
[27] Bragdon v. Abbot, 524 U.S. 624 (1998).
[28] 42 U.S.C. § 12901.

support housing targeted to persons with HIV/AIDS that is funded from other sources and provide assurances that the project is complying with Title II of the ADA.

However, if a project receives federal funds, Section 504 of the Rehabilitation Act of 1973 will apply. In such cases, the housing provider will be able to restrict units to persons with HIV/AIDS if the housing provider is also receiving federal funds that authorize or require serving people with HIV/AIDS. The HOPWA program is the only federal housing program that unequivocally authorizes (and requires) restricting occupancy to people with HIV/AIDS and their families in projects receiving HOPWA funding.

The Shelter Plus Care statute identifies persons with HIV/AIDS as one of the primary populations that is to be served by the Shelter Plus Care program.[29] The Section 811 statute also permits a project, with approval of HUD, to limit occupancy to people with similar disabilities who require a similar set of supportive services. Fox example, HUD has granted approval to limit occupancy of Section 811 projects for physically disabled persons to subcategories of that group such as persons with HIV/AIDS, or persons with brain injuries.

The Section 811 regulations, however, also provide that if a person's "sole" impairment is a diagnosis of HIV, he or she will not qualify for a Section 811 project unless he or she also meets the definition of "person with a disability" under the Section 811 statute, which provides a different definition of disability from the ADA definition cited above.[30] None of these definitions of disability have been changed since the Supreme Court decision finding asymptomatic HIV infection to be a disability under the ADA. In fact, the HUD Multifamily Occupancy Housing Handbook, updated in 2007, quotes the regulation that a person whose sole impairment is a diagnosis of HIV will not qualify for housing under the Section 811 program. Consequently, while a person with asymptomatic HIV is considered disabled under the ADA, he or she may not qualify for Section 811 housing. As a result, if Section 811 and HOPWA funds are used together in one project, the provider should contact HUD early to discuss and resolve potential conflicts in funding and occupancy requirements.

Housing providers seeking to use HOPWA funds in Section 202 funded projects should also contact HUD to discuss potential conflicts between the financing sources. In the late 1980's HUD initially refused to approve Section 202 funding for projects targeting people with HIV/AIDS on the grounds that people with HIV/AIDS did not suffer from a "physical handicap" as defined in the Section 202 statute. HUD was sued on this issue in 1989. After a court issued a temporary restraining order requiring approval of the funding application, HUD entered into a settlement agreement permitting the project at issue to target persons with AIDS, so long as other people with disabilities were not excluded and so long as persons with AIDS admitted to the project also met the Section 202 requirement that residents' disabilities cause a "functional limitation."[31]

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[29] The Shelter Plus Care program is to be consolidated with other current Continuum of Care programs into one program authorized under the HEARTH Act adopted in May 2009. HUD must propose new regulations within 18 months of the adoption of the HEARTH Act.

[30] 24 C.F.R.§ 891.305; 42 U.S.C. § 8013(k); The Section 811 statute defines a "person with a disability" to have a physical or mental impairment which is expected to be of long duration, which substantially impedes his or her ability to live independently, and which is of such a nature that such disability could be improved if residing in more suitable housing conditions.

[31] Moreau v. HUD, No. C 89 3469 (N.D. Cal. 1989).

Question 8. May housing be reserved for people with developmental disabilities?

Generally, housing may be reserved for people with developmental disabilities if services targeted to that population are provided as part of the housing program.

Certain federal programs, including Section 811, allow housing to be targeted to persons with developmental disabilities. If Section 811 does not fund the housing, but other federal funds finance the housing, to comply with Section 504, the housing provider will need to determine whether limiting occupancy to persons with developmental disabilities is necessary to provide persons with developmental disabilities equal access to housing that is as effective as housing that may be provided to those without developmental disabilities. Before restricting tenancy, housing providers should obtain data on barriers persons with developmental disabilities face in obtaining housing, as well as studies that support findings that reserving supportive housing for persons with developmental disabilities results in such persons successfully achieving a level of independent living not available in other settings. As with other distinctions made on the basis of disability, the reservation of a small number of units in a larger project for persons with developmental disabilities will be more defensible under Section 504 because it furthers the integrationist policies of Section 504 and defeats the appearance of segregation of disabled persons. If an entire development is reserved for persons with developmental disabilities, the development should include only a small number of units and the housing provider should have strong evidence that the eligibility restrictions are necessary for the residents to have a successful housing experience.

If federal funding is not assisting the development, federal and state fair housing laws would govern without the limitations of Section 504. Under the federal Fair Housing Act, as discussed in Question One of this Section, discrimination on the basis of disability is treated differently from other forms of discrimination. The Fair Housing Act does not explicitly speak to whether housing may be reserved for persons with a particular disability, but it does state that housing providers may ask questions about whether an applicant has a particular type of disability when a provider targets a unit to a specific population, implicitly permitting discrimination in favor of people with specific disabilities.

Finally, if a public entity operates the housing or if the housing receives other public funding, the housing provider must comply with Title II of the ADA. Housing could be reserved for people with development disabilities pursuant to Title II of the ADA if necessary to provide developmentally disabled people with benefits and services that are as effective as those provided to others or if such restrictions are authorized by a state or local program.

Question 9. May housing be reserved for recovering alcoholics or drug users?

Housing reserved for recovering alcoholics or drug users may be legal, although such a reservation may be subject to challenge.

To determine whether reserving units for recovering alcoholics or drug users is permitted, housing providers must determine whether the limitation is reasonable and not arbitrary. Additionally, if alcoholics and former drug users are considered disabled, the analysis set out in the answer to Question Two of this Section regarding reserving housing for people with a particular disability applies: generally, do these individuals qualify as a population with a specific set of needs that requires a particular type of services or

physical environment tailored to that population? If the housing receives federal funding, Section 504 will apply and prohibit limiting the housing to recovering alcoholics or former drug users unless a federal statute or executive order specifically authorizes the limitation.

The first step in determining whether housing may be reserved for persons addicted to drugs or alcohol is to determine whether they are considered "disabled." Under the federal Fair Housing Act, disability is defined as a physical or mental impairment which substantially limits one or more of the person's major life activities, but does not include current, illegal use of or addiction to a controlled substance.[32] Controlled substances are not limited to illegal drugs, but can include legal drugs such as narcotics when they are obtained or used illegally. The Americans with Disabilities Act also defines disability to include drug addiction, but excludes the current use of illegal drugs.[33] The regulations implementing the Fair Housing Act clarify that a physical or mental impairment does not include current illegal use of a controlled substance, but the broad definition of disability would include people who are addicted to drugs but are no longer using drugs.[34] Determining what constitutes "current" drug use may be difficult. Chapter Four, Section A, Question Ten discusses the various interpretations of current drug use.

Under both the Fair Housing Act and the Americans with Disabilities Act, alcoholism is considered a disability if it limits one or more of a person's major life activities. Neither law distinguishes between alcoholics in recovery and alcoholics who are still drinking. Although alcoholics who are still drinking are part of a protected class under the Fair Housing Act, behaviors exhibited by alcoholics while inebriated are a permissible reason to exclude alcoholics from housing on a case by case basis. This is discussed further in Chapter Four, Section A, Question Thirteen.

Certain federal programs, including Section 811 and most of the Section 8 programs, do not consider alcoholism or drug dependency alone to be qualifying disabilities for projects targeting disabled persons. Using these programs to finance housing targeted to those whose sole disability is recovery from drug and alcohol dependency would not be advisable.

If a public entity operates the housing or the project receives other public funding, the housing provider must comply with Title II of the ADA. Given that recovering drug users and alcoholics are considered disabled under the ADA, a housing provider could limit occupancy to these potential tenants but the housing would need to provide special features or programs designed specifically for the targeted population. In addition, any such housing should be authorized by a state or local law or program or otherwise be necessary to provide the targeted population equal access to housing. (See Introduction to this Chapter Three regarding serving designated populations and Question Two of this Section).

If a project receives federal funds, Section 504 prohibits restricting tenancy to this population unless a federal statute or executive order authorizes the restriction or the housing provider can make a strong case that recovering drug users and alcoholics cannot attain equal access to housing without such a preference. (See Question Three of this Section).

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[32] 42 U.S.C. § 3602(h)(3).
[33] 42 U.S.C. § 12114.
[34] 24 C.F.R. § 100.201.

The definitions of disability do not distinguish between alcoholics in recovery and those who are still drinking. In addition, no case law exists regarding whether supportive housing designated for alcoholics in recovery is allowable under Fair Housing laws, so housing providers interested in this type of housing should be cautious. Some argue that housing limited to alcoholics in recovery excludes other disabled people (those alcoholics who are not in recovery), since all alcoholics are disabled. In order to best counter such an argument, a housing provider would need to show that the services provided are specifically targeted to alcoholics in recovery and that maintaining an alcohol-free environment is necessary to achieve the goals of the program. In addition, housing providers should have support for the premise that an alcohol free environment is crucial to maintaining recovery, such as scientific studies showing better recovery results. If federal funds subsidize any of the units in a project, the provider must also meet the requirements of Section 504 for designating housing for persons with a particular disability.

Question 10. What special accessible design requirements apply to supportive housing for people with disabilities?

Housing for people with disabilities is subject to the same design accessibility requirements as housing for people without disabilities.

Housing projects targeted to people with disabilities are not subject to any additional accessible design requirements. As described in Appendix Two, various federal laws impose accessible design requirements on new construction and rehabilitation of housing projects. Please refer to Appendix Two, for an outline of the relevant law.

SECTION C. ECONOMIC DISCRIMINATION, PROJECTS SERVING HOMELESS PEOPLE, AND DISCRIMINATION BASED ON SOURCE OF INCOME

Question 1. May a landlord require potential tenants to have a minimum income?

A project that does not receive public funds may legally impose a minimum income requirement reasonably related to a tenant's ability to pay the tenant's share of rent. However, several major federal housing programs prohibit a minimum income requirement.

Many landlords in the private market require tenants to have a minimum income (e.g., gross income equal to three times the rent level) to qualify to rent an apartment. Some public funding programs prohibit the use of minimum income standards. However, if a public funding program does not prohibit this practice, then federal law permits minimum income standards. Any minimum income standard must, however, relate to the portion of rent paid by the tenant and take into account the income of all members of the household.

The federal Fair Housing Act prohibits discrimination in housing on the basis of race, color, sex, religion, national origin, disability, and familial status. As discussed above, states may have passed additional anti-discrimination legislation that establishes other protected classes. However, no state has extended such protection to economic status, nor have courts endorsed the proposition. For example, the California Supreme Court has held that economic status is not "arbitrary discrimination" forbidden by state law, and,

moreover, that landlords have a legitimate business rationale for admitting tenants based upon their economic status or financial condition.[35]

Government funding programs usually define "income" as including the collective income of all members of a household. If a household has assets (e.g., property, stocks, or a savings account), the landlord must apply an imputed interest rate to the value of the asset and add this value to the total income amount. Most federal housing programs use the definitions of income found at 24 CFR Part 5. If a housing project does not use government funds, no official definition of income applies but landlords must still comply with the requirement that the income of all co-tenants from all sources (including public assistance payments received by the tenant) be included in any calculation of an ability to pay rent.

As noted above, if the project receives public funds, the funding program may prohibit use of a minimum income standard. A number of HUD programs (including Section 202, Section 811, and the McKinney-Vento Homeless Assistance programs) prohibit minimum income standards. Housing providers receiving other government funding should check program regulations to determine whether the funding source prohibits minimum income requirements.

Housing providers may impose a "demonstrated ability to pay the rent" standard as an alternative to a minimum income requirement. A "demonstrated ability" standard is likely to lead to less harsh results for low income applicants. Under this standard, a landlord admits a person who has been paying more than a specified percentage of income on their rent, so long as the tenant can show that he/she has consistently been able to pay rent in a timely manner with unfavorable rent-to-income ratios.

Question 2. May a housing provider legally restrict a project to homeless people (e.g., to require that a person be homeless in order to be accepted as a tenant in a building)?

Yes, a provider may legally restrict units to people who are homeless at the time of application for housing.

Homelessness is an economic and social condition that is not a prohibited classification under federal or state law or an arbitrary classification under state law. If a housing provider has a mission related to alleviating homelessness or assisting people who are poor, or if it receives funding which requires serving homeless people in the project, it also has a legitimate business rationale for selecting tenants based on their homeless status.

Question 3. What is the definition of "homelessness?"

Each funding program that provides assistance to projects for homeless people has its own definition of "homelessness."

[35] Harris v. Capital Growth Investor XIV, 52 Cal.3d 1142 (1991).

The major federal programs use the definition of homelessness set forth in Section 103 of the McKinney-Vento Act. The definition was recently expanded by the Homeless Emergency and Rapid Transition Housing Act of 2009 (the "HEARTH Act"). HUD has not yet issued regulations implementing the changes made by the HEARTH Act.

The HEARTH Act defines as homeless individuals or families: (1) who lack a fixed, regular, and adequate nighttime residence; (2) who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground; or (3) who are living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by federal, state, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing).

The definition also includes:

1. Individuals who reside in a shelter or place not meant for human habitation and who are exiting an institution where they temporarily resided;

2. Individuals or families who will:

a. imminently lose their housing, including housing they own, rent, or live in without paying rent, are sharing with others, and rooms in hotels or motels not paid for by federal, state, or local government programs for low-income individuals or by charitable organizations, as evidenced by

(i) court order resulting from an eviction action that notifies the individual or family that they must leave within 14 days,

(ii) the individual or family having a primary nighttime residence that is in a hotel or motel where they lack the resources necessary to reside there for more than 14 days; or

(iii) credible evidence indicating that the owner or renter of the housing will not allow the individual or family to stay for more than 14 days, including any oral evidence from the person or family seeking assistance that is found to be credible,

b. who have no subsequent residence identified, and who lack the resources or support networks needed to obtain other permanent housing;

3. Unaccompanied youth and homeless families with children and youth defined as homeless under other federal statutes and who:

a. have experienced a long term period without living independently in permanent housing;

b. have experienced persistent instability as measured by frequent moves over such period; and

c. can be expected to continue in such status for an extended period of time because of chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of

domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment.

4. Individuals or families who:

a. are fleeing or attempting to flee domestic violence, dating violence, sexual assault, stalking or other dangerous life-threatening conditions in the individual's or family's current housing situation, including where the health and safety of children are jeopardized; and

b. who have no other residence and lack the resources or support networks to obtain other permanent housing.

HUD must issue regulations clarifying how existing programs will be impacted by the new definition of homelessness. These regulations were expected by November 2009, within six months of the HEARTH Act's passage, and will most likely be released during or shortly after publication of this Guide.

The HEARTH Act definition of homelessness, like the previous definition of homelessness under the McKinney-Vento Act, specifically excludes any individual imprisoned or otherwise detained pursuant to state or federal law, unless the person is "temporarily residing in an institutional setting.". The HUD Supportive Housing Program Desk Guide includes persons detained for fewer than 30 days in the definition of homeless if the person was homeless when entering the institutional facility.

The HEARTH Act adds a definition of "Chronically Homeless" and defines "At Risk of Homelessness." "Chronically Homeless" means individuals or families who are homeless and (1) live or reside in a place not meant for human habitation, a safe haven, or in an emergency shelter, (2) have been homeless and living or residing in a place not mean for human habitation, a safe haven, or in an emergency shelter continuously for at least one year or on at least four separate occasions in the last three years and (3) have an adult head of household (or a minor head of household if no adult is present in the household) with a diagnosable substance use disorder, serious mental illness, developmental disability, post traumatic stress disorder, cognitive impairments resulting from a brain injury, or chronic physical illness or disability, including the co-occurrence of two or more of those conditions. The definition of "Chronically Homeless" also offers some flexibility to serve people who have been imprisoned or institutionalized. The definition states that a person meeting the above definition of chronically homeless before institutionalization will still be considered chronically homeless if he or she is currently residing in an institutional care facility, including a jail, substance abuse facility, mental health treatment facility, hospital or other similar facility, and has resided there for fewer than 90 days.

At Risk of Homelessness means, an individual or family that: (1) has income below 30% of median income; (2) has insufficient resources immediately available to attain housing stability; and (3) has moved frequently because of economic reasons, is living in the home of another because of economic hardship, has been notified that their right to occupy their current housing or living situation will be terminated, lives in a hotel or motel, lives in severely overcrowded housing, is exiting an institution or otherwise lives in housing that has characteristics associated with instability and an increased risk of homelessness.

HUD Notices of Funding Availability (NOFAs) for McKinney-Vento Act programs have previously revised and refined definitions of homelessness and chronic homelessness and housing providers should review HUD NOFAs for additional modifications to the definition of homelessness.

If a state or local program is the only funding source for the housing project, the authorizing statute or ordinance may include a different definition of "homeless" which providers will need to consult.

Question 4. How is homeless status verified?

HUD's Supportive Housing Program Desk Guide provides guidance on how to verify homeless and chronic homeless status.

The HUD Office of Community Planning and Development published a Supportive Housing Program Desk Guide in August 2008 that can be found at HUD'S Homeless Resource Exchange website (*http://www.hudhre.info*). Section B of the Desk Guide, called "Eligible Participants" offers detailed guidance on verification of homeless status for people coming from the streets, emergency shelters, transitional housing, and institutions, for persons being evicted from a private dwelling who do not have sufficient resources to find replacement housing, persons fleeing domestic violence, and youth. Pursuant to the Desk Guide, a person need not actually spend time on the streets in order for a provider to verify the person as "homeless" for Supportive Housing Program purposes. Although the Desk Guide only covers the McKinney-Vento Act Supportive Housing Program, it includes guidelines for homeless status verification that may be useful in the administration of other federal, state and local programs as well, so long as the user is careful to recognize that different definitions of homelessness may require different verification procedures.

Due to modifications to the definition of homelessness under the HEARTH Act (described in Question Three of this Section), providers should be certain to use the Desk Guide along with the new HEARTH Act definitions of homelessness, at risk of homelessness and chronically homeless, once the new definitions take effect. These definitions appear in the HEARTH Act, itself, and will be included in new HUD regulations. The HEARTH Act and its HUD implementing regulations will control over any advice found in the Desk Guide.

Question 5. Is it legal for landlords to refuse to rent to tenants who have Housing Choice Vouchers?

Generally, yes, unless a project receives funding that prohibits the owner from refusing to rent to Housing Choice Voucher tenants or unless a project is subject to local statutes or other regulations barring such discrimination.

Generally, a private landlord may refuse to rent to Housing Choice Voucher holders (however, see discussion below regarding exceptions to this rule). The Housing Choice Voucher Program is a federal housing program, and owners' participation in the program is voluntary. Owners who do not want to participate can refuse to accept tenants who hold Housing Choice Vouchers, even if the owner has accepted other Housing Choice Voucher tenants. In 1996, Congress repealed the "take one, take all"

requirement that an owner of a multifamily project who accepted one Housing Choice Voucher tenant could not turn away other Housing Choice Voucher applicants due solely to their voucher status.[36]

Refusal to rent to Housing Choice Voucher holders is not a violation of federal anti-discrimination law because voucher holders (or poor people in general) are not a specifically protected classification (see discussion of economic discrimination under Section B, Question One of this Chapter). Discrimination against Housing Choice Voucher holders may have a disparate impact on certain racial or ethnic groups, or against people with disabilities, but such a disparate impact is not unlawful if the landlord has no discriminatory intent and establishes a business necessity for the practice. A desire not to participate in a federal housing program with numerous regulatory requirements would likely be a sufficient business rationale to defeat a disparate impact discrimination claim under the Fair Housing Act.

State and local housing discrimination ordinances may attempt to prohibit discrimination against voucher holders. For example, a recent decision from the Maryland Court of Appeals found that a county code prohibiting source of income discrimination also prohibited discrimination against Housing Choice Voucher holders.[37] In that case, the court found that the federal laws making participation in the Housing Choice Voucher program voluntary did not preempt local laws prohibiting discrimination against Housing Choice Voucher holders. Although the U.S. Supreme Court declined to hear the case, the ruling in the Maryland case may not apply to all state and local ordinances banning source of income discrimination. In fact, the Maryland court case conflicts with several federal court cases. Additionally, other state and local ordinances prohibiting source of income discrimination may contain language different from the language involved in the Maryland case.

If an owner is participating in a publicly-funded housing program, the program may include a requirement that the owner accept tenants with Housing Choice Vouchers on the same basis as it accepts all other applicants, and that such applicants cannot be rejected simply because they receive rental assistance through these programs. For example, the federal Low-Income Housing Tax Credit Program includes a requirement that a provider cannot reject an applicant for a unit the provider is counting as a low-income housing tax credit unit on the basis that the applicant is a voucher holder.[38] Similarly, a public funder may impose such a requirement as a policy matter in grant or loan documents.

Question 6. How can a housing provider best comply with different funding programs that have different or conflicting income and rent requirements?

The provider must comply with the most stringent requirements. If requirements conflict, the provider must consult with the administering agencies for guidance or resolution of the conflict. Not all conflicts can be resolved.

Generally, a provider must comply with all funding requirements, and accomplishes this by complying with the most stringent requirements. For example, if one program requires tenants to have incomes below 50% of area median income and another requires tenants to have incomes below 35% of area median

[36] P.L. 105-276; HUD FY 1996 Appropriations Act, Section 554 striking § 8(t) of the Housing Act of 1937.
[37] Montgomery County, Maryland vs. Glenmont Hills Assocs., 402 Md. 250 (2007).
[38] I.R.C. § 42(h)(6)(B)(iv).

income, the provider can meet both requirements by renting to tenants with incomes below 35% of area median income.

When a provider uses HUD Section 202 or Section 811 funding in a project, a local requirement setting aside units for tenants earning less than 50% of area median income may create a problem. The Section 202 and Section 811 programs require tenants to have incomes at or below 50% of area median income. HUD may not permit a local government providing additional local funds to require deeper affordability. In some cases, local government funders have been required to waive local requirements that tenants meet a 35% of area median income standard.

Federal programs also may conflict with each other. For example, in one project, the public housing authority (PHA) required a housing provider to offer Project-Based Voucher assisted units to tenants at or below 80% of area median income who had been displaced from a demolished public housing project. The PHA was hesitant to allow the housing provider to use tax credit units to satisfy this requirement, since the tax credits required the housing provider to target tenants earning 50% or 60% of area median income. The PHA was concerned that tenants earning between 60% and 80% of area median income would be excluded. In such a situation, the provider's only option was to forego the funding or negotiate with the different federal and local agencies administering these programs to obtain a more flexible interpretation of the various requirements. Some federal programs include regulations permitting the Secretary of HUD to waive a requirement or approve a special arrangement. If an administering agency takes the position that it has no flexibility to provide an interpretation that will eliminate a conflict (either because the statute or regulations are inflexible or because the administering staff is inflexible), a change in the law may be required to enable a housing provider to use the conflicting sources of funds in one project.

Program requirements may also conflict in determining when a provider may terminate tenancies once a tenant's income increases above the level required for initial occupancy. Federal programs usually do not permit providers to evict tenants when the tenant's income exceeds initial eligibility guidelines, but permit (or require) the owner to raise the rent on such tenants.

Integration of separate or conflicting funding requirements can be extremely challenging. An attorney or other advocate who is familiar with the different funding programs may be useful in this process. A housing provider should also keep in mind which public agencies administer each program and, sometimes, the particular department within the agency, since a provider may find it necessary to coordinate with people within these departments to resolve conflicts. At HUD, the Section 202 and Section 811 programs are administered through the Multifamily Housing Division, while McKinney-Vento Act, HOME, and HOPWA programs are administered through the Community Planning and Development Division.

Finally, providers need to identify possible conflicting requirements as early as possible, and avoid applying for funding from programs with truly incompatible requirements. Conflicting income and rent standards can severely affect the financial feasibility of the development.

Question 7. May housing be limited to people who receive SSI benefits or who are eligible to receive SSI benefits?

Generally, no.

Some housing providers wish to limit occupancy in a project or in specific units in a project to persons with disabilities who receive SSI benefits because these persons will have enough income to pay some level of rent. However, certain states have enacted statutes that specifically prohibit discrimination in housing based on "source of income" and SSI payments are clearly a source of income. While this prohibition is more commonly thought to prevent private landlords from excluding persons on SSI or other welfare programs from their projects, it also applies to prevent project owners from accepting only people who receive SSI payments.

A requirement that applicants for housing be "SSI-eligible" is also problematic because SSI has a different definition of "disability" than other federal and state housing programs and SSI eligibility includes requirements regarding income levels and citizenship status. If a provider requires an applicant to be "SSI-eligible," the provider may be violating other non-discrimination requirements applicable to the project or may inadvertently be imposing income restrictions on the project that conflict with income restrictions funding programs impose.

A housing provider may establish minimum rent levels as a specific percentage of a standard SSI benefit amount, such as 30% of a state's monthly SSI benefit amount. SSI is only used to measure the amount of rent charged and tenants are free to use any type of income to pay the rent, avoiding the legal pitfalls inherent in demanding SSI eligibility.

SECTION D. RESTRICTING HOUSING TO OTHER GROUPS

Question 1. May housing be designated as single-gender?

Generally, no.

Under federal law, housing providers cannot discriminate on the basis of sex (gender). Although a housing provider may have rational business reasons for limiting housing to a single gender, such as single mothers, and the services required by these individuals may be unique to this group, gender is a protected classification and courts would most likely find any restriction based on gender unlawful. In 2007, a Ninth Circuit Court of Appeals case from Idaho held a homeless shelter's men-only policy invalid because the facially discriminatory policy did not benefit the excluded class (homeless women desiring to stay at the shelter) or respond to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.[39] The Court found that the homeless shelter did not offer adequate evidence demonstrating that homeless women would benefit from the men-only policy, and the shelter operator did not provide any police reports, incident reports, or other documentation to show that the policy furthered

[39] Community House, Inc. v. City of Boise 490 F.3d 1041 (9th Cir. 2007).

safety concerns. While the court did state that privacy concerns might justify a single-gender facility, the court also noted that this justification is not sufficient if the facility provides separate rooms for men and women.

HUD has indicated that single-gender housing may not violate the Fair Housing Act if compelling privacy and/or security reasons for the gender segregation exist, but HUD also has stated that the legality of single-gender housing is still unsettled. Compelling privacy reasons are narrow, such as if the housing has only a single bathroom or the shelter includes shared sleeping facilities. HUD has only approved single-gender housing in limited situations. Even if HUD allows single gender housing, a court may not uphold a gender-based restriction.

Single gender housing may be more acceptable in situations like domestic violence shelters, where the duration of a woman's stay is limited. However, a shelter provider would still be well-advised to establish occupancy criteria that are gender-neutral (e.g., permit admission of both men and women). In this way, the provider may eliminate a claim of intentional discrimination against men.

Question 2. May housing be reserved for families with children? May housing be reserved for single parents with children?

Housing may be reserved for households with children, but housing for single parents with children may violate local fair housing laws that prohibit discrimination on the basis of marital status.

Under the federal Fair Housing Act, familial status is a protected classification. "Familial status" is defined under these laws as a household that includes a person under the age of 18 living with a parent or legal guardian or a designee of the parent or legal guardian. Courts interpret these laws to prohibit discrimination against households with children but not to prohibit discrimination in favor of households with children (or against households without children). Therefore, a housing provider may reserve units in a project for households with children under the age of 18.

Reserving housing for single parent households with children does not violate the Fair Housing Act, but may violate state and local fair housing laws. There may also be state and local non-discrimination ordinances that prohibit discrimination on the basis of marital status, meaning that a housing provider cannot lawfully require persons to be either married or unmarried to rent a unit in a project. Since discrimination in favor of single parent households necessarily requires exclusion of two-parent households, and since "two-parent" status is directly linked to marital status, single parent occupancy requirements are likely to violate these fair housing laws.

Question 3. May housing be targeted to a youth population?

Generally, no, when the housing provider is receiving federal funding. However, exceptions exist, including federal, state, or local laws that authorized age restriction.

The Federal Age Discrimination Act generally prevents housing providers receiving federal funding from limiting housing on the basis of age. Exceptions to this general prohibition of age discrimination exist, however, and one such exception is particularly useful: federally financed housing may include age limits if the age restriction is authorized by any law, including state or local laws. Providers desiring to restrict housing to transition aged youth should determine whether there is a state or local law that would allow this limitation. If such a state or local law exists, HUD should permit housing for homeless youth. However, until HUD affirmatively approves housing for homeless youth in federally financed housing developments, developers may benefit from discussing youth-oriented housing proposals with their HUD representative.

Housing providers serving homeless youth may not exclude transition age youth with children or transition age youth who are pregnant. Federal fair housing laws prohibit discrimination on the basis of familial status. This prohibition means that homeless youth with children and homeless youth who are pregnant must be given the same rights as other homeless youth during tenant selection and throughout occupancy.

Question 4. May housing be reserved for senior citizens?

Housing may be reserved for senior citizens if the age restrictions and project design comply with federal fair housing laws.

A housing project may not legally exclude children, or otherwise discriminate based on age, unless the project qualifies as a senior development under *both* the Housing Act and any applicable state anti-discrimination law. The requirements related to senior housing are an exception to the provisions of federal fair housing laws that prohibit discrimination on the basis of age or familial status.

In the event of a conflict between the federal law and any applicable state law on senior housing, rules of preemption require that the housing provider follow the most restrictive law. Since the senior laws are an exception to age discrimination, the most restrictive laws are those that place the most limitations on creating and maintaining senior housing. Federal law only allows senior housing that is restricted to persons either 55 years of age or older or 62 years of age or older. Other age limitations are not allowed and will violate fair housing laws.

A development may qualify as senior housing under the federal Fair Housing Act in two different ways: first, the housing may be "over 62 housing" if all occupants (other than managers) are required to be 62 years of age or older; alternatively, a project may be "over 55 housing " if the housing provider requires that at least one person 55 years of age or older occupy at least 80% of the units (underage households may occupy the remaining 20%). The project must also publish and adhere to policies that indicate its intent to qualify as a senior project and must have established procedures for routinely determining the occupancy of each unit, including verification that at least one person in the unit meets the 55-or-over age requirement. Projects are required to maintain documentation which shows that property managers verify occupancy at least every two years.

The fair housing laws related to senior housing do not encourage multi-generational housing. A strict reading of the statutes appears to require that the only developments that can designate units for seniors are those that limit all units to seniors (except for live-in aides). Despite the language of the statutes, courts have interpreted the fair housing laws to allow housing providers some latitude in designing developments

that serve a range of ages and households. Courts have found senior restrictions to comply with fair housing laws where separate buildings within a development are designated as senior or family housing, as long as the housing provider clearly delineates between the family housing and the senior housing. Housing developers desiring to develop a project containing both senior and family housing should design the development so that the senior portion is clearly separate, preferably in a separate building with separate entrances and facilities.

Housing developers providing senior housing should also review their funding source requirements. Some funding programs have different age requirements that may pre-empt both federal and state law. For example the HUD Section 202 program, which funds senior developments, defines seniors as persons who are 62 or older and only requires that one member of the household be 62. Project-Based Vouchers have has a similar age restriction.

Question 5. May a housing provider discriminate against an applicant based on his or her marital status?

Not in states where marital status is a protected class.

While marital status is not a protected class under the Federal Fair Housing Act, certain states have made it illegal to discriminate against a person in housing because of his or her marital status. As a result, a housing provider who refuses to serve a person or treats that person differently because he or she is unmarried, married, divorced, widowed, or single is likely to run afoul of that state's fair housing laws.

Question 6. Is it legal to have a tenant-selection preference for residents of a particular geographic locality?

Preferences for residents of a particular city or county are legal under limited circumstances. A preference is not permissible if such preference is adopted purposely to exclude people based on a protected classification (such as race, gender, etc.), operates to disproportionately exclude such people, or is structured in such a way to infringe on the "fundamental right to travel." Some funding programs also prohibit local preferences.

A requirement that local residents receive preference for admission to a housing project may be legally vulnerable because it may operate to exclude certain racial or ethnic groups from the project and thus have a disparate impact without adequate justification. For example, in a predominately white community, a tenant selection preference for people who are already residents of the community may result in a predominately white tenant population in the project, in the face of a larger regional community that may be more ethnically diverse. If an applicant challenges a local preference as having a disparate impact, the plaintiffs must present evidence (usually statistical) demonstrating that the preference has a significantly adverse impact on a protected classification. For instance, the plaintiffs could compare the ethnic make-up of the preferred community with the potential tenant pool from the larger community (such as the county, the region, or the housing market area). If the potential tenant pool from the larger community is considerably more diverse in ethnic or racial composition than the local community, courts could find the local preference to have a disparate impact. Under the federal Fair Housing Act, disparate impact, even

without discriminatory intent, is illegal unless the project owner shows a legitimate business purpose for the practice and demonstrates that the practice furthers this purpose. This standard makes justifying a geographic preference difficult.

A preference for local residents required by a public agency may also be subject to challenge under the equal protection clauses of the federal constitutions. However, a court would have to find discriminatory *intent*, as well as discriminatory *impact*, to invalidate the preference on constitutional grounds. Discriminatory impact alone is sufficient to challenge a local resident preference under the Fair Housing Act.

Finally, if a local preference impacts a "fundamental right," a court would subject it to a "strict scrutiny" test. This test requires a "compelling governmental interest" to justify the preference, which would be an extremely difficult standard to meet. The United States Supreme Court has held that the right to housing is not a fundamental right that is specially protected by the Equal Protection Clause of the United States Constitution.[40]

The right to travel, however, is a fundamental right. Courts have found a durational residency requirement for admission to public housing (requiring not merely local residency, but residency for an extended period) affects the right to travel. No court has examined the right to travel issue in the context of access to privately-owned but publicly-assisted housing, but generally a preference for local residents is more defensible if it has a very short durational requirement (i.e., requires residency of only a few months) and includes a preference for people who work in the jurisdiction, even if the person may not live there (including part-time and household workers). In addition, a local preference should not operate to entirely exclude non-local residents, and the local government findings that a preference serves compelling public policy reasons beyond desire to serve local residents should bolster the preference with additional justification, such as, providing housing for local safety workers. The smaller the geographic preference area (for example, a preference for residents of a particular neighborhood), the less defensible the preference generally will be. A smaller area is more likely to perpetuate racial or ethnic concentrations in the population. Finally, courts may be less likely to uphold a “business necessity” argument for a private owner’s imposition of a local residency preference if the preference is not required by a public agency.

A recent federal court case in Massachusetts reviewed housing authority policies of issuing Housing Choice Voucher certificates based on a local residency preference.[41] The court in this instance first looked at the effect of the local residency preference on various protected groups by using a variety of statistical tests. After finding that the local residency preference did have a disparate impact, the court then looked at the housing authorities' justification for the local residency preference, which was that the housing authorities wanted to keep residents living in their communities and that it was important to community morale to know that the housing authorities were working for their own residents. The court found this justification insufficient and indicated that the housing authorities would have to offer a record of local conditions and needs to maintain the preference. Additionally, the court found that, based on the limited justification for the preference the housing authorities offered, they also had failed to show that a less

[40] Lindsey v. Normet, 405 U.S. 56 (1972).
[41] Langlois v. Abington Housing Authority, 234 F. Supp. 2d 33 (D. Mass. 2002).

discriminatory alternative existed for achieving their goals. This case may provide guidance for district courts in other parts of the country faced with local preference challenges.

The HUD Multifamily Occupancy Handbook (4350.3) imposes additional requirements on HUD-assisted projects and other projects that are subject to the Handbook. The Handbook prohibits residency requirements. It also provides that preferences required by state or local law are permissible only if they are consistent with HUD and applicable fair housing requirements. Further, owners of projects subject to state and local preferences must submit a written request to the applicable HUD Field Office requesting HUD approval of the preference. If a geographic preference is required by state or local law, owners of HUD-assisted projects should seek HUD approval by submitting the law or ordinance to their local Field Office.

The HUD Multifamily Occupancy Handbook also sets forth permissible and impermissible owner-imposed local preferences. HUD does not allow residency *requirements* and only allows *preferences* if the residency preferences are not for the purpose or effect of delaying or otherwise denying admission to a project or unit based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family. Additionally, when an owner adopts a residency preference, HUD requires that the owner consider the following classes of people as "residents": (1) people who work in the jurisdiction, (2) people who have been hired to work in the jurisdiction, and (3) people who are expected to live in the jurisdiction as a result of planned employment. The owner may treat graduates of, or active participants in, education and training programs located in a residency preference area as residents of the area if the education or training program is designed to prepare individuals for the job market. For Section 8 properties, HUD must approve an owner's residency preference through a modification to the Affirmative Fair Housing Marketing Plan, in accordance with 24 C.F.R. 108.25. Owners may not base a residency preference on the length of time an applicant has lived or worked in the area. If no eligible residents are on the waiting list, owners cannot hold units open because of a residency preference. Finally, HUD must approve owner-imposed residency preferences prior to an owner's use.

Question 7. What are the "federal preferences," and when do they apply?

Federal preferences were repealed in 1998 and no longer apply to federally funded projects unless voluntarily adopted by a local housing authority.

The "federal preferences" were preferences HUD required housing providers receiving certain federal housing funds to follow during tenant selection. The preferences granted priority to applicants for housing with the following characteristics: (1) people who are involuntarily displaced by governmental action; (2) people occupying substandard housing; and (3) people paying more than 50% of their income for rent and utilities. The Quality Housing and Work Responsibility Act of 1998 repealed the preferences and replaced the preferences with a provision permitting local housing authorities to establish a local system of preferences for public housing and the Section 8 certificate and moderate rehabilitation programs.[42] Housing providers participating in McKinney-Vento Act Section 8 Moderate Rehabilitation Program for SROs should check their Housing Assistance Payments Contract (HAP), and with HUD and their local housing authorities to see if any local preferences apply to their projects.

[42] Title V, Section 501 of H.R. 4194, which was the HUD appropriation bill for FY 98-99.

Individual federal programs may include other program-specific preferences in the statute, regulations or HUD Handbook governing the program.

Question 8. What special issues arise when renting supportive housing to students?

While renting supportive housing to students is permissible, certain programs limit eligibility for assistance to students, impose a prohibition that all tenants in a unit may not be students, and/or require additional documentation from students to verify income.

Section 8 assistance may not be provided to any individual who is a student (part-time or full-time) at an institution of higher education for the purpose of obtaining a degree, certificate, or other program leading to a recognized educational credential if the individual is under the age of 24, unless the individual is married, a veteran, has a dependent child, or is disabled. A student also may qualify for Section 8 and other programs the HUD Multifamily Occupancy Handbook if the student is of legal contract age, has established a separate household from his/her parents or legal guardians for at least one year, does not have parents or legal guardians claiming him/her as a dependent, and the student's parents or legal guardians sign a certification of financial assistance.

A unit will not qualify for Low-Income Housing Tax Credits if full-time students are the only inhabitants of the unit.[43] IRC Section 151(c)(4) defines a "student" as an individual who is enrolled in an educational organization for any five months of a given tax year. Elementary schools, junior and senior high schools, colleges, universities, and technical, trade, and mechanical schools all meet the IRC § 170(b)(1)(A)(ii) definition of "educational organization." Participants in on-the-job training courses offered by private employers to their employees are not considered students under these rules. If a student is enrolled at a qualifying educational organization, that organization's internal criteria are used to determine the meaning of "full-time." A course load of twelve or more credit hours per term, approximately equal to three courses, is a common demarcation between part-time and full-time status. The IRS allows a number of exemptions to the full time student prohibition: all married couples who jointly file income tax returns and most single parents automatically qualify for an exemption, as do single individuals who are receiving certain types of government assistance or who are participating in certain publicly-funded job training programs.[44] In addition, the Housing and Economic Recovery Act of 2008 added an additional exception for units comprised of students previously under the care and placement responsibility of a state foster care program. This provision is effective for buildings placed in service after July 30, 2008.

Under prior law, tax exempt bond rules required additional conditions to be met to allow students to qualify for *bond* units (e.g., student tenants need to file joint tax returns to qualify for bond units). The Housing and Economic Recovery Act conforms the bond rule to the Low-Income Housing Tax Credit rule.

With advice from knowledgeable legal counsel, a provider may structure occupancy so that at least some tenants may be enrolled in school on a full-time basis. A blanket prohibition against student status is overbroad and should not be imposed by the provider.

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[43] I.R.C. § 42(i)(3).
[44] I.R.C. § 42(i)(3)(D)(i).

Question 9. Can a provider legally impose a tenant selection preference for veterans?

Generally, yes, so long as the preference furthers a strong public policy goal, such as combating homelessness or reintegrating veterans and their families into the community. In addition, any preference should be coupled with services and supports that contribute to the housing program goals.

If an individual housing provider seeks to serve veterans by granting them a preference in housing, that preference may result in a disparate impact if it operates to disproportionately exclude women or certain racial or ethnic groups. To defend against a claim of disparate impact, a housing provider would need to demonstrate that (1) it has a business necessity for the preference and (2) the preference effectively carries out the purpose it is intended to serve.

A housing program that provides a housing preference for veterans could likely withstand a disparate impact claim if the housing program is rooted in and furthers a strong public policy goal such as reintegrating military families in the community or combating homelessness, especially given the high rates of homelessness among veterans. According to a 2002 HUD guidebook, veterans comprise 23% of homeless adults and 33% of homeless men, even though veterans comprise 9-10% of the general population.[45]

The federal government and numerous state governments have various housing programs designed to serve veterans. For example, the federal government instituted mortgage housing programs for veterans in the 1940s. HUD currently permits public housing authorities to grant a preference to veterans in their public housing activities. In addition, the HUD-Veterans Affairs Supportive Housing program, enacted as part of the 2008 Appropriation Act, provides $75 million of funding for a housing voucher and supportive service program for veterans (the "HUD-VASH Program"). The federal government also has numerous other housing programs designed to serve veterans.

Despite the broad political and programmatic support for veterans housing, housing providers who establish a veterans preference should link the preference to significant policy goals and to their organization's purpose and should provide access to services and supports that will help to further such goals. Linking a veteran's preference to public policy and organizational goals will help defend against a disparate impact or other discrimination claim, if such claims arise.

Question 10. May housing be reserved for persons recently released from prison?

Generally, yes.

Some housing providers may wish to restrict a project to people recently released from prison. Restricting a project to former prisoners should be permissible under fair housing laws if services are provided that are specially designed to assist this population. A housing provider should also analyze the targeting in the particular geographic location of the project to determine if it would have a disparate impact on a protected

[45] Coordinating Resources and Developing Strategies to address the needs of Homeless Veterans, U.S. Department of Housing and Urban Development, Community Planning and Development Office (February 2002).

classification of people. Given the gender, racial, and ethnic make-up of the prison population, a project targeting former prisoners may operate to exclude women and members of certain racial groups. If this is the case, the provider must be able to justify the preference as furthering a provider's legitimate business purpose.

In addition to analyzing a target population, providers should be aware that certain state and local laws might affect their ability to house former prisoners. Although of questionable enforceability, some cities have enacted zoning ordinances that restrict the residency of former prisoners.

Finally, housing providers should review funding source requirements, as a funder may not permit a preference or restriction favoring former prisoners. For example, a project funded under the McKinney-Vento Act cannot exclude a homeless person without a history of incarceration, in favor of one who has such a history. In addition, a funding source may outright prohibit former prisoners from occupying a project.

Question 11. May a Low-Income Housing Tax Credit (LIHTC) project give a preference to specific tenant populations?

A LIHTC project may provide preferences to designated populations of tenants, so long as the preference does not violate HUD non-discrimination policies.

Only residential rental units that are "available for use by the general public" are eligible for Low-Income Housing Tax Credits under Internal Revenue Code, Section 42. Treasury Regulation Section 1.42-9 provides that this requirement is met if the housing provider rents the unit in a manner consistent with HUD policy governing non-discrimination (contained in HUD rules and regulations), and so long as the provider does not limit the unit to members of a particular social organization and is not an employer limiting units to its employees.

Accordingly, the Internal Revenue Service has held that owners who give preferences to certain classes of tenants (e.g., people who are homeless or disabled) will not violate the "general public" use requirement if such preferences would not violate any HUD policy governing non-discrimination expressed in HUD Handbook 4350.3.[46]

HUD Handbook 4350.3 sets forth complicated procedures for using preferences. The discussion of preferences in the Handbook, together with the extensive discussion of fair housing compliance issues in HUD multifamily programs (including some programs designed to serve special needs populations), provides guidance on whether a proposed preference is consistent with HUD policy. The prevailing view is that a housing provider may offer preferences in LIHTC projects so long as they do not violate fair housing laws according to HUD. If a HUD program authorizes a particular tenant preference (such as homelessness, AIDS, or disability), a particular preference may be permissible, since federal legislation has recognized these populations as having specialized housing needs, even if the housing provider is not using the HUD program in that tax credit project. LIHTC are not considered federal financing or assistance,

[46] Private Letter Ruling 8944042; Private Letter Ruling 8945036; Private Letter Ruling 8950057; see also Internal Revenue Bulletin 1989-2.

so Section 504 does not apply to tax credit projects unless the provider is receiving funding under another federal program that triggers Section 504 restrictions.
A provision in the Housing and Economic Recovery Act of 2008 clarified that a project will not fail to meet the "available to the general public" requirement solely because it has an occupancy restriction or preference for tenants (1) with special needs, (2) who are members of a specified group under a federal or state program or policy that supports housing for such group, or (3) who are involved in artistic or literary activities. However, housing providers must still analyze such preferences in tax credit projects on a case by case basis, using the analysis described above. If a local preference is involved, see Question Six of this Section.

Question 12. May a social service organization that owns housing provide a preference for clients of its services program?

Generally, no.

Some social service organizations that own housing seek to provide the housing for their service clients, either by denying housing to non-clients altogether, or by providing a preference that moves clients to the top of the list of prospective tenants. Such tenant selection policies are usually impermissible.

Fair housing and civil rights laws generally prevent a social service organization from favoring (or providing housing exclusively to) its own clients. Under these laws, a social service organization may limit its housing for its own clients, or provide a preference in its housing for its own clients, only if (1) the organization is not intentionally excluding residents based on a protected classification, such as race, gender, religion, etc. (2) any disparate impact on a protected classification is caused by a facially neutral practice that furthers a legitimate business necessity of the organization and is the least discriminatory means of achieving the business necessity, and (3) the tenant selection practice is not in violation of any state or local anti-discrimination law.

The client screening process for a social service organization most often will look at factors different from factors providers typically use to determine housing eligibility. Often these screening criteria may result in favoring certain groups over others. If a social service organization routinely turns away members of a protected classification, either intentionally, because the organization has a specific client base they serve, or inadvertently, the housing operated by that organization will similarly exclude the members of the protected classification. Although a social service organization's intentional or inadvertent exclusion of certain groups may not generally give rise to discrimination claims, the chances of such claims in the context of housing are greater and the requirements on the provider for justifying any impact on a particular classification are harder to meet.

Even where the organization has not violated fair housing or civil rights laws, funding program and policy requirements sometimes prevent a social service organization from favoring (or providing housing exclusively to) its own clients. For example, many funding programs have affirmative fair housing marketing requirements, as discussed below in Question Eighteen of this Section. The marketing requirements usually prohibit a housing provider from giving advantages to a select group of insiders, such as the clients of the housing provider's social services arm. Similarly, many funding programs have specific rules on preferences, and these preference requirements may similarly prohibit a housing provider from

offering advantages to clients of the housing provider's social services arm. HUD programs generally prohibit participating providers from granting special preference to clients of the provider. Under recent guidance from the IRS, housing that limits occupancy to clients of a particular social service agency may not be considered to be open to the general public and so may lose eligibility for low-income tax credits. For the foregoing reasons, any social services organization seeking to favor, or provide housing exclusively to, its own clients should confirm that the tenant selection process is consistent with program regulations governing project subsidies, as well as the informal policies and contract provisions of project funding sources.

Question 13. May a housing provider accept only tenants who are referred from a particular social service organization?

Housing providers should review the selection criteria of the service provider to ensure that such referrals are not discriminatory before agreeing to rely upon referrals from a particular service provider.

Often, in providing housing to persons with special needs, a funding source requires or a housing provider seeks to accept only tenants referred from a particular social service agency. Sole source referrals may occur because a single service provider for special needs tenants ensures a more consistent level of service while easing the administrative burdens on the housing provider. Sometimes public agencies providing funding may require that referrals come from a single service provider.

Housing providers limiting housing to referrals from a particular social service organization should consider whether the social service organization's client selection process results in intentional discrimination or has a disparate impact on a protected class of individuals. Some social service organizations may limit their clientele to a particular ethnic or racial group. Since social service agencies not providing housing are not subject to the same fair housing laws that apply to housing providers, they may have screening policies for services that intentionally discriminate. In other situations, some outreach and screening policies may result in unintentional exclusion of certain ethnic groups.

Housing providers may subject themselves to fair housing claims if they fail to examine the basis for the referrals. For example, a social service agency may be located in a neighborhood with a majority ethnic population and may advertise its services in both English and the language of the neighborhood ethnic group. The social service agency's bias toward that particular ethnic group may deter otherwise eligible persons from other ethnic groups from using that agency's services. As a result, a housing provider relying upon that social service agency for referrals may be unintentionally excluding protected groups from their housing, resulting in a disparate impact on those groups. In this instance, the housing provider may face liability for fair housing violations if the provider cannot justify the exclusion.

If, on the other hand, the housing provider is relying upon referrals from a particular social service agency because a funding source has identified the social service provider as its designee for screening eligible prospective tenants, this practice may serve as a legitimate business necessity and overcome the claim of disparate impact. However, whether a funder's requirement to use a particular service provider creates a legitimate business purpose sufficient to overcome a disparate impact claim is untested. If the service provider intentionally discriminates against a protected classification (for instance, if the provider

intentionally focuses its efforts on one ethnic group), then a claim of *intentional discrimination* (rather than a disparate impact claim) could be filed against the housing provider, and a court would overturn the practice, despite any business purpose the provider claims.

Question 14. Can a provider legally segregate specific populations within the same building or development (e.g., women's floor, clean and sober floor)?

Single-gender floors may be legal if a compelling privacy interest exists. Floors for people with a particular disability may be legal if the population requires specific services or environments and Section 504 does not apply. Otherwise, these practices are generally prohibited.

As discussed above under Chapter Three, Section D, Question One, housing providers generally cannot discriminate on the basis of gender. However, if the housing provider has a compelling privacy interest in segregating people, such as privacy interests presented when a floor includes only one shared bathroom, segregation by floor may be defensible. If the housing provider has safety concerns justifying the segregation, which evidence supports, and the safety concerns are not merely based on stereotypes, the housing provider may also be able to defend the segregation.

No court cases have determined the legality of segregation by floor, and, if a tenant challenged such a scheme, a court may find it unlawful. However, a 2007 decision by the Ninth Circuit Court of Appeals stated that facial discrimination on the basis of gender may be upheld if the restriction (1) benefits the excluded class *or* (2) responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. In a footnote to its decision, the Court also suggested that, depending on the facility, privacy concerns may justify housing segregated by gender.[47] As a result, a housing provider establishing a single gender floor for privacy or safety concerns (which are not based on stereotypes) may have at least an arguable case that the segregation was not discriminatory.

Segregation by floors or buildings for certain types of disabilities, such as clean and sober floors or units for alcoholics, may be acceptable. Before separating people with disabilities by floor, a housing provider should perform an analysis to determine if units may be reserved for people with disabilities spelled out in Question One in Section B of this Chapter. If the housing provider can show that the specific disability requires a certain level of service or a particular physical environment that is unique to that particular disability, and that such services or physical environment are provided on the separate floor, then the segregation by floor would not be arbitrary and should be acceptable. If Section 504 applies to the development, the law often prohibits limitations for particular disabilities as described in Question Three in Section B of this Chapter. Public entities who are providing housing (who are subject to Title II of the ADA) or providers of housing funded with state funds (who are subject to that state's anti-discrimination laws, if any) should also ensure their policy arises from a state or local program or that the provider's policy is necessary to provide equal access to housing. Providers considering designating floors as clean and sober floors should be aware that implementing and enforcing rules designed to uphold such policies may be difficult, as discussed in Chapter Five, Section C, Question One.

[47] Community House, Inc. v. City of Boise 490 F.3d 1041 (9th Cir. 2007).

Question 15. What are legal ways to assure an integrated environment with a mix of disabled and non-disabled people in a building?

Housing providers should not reserve units for non-disabled people in order to assure an integrated building of disabled and non-disabled residents.

Some housing providers seek to provide an integrated housing environment with prescribed percentages of both disabled residents and non-disabled residents. Some tools are lawfully available to help achieve this outcome. For example, a housing provider can market to a mixed population in hopes of attracting a mixed applicant pool which will help ensure a mix of tenant types. In addition, a housing provider may legally discriminate in favor of disabled persons which will help limit the percentage of non-disabled persons, as discussed above in Chapter Three, Section A.

However, a housing provider may find it difficult to achieve and maintain prescribed percentages of disabled and non-disabled residents, since a provider cannot legally limit the percentage of disabled persons. Federal and certain state fair housing laws generally prohibit intentional discrimination against disabled persons. When a non-disabled person vacates a unit, intentional discrimination against disabled persons would occur if the housing provider preserves the unit for a non-disabled person or categorically excludes disabled persons. The possible benefits of an integrated environment in general and a "wellness" model in particular do not create an exception to the law's prohibitions.

Question 16. May a housing provider maintain separate waiting lists for different populations?

Whether separate waiting lists are permissible depends on how the waiting lists are administered.

Some housing providers use separate waiting lists to manage multiple funding sources with different eligibility requirements. As an example, consider a building in which some but not all of the units have assistance from a funding source that serves a narrowly-defined population. The housing provider may seek to maintain two waiting lists, one for households eligible for the specialized funding source and one for general households. This approach facilitates the housing provider's leasing process: when a tenant vacates a unit restricted to the designated population, the housing provider offers the applicant at the top of the specialized waiting list the unit, and when a general unit is vacant, the provider offers the applicant at the top of the general waiting list the unit.

The problem with this approach is that it could have the effect of penalizing persons on the specialized unit waiting list who are protected by the fair housing laws because the provider is not offering the general units to the people on the specialized unit waiting list.

A more defensible approach would be for the provider to maintain a single waiting list in which the property manager notes an applicant's eligibility for the specialized units. For instance, when a specialized unit is vacant, the manager should offer the unit to the highest specialized unit eligible applicant on the waiting list. Further, when a general unit is vacant, the manager should offer the unit to the applicant at the top of the waiting list whether or not the applicant is specialized unit eligible. Another defensible approach would be

to maintain a separate specialized unit waiting list, but also to permit specialized unit eligible applicants to apply for both the general waiting list and the specialized unit waiting list.

Question 17. May a housing provider advertise for a specific population?

Yes, so long as the project's admission criteria do not violate fair housing laws.

Both the federal Fair Housing Act and certain state anti-discrimination laws prohibit discriminatory advertising, making it illegal to make, print, or publish any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, disability, familial status, or national origin, marital status, ancestry, sexual orientation, or source of income.[48] These prohibitions are very broad, extending to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling, including oral statements made to persons inquiring about a rental. The prohibitions also extend to printers, advertising agencies, and the media, as well as the person creating the advertisement. It includes advertising on the internet. Newspapers that publish discriminatory advertisements have been found liable for violations of the Fair Housing Act, and providers may therefore find newspapers to be reluctant to publish advertisements that indicate any kind of occupancy preference. Recently, internet host sites such as Craigslist have also been the subject of fair housing complaints for rental postings that contain discriminatory selection criteria.

While the Fair Housing Act regulations authorize housing for seniors to advertise as such, the regulations do not similarly authorize advertising housing for people with disabilities. Logically, if a project's admission requirements do not violate fair housing laws, a provider should be permitted to include those requirements in an advertisement. However, given the complexity of the law in this area, as well as the reluctance of the media to make fine distinctions between illegal discrimination and legal occupancy requirements, many providers have found it more practical to advertise by describing their facility rather than describing tenant qualifications (e.g., "supportive housing project providing services for persons with serious mental illness seeks tenants"). Finally, all advertisements should include the HUD equal housing opportunity logo or statement.

Question 18. What is “affirmative marketing” and does an affirmative marketing requirement conflict with targeting of a specific tenant population?

Affirmative marketing is project advertising designed to reach all potential occupants of a project, regardless of race, color, religion, national origin, gender, familial status, disability, or any other protected bases. Affirmative marketing requirements do not preclude designation of a project to serve specific tenant populations.

Most HUD-funded housing programs require compliance with HUD “affirmative fair housing marketing” requirements, as well as approval by HUD or the local jurisdiction administering the HUD-funded program of an “Affirmative Fair Housing Marketing Plan.” Affirmative marketing is project advertising which is designed to reach protected classes of people. HUD published Affirmative Fair Housing Marketing

[48] 42 U.S.C. § 3604(c); California Government Code § 12955(c).

regulations in 1972 that are set forth in 24 CFR Part 200. The regulations mandate affirmative marketing to ensure housing availability to individuals in the market area of HUD-assisted projects, regardless of their race, color, religion, or national origin. Subsequent amendments to the Fair Housing Act indicate that sex, familial status, and disability should be included in the groups enumerated in the HUD Affirmative Marketing Regulations. These regulations apply to HUD-subsidized and FHA unsubsidized projects. The Section 202 and 811 programs explicitly require compliance with the HUD Affirmative Marketing Regulations. HUD Handbook 8025.1 (Implementing Affirmative Fair Housing Marketing Requirements) provides detailed guidance in this area.

The HUD Affirmative Marketing Regulations require development of an affirmative marketing plan that provides for (1) a project to be publicized to minority persons using minority media and other minority outlets (2) the use of the HUD equal opportunity logo or slogan in all advertising and literature and posting in conspicuous locations (3) maintenance of nondiscriminatory hiring policy so that staff will include people of majority and minority groups and both genders (4) oral and written instruction to employees and marketing agents on non-discrimination and fair housing, and (5) solicitation of eligible applicants for housing reported to HUD offices.

The HOME, HOPWA, and various McKinney-Vento Act program regulations do not cross-reference the general HUD Affirmative Marketing Regulations. Instead, each includes its own basic affirmative marketing requirement without the requirement to prepare and obtain HUD approval of an affirmative marketing plan. The HOME regulations require each participating jurisdiction to adopt affirmative marketing procedures "to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability," including procedures owners use to use to inform and solicit applications from persons who are not likely to apply for the housing without special outreach.[49]

The HOPWA regulations require project sponsors to adopt procedures to ensure that all persons who qualify for the assistance, regardless of their race, color, religion, sex, age, national origin, familial status, or handicap, know of the availability of the program.[50] Similarly, the McKinney-Vento Act Emergency Shelter Grant, Shelter Plus Care, and Supportive Housing Programs all require project sponsors to adopt procedures to make their programs known and available to persons in the enumerated groups who may not otherwise be reached, and also to make available information on the existence and location of facilities and services that are accessible to persons with disabilities.

In addition, the Shelter Plus Care and Supportive Housing Program regulations state that, where a specific population of disabled homeless persons is designated to be served by a project (such as people with serious mental illness, people who abuse alcohol or substances, or people with AIDS), project sponsors must meet non-discrimination and affirmative marketing requirements within the designated population.[51]

[49] 24 C.F.R. § 92.351.
[50] 24 C.F.R. § 574.603.
[51] 24 C.F.R. § 576.57(a)(2) for Emergency Shelter Grants; 24 C.F.R. § 583.325 for the Supportive Housing Program; and 24 C.F.R. § 582.330(c) for Shelter Plus Care. The Shelter Plus Care and Supportive Housing Program regulations are expected to be replaced by new regulations adopted pursuant to the HEARTH Act sometime in 2010.

A housing provider may comply with affirmative marketing requirements in a project designated for a particular population, so long as the tenant targeting criteria do not violate fair housing law. If a project is lawfully targeted to people with a particular disability, and complies with the Fair Housing Act (see discussion under Question One in Section B of this Chapter), the affirmative marketing plan may provide for affirmative marketing within the targeted disability group. For example, a project reserved for persons with a mental illness can be affirmatively marketed to individuals who meet the tenancy requirements for the project and are members of potentially underrepresented racial, ethnic, religious, or other enumerated categories.

Chapter Four: *Selection of Individual Tenants*

This Chapter discusses issues related to selection of individual tenants in the context of fair housing laws. The concepts of "reasonable accommodation" and "reasonable modification" are crucial here, and are discussed at length.

All questions in this Chapter in some way require the provider to collect information about eligibility for housing. Providers should be cognizant of the rights of applicants throughout this process. Credit agencies and tenant "blacklists" are rife with incorrect information about individuals. Consequently, housing providers should consistently inform applicants of the reason for rejection of their application and providers should give applicants an opportunity to respond to or correct inaccurate information.

SECTION A. SCREENING AND INTAKE

Question 1. What questions may be asked to identify an applicant as a member of a targeted group?

If the housing provider is restricting the housing to a particular population and this restriction does not violate fair housing laws, providers generally can ask an applicant questions pertaining to whether he/she qualifies to be admitted to the housing. The Fair Housing Act provides a list of permissible questions.

In establishing a tenant screening process, housing providers should first review procedures to determine whether the information the property manager requests of the applicant is reasonably related to the tenancy. Requests for information that do not bear on the applicant's ability to pay rent, maintain the premises rented, or comply with the terms of the lease may be unlawful.

The Fair Housing Act Regulations at 24 CFR Section 100.202 set forth questions housing providers may ask applicants for housing. These questions are limited to the following:

- Inquiries into an applicant's ability to meet the requirements of ownership or tenancy, including inquiries into such things as income if the housing is income restricted and age if the housing is limited to seniors or transition age youth.
- Inquiries to determine whether an applicant is qualified for a dwelling available only to disabled persons or to persons with a particular type of disability, if the housing is appropriately limited to these populations (see Chapter Three).
- Inquiries to determine whether an applicant qualifies for a preference available to disabled persons or to persons with a particular type of disability.
- Inquiries to determine whether an applicant is a current illegal abuser or addict of a controlled substance.
- Inquiries to determine whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance (See Questions Six and Seven in this Section for additional information regarding inquiries about an applicant's criminal record).[52]

[52] 24 C.F.R. § 100.202.

If the provider asks these questions of any applicant, then the provider should ask the same questions of each applicant, regardless of whether the housing provider believes the applicant qualifies for a specific program.

The broad areas of permissible inquiry listed above leave many unanswered questions regarding applicant screening and do not provide any guidance on verifying applicant provided information. They therefore raise numerous questions regarding verification of the information, particularly relating to verification of the applicant's disability. For example, if the housing is limited to people with a particular disability, how does a housing provider determine that the applicant suffers from the disability? Also, if an applicant requests a reasonable accommodation, how does a housing provider determine whether the applicant qualifies for a reasonable accommodation?

If a person is applying for housing that is designated for people with disabilities or people with a particular disability, the housing provider may ask the applicant to document the disability, although the information that may be requested is limited to a medical provider's statement that the applicant has the particular disability, rather than detailed information on the severity of the disability. So, for example, if the applicant provides a Supplemental Security Income award letter that does not specify the disability and the housing is designated for all applicants with disabilities regardless of the type of disability, the applicant would qualify and the housing provider would not be allowed to request any additional information.

Eligibility for SSI is not the only way to establish disability. In fact, the definition of disability under the Fair Housing Act is much broader than the SSI definition of disability. The definition of disability under the Fair Housing Act includes people who have been misclassified or considered by others to have a physical or mental impairment even if the individual does not have that impairment (e.g., a gay person who is excluded from housing because he is assumed to have HIV/AIDS is protected under the Fair Housing Act, even if he does not have HIV/AIDS and is therefore not actually disabled). Additionally, housing providers should be aware that certain states have passed supplementary anti-discrimination statutes with broad definitions of disability that may expand covered classes. The expansive definition of disability under the federal fair housing laws means that housing providers may have to be flexible in the type of documentation used to verify disability status.

Question 2. Does providing services with housing permit a provider to ask additional eligibility questions as long as the provider uniformly asks the questions of all potential tenants?

No.

The fact that the housing includes a service component does not allow the housing provider to ask additional questions not otherwise permissible. The questions asked must relate to lawful conditions of renting (i.e., ability to pay rent, eviction history) (See Questions One and Four for additional information on this issue). In a licensed facility, owners are still subject to the Fair Housing Act, but may be required by licensing laws to ask additional questions of applicants. In such a case, providers should comply with the licensing requirements.

Question 3. Should a housing provider have a single housing application that includes all questions to determine eligibility for all programs the agency operates or should it have a separate form for each program?

A single application asking all eligibility questions is preferable from a fair housing perspective.

Many housing providers operate developments with multiple sources of funding or may have a number of different developments, each with a unique source of funding. These funding sources often contain occupancy restrictions or target occupancy to certain special needs populations. The result of the multiple funding programs is that housing providers may have some units restricted to people with HIV/AIDS and other units restricted to people with mental illness. Determining who qualifies for what housing can be difficult. The easiest and most defensible solution to this problem from a fair housing perspective would be to have a single application for all housing the provider operates. This application could list the qualifications for each type of housing operated and ask the applicant if he or she qualifies for each type of housing. A single application is preferable to a separate application for each targeted group, since determining which application to provide to an applicant would require the provider to make an assessment of whether the applicant possesses the required disability prior to obtaining any applicant information. The questions necessary to determine which application to give an applicant could lead to discrimination claims.

Question 4. May a housing provider use an applicant's psychosocial history in making tenant selection decisions?

Given the limited nature of inquiries allowed under the Fair Housing Act, psychosocial evaluations should not be used in making tenant-selection decisions in unlicensed facilities.

The issue of psychosocial evaluation often arises when the housing provider operating an unlicensed facility is a social service agency that also provides services independent of the housing. This issue may also arise when a housing provider works with a social services agency to provide service-enriched or supportive housing. Before performing or participating in any psychosocial screening, the housing provider should consult with a knowledgeable fair housing attorney.

Generally, the use of psychosocial evaluations or histories is not appropriate and should be discouraged in tenant selection. Psychosocial evaluations provide information unrelated to the individual's ability to meet the terms and conditions of tenancy. Due to the subjective nature of the information obtained in such a process, a rejected applicant could argue that the housing provider denied housing for personal traits rather than on the basis of objective criteria related to tenancy, and the provider would have difficulty proving otherwise. A housing provider may inquire into a tenant's rental history that may present information relevant to a tenant's psychosocial history. However, a housing provider must restrict such inquiries to behaviors, rather than mental or physical conditions. All inquiries must relate to terms of tenancy, such as whether the tenant would maintain the apartment and pay rent.

Operating supportive housing sometimes requires obtaining some information regarding the tenant's psychosocial history to provide appropriate and necessary services to the tenant. The housing provider should only seek psychosocial information after the provider has admitted the tenant to the housing program. Asking for psychosocial information after a tenant's admission will ensure that the provider does

not use any of the information obtained to provide social services for housing decisions. Again, psychosocial information is irrelevant to housing decisions. Additionally, it would be prudent for the service agency to maintain completely separate files for the housing and social service programs, and to allow access to each set of files only to service staff working in each program area, without allowing access to property management staff. Such strict controls ensure confidentiality and that housing decisions are made on valid grounds.

The reality of many supportive housing programs, however, is that limited staff operate the programs. As a result, the same people often work in both the social service function and the housing function of the program. If staff members responsible for making decisions regarding occupancy have access to information about the applicant that is not directly relevant to a housing eligibility decision and which, in an ordinary landlord-tenant relationship, would not be available to the landlord, staff should exercise caution. In these situations, where staff members wear many hats or work closely together, the staff members selecting tenants should not base decisions on information extraneous to the landlord-tenant relationship. Before making a tenant selection decision, the staff member may want to review the following series of guidelines to ensure that the staff is making a housing decision on defensible grounds:

- Is the information guiding the housing decision information that the staff would have obtained if the applicant's only point of contact with the agency was in applying for housing?
- Is the basis of the housing decision related to the terms and conditions of tenancy rather than the applicant's overall psychosocial evaluation?
- If the applicant is disabled as defined in the Fair Housing Act (see Appendix Seven) and the housing provider is made aware of this disability, would a reasonable accommodation enable the applicant to meet the terms and conditions of tenancy?

Housing providers and social service agencies should also keep in mind confidentiality issues related to sharing applicant information. Prior to sharing any information regarding an applicant between a social service agency and a housing provider, the provider should attempt to obtain the applicant's consent (See Question Five below for more on sharing information between case managers and property managers).

In a licensed facility, a housing provider may be required to ask for information generally gathered as part of a psychosocial evaluation pursuant to licensing requirements. If this is the case, the provider should comply with the licensing requirements, as it is legally required.

Question 5. What types of information may be shared across supportive services and property management teams without violating confidentiality?

Generally, property management staff should only have information related to an applicant or tenant's ability to meet the terms of tenancy. Case managers and other staff members providing supportive services should be aware of any confidentiality requirements of their profession before disclosing any information. If supportive services staff and property management staff need to share information, staff should first obtain the tenant's consent.

Supportive housing programs that include both residential facilities and service programs present unique privacy challenges for the service provider and the housing provider. Although sharing information

between the two may occasionally allow for a more informed treatment program, some information sharing may violate privacy laws.

Under federal privacy laws, housing providers are required to keep confidential any personal information about a person that was obtained in a confidential manner or from a confidential source. State privacy laws may also require confidentiality on certain matters. Housing providers should not share information unless necessary. If a tenant with a disability gives the housing provider permission to reveal the information to other tenants or to service providers, the housing provider should obtain the permission in writing. Then the housing provider can inform other tenants or service providers, but providers should make certain that any information disclosed is only disclosed to people the tenant authorized to receive the information. Additionally, the information staff disclose should only be the information that the tenant has authorized to be disclosed. Providers should be particularly careful of these privacy concerns in considering tenant participation plans. Peer counseling and other tenant-to-tenant programs should be designed to ensure that staff and tenants participating in the process do not inadvertently disclose confidential information. Providers may want to have tenants participating in these programs sign confidentiality waivers or train peer and tenant counselors regarding disclosures.

Professional standards and duties govern case managers' and service providers' release of confidential information to a housing manager. Case managers, be they social workers, nurses, or some other professional designation, all have duties of confidentiality. Case managers should not breach these duties by disclosing information to a housing manager, unless the client authorizes the disclosure or disclosure is necessary to protect the health and safety of others. Unless waived by the tenant, these confidentiality obligations apply regardless of whether the case manager and housing manager work for the same organization. In addition, most case managers will be subject to the Health Insurance Portability and Accountability Act (HIPAA), which requires the patient to agree to release of information prior to any such release. HIPAA regulates the transmittal of information regarding health care via electronic means. HIPAA covers any entity that provides health care, including counseling services related to physical or mental conditions. Although Congress primarily intended HIPAA to apply to health insurers and medical providers, the broad definitions in the statute could be interpreted to apply to supportive housing providers who counsel or provide other supportive services to residents. Under HIPAA, information regarding a patient's medical care may not be released to other entities or persons without the patient's permission. Additionally, when releasing information pursuant to a patient-approved release, the release must inform the receiving party that the information is not to be further disclosed to others. Although housing providers are not the intended target of HIPAA, supportive services providers should ask clients to complete HIPAA release forms.

Generally, a case manager should not disclose information to the property manager during the tenant screening process. Property managers should base screening primarily on information relevant to the landlord-tenant relationship, specifically regarding whether the tenant is capable of meeting the terms and conditions of residency.

Without an appropriately obtained waiver of confidentiality, the case manager should not disclose information to the property manager during tenancy either. The type of information disclosed would most likely relate to the severity and nature of a client's disability. A property manager is generally not entitled to request information about the severity and nature of a client's disability either as part of an application process or once a tenancy is established. A property manager in possession of such information may open the door for the tenant to allege that the property manager made decisions regarding the tenant's housing

situation based on this information, which would be discriminatory. Although the housing manager may not have considered the information in making a decision, such as the initial decision to select the tenant or the later decision to evict, the mere possession of such information makes such a defense harder to support.

Realistically, when serving a special needs population, such as persons with a mental illness, information from a case manager may be useful to the property manager in his or her day-to-day dealings with the tenant. If the property manager believes such information would be useful and in the best interest of the tenant, the property manager should ask the tenant to waive confidentiality requirements in writing so that the case manager may provide the property manager with the necessary information. But, again, property managers and case managers should exercise caution when making the decision to obtain such information, since the property manager's possession of medical information may be used as evidence of discriminatory treatment.

Question 6. What are HUD's "One Strike" policies and what housing programs do they cover?

*The HUD "One Strike" policies, which apply to many federal programs, require property managers to screen applicants for drug and alcohol abuse and certain criminal activity. One Strike policies also require property managers to include tenant lease provisions that facilitate eviction of tenants in circumstances related to drugs, alcohol, and criminal activity. The "One Strike" policies do **not**, however, require blanket exclusions for all individuals with histories of criminal or drug activity.*

A set of federal laws and regulations that govern pre-occupancy screening of applicants for drug and alcohol abuse and certain criminal activity in some federally funded housing programs are often referred to collectively as "One Strike" policies.[53] One Strike policies also require tenant lease provisions that address circumstances related to drugs, alcohol, and criminal activity. HUD has published regulations, notices and handbooks that implement the One Strike requirements. One Strike policies are applicable to housing funded by certain federal housing programs, including public housing, Section 202, Section 811, Section 236, Section 221(d)(3) and (5), Project-Based Section 8, Tenant-Based Section 8, and Section 514 and 515 rural housing. One Strike policies do not currently apply to HOME, CDBG, or McKinney-Vento Act programs (with the exception of McKinney-Vento Act Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care)

In connection with tenant selection, providers of public housing and Tenant-Based Housing Choice Vouchers, as well as housing financed with Section 202, Section 811, Section 236, Section 221(d)(3) and (5), and Project-Based Section 8, must establish the admission standards set forth below. One Strike policies require housing providers to create admission standards, but the rules *grant housing providers*

[53] In 1996, President Clinton expressed concern in his State of the Union Address about increases in crime in public housing communities, and announced a "one strike and you're out" policy for public and Section 8 housing, requiring housing authorities to enforce stricter screening and eviction policies related to drug and alcohol abuse and criminal activity. The President's "one strike and you're out" remarks served as the impetus for laws enacted by Congress addressing criminal behavior and drug and alcohol abuse in public housing and the regulations adopted by HUD for enforcement purposes. Some of the regulations which still govern eligibility and termination policies, however, pre-date Clinton's State of the Union Address, such as the Anti-Drug Abuse Act of 1988.

discretion in their admission decisions. In fact, One Strike policies *do not require blanket exclusions for all individuals with histories of criminal and/or drug activities*. Under One Strike policies:

- Housing providers must prohibit admission of a household if any member of the household has been evicted from federally-assisted housing for drug-related criminal activity within the past three years. However, housing providers have the discretionary authority to admit the applicant if (1) the circumstances leading to the earlier eviction no longer exist; or (2) the applicant has successfully completed an approved supervised drug rehabilitation program.
- Housing providers must establish admission *standards* that prohibit admission of a household if the provider determines that any member is currently engaging in an illegal use of a drug.
- Housing providers must establish admission *standards* that prohibit admission of a household if the provider determines that a household member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- Housing providers must establish admission *standards* that prohibit admission of a household if the provider determines that a household member's pattern of alcohol abuse may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- Housing providers must establish admission *standards* that prohibit admission of a household if any member of the household is subject to a lifetime registration requirement under the sex offender registration programs in the state in which the housing is located or in the state or states in which the sex offender has previously lived.

In public housing, Housing Choice Vouchers, and certain Project-Based Section 8 Programs, housing providers must also permanently prohibit admission to the program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing. Providers should review the regulations for Sections 514 and 515 to determine how One Strike policies impact those programs.

In establishing *standards* for admission, housing providers have *discretion* and may consider numerous mitigating factors, including: (1) the seriousness of the offending action, (2) the effect on the community of denial or termination or the failure of the housing provider to take such action, (3) the extent of participation by the leaseholder in the offending action, (4) the effect of denial of admission or termination of tenancy on household members not involved in the offending action, (5) the demand for assisted housing by families who will adhere to lease responsibilities, (6) the extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending actions, and (7) the effect of the housing provider's action on the integrity of the housing program.[54]

In addition, when establishing admissions standards regarding applicants with histories of illegal drug use or alcohol abuse that may pose a threat to the health and safety of other residents, housing providers may also take into account whether or not an applicant has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully. Providers may establish a reasonable period before the admission decision during which the applicant must not have engaged in the prohibited criminal activity. [55]

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[54] 24 CFR § 5.851.

[55] Providers have discretion as to the length for the “reasonable period” and there is currently no minimum required length. HUD has commented that five years is "reasonable" but the courts have indicated that a period as long as 14 years may be "reasonable".

The One Strike regulations also authorize, but do *not* require, housing providers to prohibit admission for drug-related criminal activity, violent criminal activity or other criminal activity that would threaten the health, safety or right to peaceful enjoyment of the premises by other residents or by the owner of the housing, or any employee, subcontractor, contractor or agent of the owner who is involved in the housing operation.

Despite the fact that the One Strike regulations permit housing providers to set admission standards which allow for some discretion, a recent HUD Notice advocates for a zero tolerance approach regarding the admission of sex offenders subject to lifetime sex offender registration requirements. This Notice (H 2009-11) states that housing providers are required to deny admission to any applicant who is lifetime sex offender. The Notice also encourages housing providers to perform sex offender lifetime registration checks on all household members (including minors) and to verify the accuracy of any tenant response concerning lifetime registered sex offender status through the Dru Sjodin National Sex Offender Database.

One Strike regulations do not require a criminal conviction for an owner to deny application for tenancy and do not offer guidance on the type of evidence an owner should rely on to determine if an applicant has engaged in criminal activity. In making judgments about criminal activity, housing providers should rely on objective criteria. Housing providers should also ensure that such criteria, more likely than not, demonstrates that the applicant has engaged in criminal activity. Providers are cautioned against relying exclusively on arrest records to make a determination concerning the applicant's previous criminal activity, given the racial and ethnic bias often reflected in arrest patterns.

Program applicants may appeal denial of admission decisions, and PHAs and housing providers may reconsider an applicant who has previously been denied admission. Housing providers should review HUD Handbook 4350.3 Chapter Four, Section Two for requirements concerning reconsideration.

One Strike issues often arise in mixed-financed projects where some units are federally funded and subject to One Strike regulations while other units do not receive federal funds and thus are not subject to One Strike policies. In such a situation, rather than have multiple admission policies, all applicants should be provided with the same application which may include questions related to One Strike regulations and the housing provider should perform the same background checks on all applicants. However, the provider may decide to apply the One Strike prohibitions only to those units actually funded with federal funds.

Question 7. May a housing provider ask applicants if they have a criminal conviction?

A housing provider may ask an applicant if he or she has a criminal conviction, but the request for such information should be related to the terms and conditions of tenancy and should only be used to determine whether the applicant can comply with the lease.

The One Strike rules, which are described in detail in Question Six of this Section, specifically authorize owners of housing assisted with certain federal financing to prohibit admission to people who have engaged in certain criminal activity. Therefore, for units subject to One Strike, housing providers may ask if an applicant has a criminal conviction.

For housing not subject to One Strike regulations, the Fair Housing Act specifically authorizes housing providers to ask whether an applicant has been convicted of the illegal manufacture or distribution of

controlled substances. In addition, a housing provider may ask whether an applicant has been convicted of a crime that might adversely affect the health, safety or welfare of other tenants.

Although the Fair Housing Act does not specifically state that a housing provider can ask applicants about criminal convictions unrelated to drug crimes, such a question often relates to whether the tenant would comply with the terms of tenancy and sometimes ensures the safety of occupants. Thus, such questions are reasonable, although no case law provides guidance on this point and providers may find themselves fighting a discrimination claim if property managers ask such a question. Housing providers should also be aware that one study has found that criminal history does not provide any predictive value of a supportive housing tenant's ability to comply with terms of tenancy. The authors of the study stated that their findings run, "[C]ounter to common beliefs that housing needs to be free of offenders in order to be safe for the other residents."[56]

Arrest records not resulting in conviction are generally not a valid reason for rejecting an applicant for housing. However, if One Strike policies apply, a housing provider may deny admission to an applicant who has engaged in any "criminal activity." Therefore, in the context of One Strike policies, conviction is not required and while arrest records should not be the only evidence relied upon, they may provide evidence of impermissible criminal activity.

Question 8. May a property manager reject an applicant because of a criminal conviction?

Yes, depending on the type of crime committed.

A housing provider may deny housing to a person with a criminal conviction history, as opposed to arrests, if the conviction involved crimes of physical violence to persons or property, drug-related crimes, or other criminal activity that would adversely affect the health or safety of other tenants if the applicant committed the crime in the housing development or if the applicant's criminal activity otherwise relates to his/her ability to meet the terms of tenancy. For example, someone who has been convicted of perjury probably does not pose a threat to other residents, but someone with a conviction of assault may pose a threat to other tenants. Criminal records of check forgery or other check fraud reflect upon an applicant's ability to pay monthly rent and may be a basis for denial. The housing provider must use judgment to evaluate the age of the convictions and other mitigating factors. In addition, HUD's One Strike requirements, discussed in Question Six of this Section, *require* exclusion of people with limited specific criminal convictions from some federally-funded housing projects. For public housing, Tenant-Based Section 8 and certain Project-Based Section 8 Programs, housing providers must permanently prohibit admission to the program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

[56] Malone, Daniel. "Assessing Criminal History As a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders." *Psychiatric Services*. Vol. 60, No. 2. Feb. 2009.

Question 9. May a housing provider prohibit admission to a unit if a member of the household is a registered sex offender?

Generally, no, except if the "One Strike" policies apply, if necessary to protect people at risk, or if the housing is located in an area where state law prohibits sex offenders from residing.

If the One Strike rules described in Question Six above apply due to specific types of federal funding for the project, then admission of registered sex offenders may be prohibited. If the One Strike rules do not apply, then state laws governing the regulation of housing rights for ex-offenders, if any, will apply. For example, some states restrict sex offenders from living near areas where children often gather, such as schools and parks. Private landlords may also seek to deny tenancy to individuals on a state-mandated register of sex offenders to guard against negligence lawsuits from existing tenants who are concerned for their safety. The legality of such policies depends on the state's particular anti-discrimination laws, and is not well settled from a legal perspective.

Given the lack of legal clarity as to treatment of sex offenders with regards to housing decisions and the interplay between various laws intended to restrict occupancy by ex-offenders, housing providers should be careful to craft tenant selection policies that factor in the risks the particular applicant may pose, the tenant's civil liberties and the housing provider's obligation to protect other tenants in the development.

Question 10. May a housing provider require an applicant to be "clean" to be accepted as a tenant? May people who are addicted to drugs be excluded from housing?

Persons who are currently using illegal drugs may be excluded from a project.

Under HUD's One Strike rules, housing providers of certain federally assisted housing programs must establish standards to prohibit admission to any person who is engaged in illegal drug use.

Additionally, the One Strike requirements prohibit admission to any persons whose history of illegal drug or alcohol abuse interferes with other resident's health, safety, or peaceful enjoyment of the housing (See Question Six of this Section for additional information on HUD's One Strike requirements).

All housing providers may ask an applicant whether the applicant is currently using or is addicted to an illegal controlled substance.[57] If the applicant answers yes, the applicant may be excluded from the housing. If the applicant answers no, the provider may need to assess the truthfulness of the answer. If the applicant is recovering from drug addiction and not currently using illegal drugs, the applicant may be considered disabled and entitled to protection from laws prohibiting disability discrimination.

The Fair Housing Act and the Americans with Disabilities Act (ADA) do not address how a housing provider determines whether someone is a current drug user or a former drug user. No definition of former drug user serves as guidance and probably every drug rehabilitation program has a different standard for what constitutes current versus former drug use. This lack of definition presents a dilemma for housing providers trying to ensure that only former drug users are admitted to the housing program.

[57] 24 C.F.R. § 100.202.

The regulations implementing the Americans with Disabilities Act (ADA) offer one standard that may be of use to housing providers trying to determine if someone is a current drug user. The ADA regulations define current illegal drug use as "illegal use of drugs that occurred recently enough to justify a reasonable person's belief that a person's drug use is current or that continuing use is a real and ongoing problem."[58] A similar definition of current illegal drug use is contained in the One Strike regulations, where "currently engaging in" is defined as recently enough to justify a reasonable belief that the individual's behavior is current.[59]

A series of ADA cases has tried to define current drug use, with few clear-cut answers. The courts are in agreement that an applicant does not have to have "a heroin syringe in his arm or a marijuana bong to his mouth" to be a current user, but there is no bright-line test emerging in case law.[60] In one federal court case, an individual who was drug free for one year and was involved in a continuing professional rehabilitation and mentoring program was not considered to be a current drug user and was entitled to protection as disabled under the Fair Housing Act.[61]

Note that a person whose sole impairment is alcoholism or drug addiction (e.g. a person who does not have some other illness or disability that is independently considered to be a disabling condition) will not be considered to be disabled for the purposes of Section 202 and Section 811 program eligibility.[62]

The questions of what constitutes current drug use and what standards a housing provider can adopt for current drug use are the subject of controversy among housing professionals. Some housing advocates argue that a bright-line test, such as no drug use in the last six months, is legal, as long as, (1) the policy is based on some statistical or scientific evidence regarding the likelihood of staying "clean" after such period, (2) the provider can demonstrate the necessity to screen out current illegal drug users to operate a successful program, and (3) any such policy includes a degree of flexibility enabling and requiring the provider to assess individually an applicant who may not fall within the bright-line time period, but can show that he or she is drug free. Others argue that any bright-line policy is illegal primarily because such policies fail to treat people with disabilities as individuals. Instead, bright-line policies make assumptions about people, as a group based on their disability.

Given the lack of court guidance on this issue, any policy adopted by a housing provider may result in claims. A defensible course of action may be to adopt a carefully crafted policy that sets a standard for being clean. This standard should be based on research that shows that some percentage of drug users who are drug free for the designated period are likely to remain drug free. The policy should also include provisions that would allow applicants to present additional evidence to rebut the presumption that they are not drug free, such as ongoing participation in drug rehabilitation programs, recommendations from drug treatment centers, or other relevant evidence. The housing provider will then have to evaluate this evidence to determine whether the applicant should be admitted even though the applicant has not been drug free for the required period. Obviously, this screening process will require some knowledge and skill on the housing provider's part in determining each applicant's likelihood of remaining drug free. But, until court decisions or regulations offer further guidance, there is no bright-line test that providers can apply.

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[58] 28 C.F.R. § 36.104.
[59] 24 C.F.R. § 9.103; 24 C.F.R. § 5.853.
[60] Shafer v. Preston Memorial Hospital Corporation, 107 F.3d 274 (4th Cir. 1997).
[61] United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992).
[62] 24 C.F.R. § 891.305; 24 C.F.R. § 891.505.

Question 11. Is pre-admission drug testing legal?

Pre-admission drug testing is not prohibited if it is required of all applicants, but is not recommended.

Federal laws limiting drug testing apply to employment situations, not to housing admission. Drug testing is legal if the provider requires drug tests as a condition of tenancy for all tenants living in all units the provider operates. Drug testing might not be lawful if a provider only uses it in certain types of projects (like projects for people with disabilities or people who are homeless) and not in others. For certain HUD-funded programs, HUD requires that tenant selection plans include standards for prohibiting the admission of prospective tenants who have engaged in drug-related activity, but offers no official guidance on whether drug testing can be part of the selection plan.

Although drug testing is not illegal, before implementing a drug testing policy, housing providers should carefully consider the ramifications. Drug testing can be expensive. Also, the results of drug tests are not infallible and finding reputable, accurate labs may be difficult. The rejection of applicants on the basis of drug tests may result in additional administrative costs if an applicant challenges the results and the housing provider must defend the testing procedures to prove accuracy. Additionally, in states that permit the use of medical marijuana, a tenant may ask a landlord to waive results from a drug testing program as a reasonable accommodation if the applicant uses medical marijuana in connection with his or her disability.

Question 12. Does HUD have a requirement that current drug users must be rejected as tenants?

Yes, under "One Strike" rules, but those rules do not apply to all HUD programs.

The One Strike regulations require owners of certain kinds of HUD projects to establish standards that prohibit admission to a household *if the owner determines* that any household member is illegally using a controlled substance. The HUD One Strike regulations also require owners to prohibit admission to a household if the *owner determines* that a household member's illegal use (or pattern of illegal use) of a controlled substance may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. Note that a criminal conviction evidencing drug use or abuse is *not* required. This law applies to public housing, Tenant-Based Section 8 Housing Choice Vouchers, Section 202, Section 811 and federally insured Section 221(d)(3) and Section 236 projects (See the extended discussion of the HUD One Strike policies under Question Six of this Section).

Question 13. May a housing provider require an applicant to be sober?

Generally, a housing provider may not require an applicant to be sober. However, HUD programs permit exclusion of applicants whose use of alcohol may interfere with the health and safety of other tenants or with the applicants' ability to meet the terms of the tenancy.

Unlike drug users, the fair housing laws do not distinguish between alcoholics who are currently drinking and alcoholics in recovery. Alcoholism is considered a disability if it interferes with one or more major life

activities and therefore is not a basis by itself for refusing occupancy, even if the applicant has not achieved nor desires sobriety.

Both the Fair Housing Act and the Americans with Disabilities Act (ADA) include alcoholism within the definition of handicap. Since alcohol is a legal substance, whether the applicant is currently drinking alcohol is not relevant. Refusing housing to someone because that person is an alcoholic would be unlawful discrimination since alcoholics are treated like all other disabled persons. If the applicant's problems with alcohol have caused behavior problems that interfere with the applicant's ability to meet the terms of tenancy, the housing provider may use this as the basis for rejecting an applicant. However, since alcoholism is considered a disability under the Fair Housing Act and the ADA, housing providers may be required to consider reasonable accommodations that would allow an alcoholic to reside in the housing. For example, if the applicant has a poor tenancy history due to difficult behaviors resulting from alcohol use, the housing provider may need to waive requirements related to past rental history to accommodate the tenant if the tenant can show that he/she has taken steps to reduce the chances of the negative behavior reoccurring.

The definition of "individual with handicaps" in HUD's Section 504 regulations excludes an individual whose current alcohol use prevents him/her from participating in the program the individual is applying for, or whose participation, because of current use of alcohol, would constitute a direct threat to property or to the safety of others.[63] This definition would appear to allow housing providers receiving federal funds to reject alcoholics on the basis of current drinking, if the drinking results in behavior problems. However, providers should exercise caution. The standard for rejection under Section 504 is that the individual is not able to participate in the program or activity offered because of the individual's alcohol consumption. If the provider's program simply offers rental of an apartment, with no services provided, which is the case for some of HUD programs, the housing provider will need to show that the applicant's drinking prevents the applicant from meeting the terms and conditions of tenancy (e.g., payment of rent or maintenance of the apartment), which is always a permissible reason for rejecting a tenant (subject to the reasonable accommodation requirement). Thus, the drinking itself is not sufficient reason for rejecting an applicant. Rather, behaviors resulting from the drinking must justify the rejection.

Additionally, sobriety requirements may run afoul of the tax-credit requirements that tax credit projects be available to the general public. In at least one instance, IRS agents have questioned whether a sobriety requirement means the housing is not available to the general public. Although, at this time, the IRS has not issued any official rulings on this point, providers should review this issue with experienced legal counsel before imposing a sobriety requirement in tax credit projects.

Finally, under the One Strike policies, owners of certain kinds of HUD-assisted projects must establish standards to prohibit occupancy to households where a household member's pattern of alcohol abuse may interfere with other resident's health, safety, or right to peaceful enjoyment of the premises. However, One Strike regulations permit limited exceptions for people who have completed or are participating in rehabilitation programs and are no longer abusing alcohol[64]. (See the detailed discussion of One Strike policies in Question Six of this Section).

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[63] 24 C.F.R. § 8.3.

[64] 42 U.S.C. § 14377; 42 U.S.C. §§ 13661, 13662, and 13664; 24 C.F.R. § 5.852; 24 C.F.R. § 5.857, 24 C.F.R. § 882.518, 24 C.F.R. § 960.204; 24 C.F.R. § 982.553.

Question 14. May a housing provider exclude applicants based on their citizenship status?

A housing provider should not exclude applicants based on their citizenship status unless required by federal law.

Some municipalities across the country have adopted ordinances that prohibit landlords from renting to undocumented immigrants. Such laws may be preempted by contradictory state statutes and have generally failed to survive court challenges on federal constitutional grounds. On the other hand some states, including California, have sought to prohibit landlords from requiring any tenant or potential tenant to state, certify, or represent immigration status to a landlord, including prohibiting any inquiries regarding immigration or citizenship status of a tenant or prospective tenant. This means that rental housing providers may not adopt "citizen-only" preferences or requirements, or inquire about the immigration status of applicants.

Federal law, which takes precedence over any state and local laws, is generally silent on this topic, but does prohibit certain types of government assistance to some noncitizens based on immigration status. Section 214 of the Housing and Community Development Act of 1980 prohibits certain HUD programs from assisting noncitizens and persons without eligible citizenship status. The regulations implementing Section 214 identify the following HUD programs as requiring this prohibition: (1) Section 235 of the National Housing Act (HUD-insured mortgages); (2) Section 236 of the National Housing Act (for tenants paying below market rent); (3) Section 101 of the Housing and Urban Development Act of 1965 (the Rent Supplement Program); and (4) the United States Housing Act of 1937 (which covers (i) public housing, (ii) Section 8 Housing Assistance Programs, and (iii) Housing Development Grant Programs with respect to low income units only).[65] If a housing provider is accessing any of the listed funds, then the provider must verify applicants' immigration status and may not rent to persons without eligible immigration status, which is described in detail in Chapter Three of the HUD Multifamily Occupancy Handbook (4350.3). Housing providers should carefully review the 214 regulations to understand the types of immigration status that are eligible or ineligible for housing subject to Section 214.

If a housing provider is accessing the above-listed federal funds for any housing units, the provider should adopt a uniform policy of verifying immigration status so that the policy is fairly implemented. A housing provider should only inquire regarding applicants' immigration status for the units receiving the federal funding listed above. Housing providers will face challenges in mixed-financed buildings, which include units that are subject to the federal law and units that are not subject to the federal law. In such mixed-finance buildings, housing providers should consult with a knowledgeable fair housing attorney who can help craft a tenant selection policy that complies with federal requirements and if applicable, any state or local requirements, but also promotes equal treatment of all applicants.

[65] 24 C.F.R. § 5.500 et seq.

Question 15. Should existing tenants assist in selecting future tenants?

This practice is very risky unless the housing provider implements proper precautions and oversight.

A housing provider is responsible for tenant selection decisions, regardless of who conducts the screening process. Therefore, if a tenant selection committee provides input into the selection process, the housing provider will be liable for any unlawful discrimination by the committee. This liability cautions against using selection committees that include current tenants for pre-screening. With tenant selection committees, the housing provider loses control of the initial selection process, the tenants' individual prejudices may affect the process, and the housing provider will still face all of the risk of decisions that go awry. Additionally, in the context of housing reserved for persons with disabilities, information on the tenant's qualifying disability may be confidential under privacy laws as well as the Health Information Portability and Accountability Act (HIPAA). As such, providers and staff participating in the tenant selection process should not disclose the tenant's disability status to other tenants.

In some housing circumstances, providers may want to include tenants as part of the screening process, with the ultimate decision resting with the property manager. In this situation, tenants may be part of the screening process along with professional property managers or others representing the housing provider. In such a situation, property managers should only provide tenant screeners information about the applicant that is not confidential. A property manager should not disclose information regarding an applicant's disability to the tenant screeners. When tenants are involved, the tenants should receive training on antidiscrimination laws and written tenant selection procedures should clearly indicate that the tenant screening committee is only advisory.

SECTION B. REASONABLE ACCOMMODATIONS AND REASONABLE MODIFICATIONS

Question 1. What do "reasonable accommodation" and "reasonable modification" mean?

A reasonable accommodation is a change to a rule, policy, practice, or service when necessary to allow persons with disabilities equal access to housing.

A reasonable modification is a physical or structural change to housing that is necessary to afford people with disabilities equal access to the housing.

The Federal Fair Housing Act prohibits discrimination against persons with disabilities in the provision of housing, but also goes further and creates an affirmative duty for housing providers to accommodate persons with disabilities. “Failure to accommodate” is a separate and distinct charge under of the law. In other words, housing providers must make changes to their rules, policies, and procedures that will allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. A housing provider must also permit physical or structural changes to housing that are necessary to afford people with disabilities equal access to housing.[66] These structural changes are called reasonable

[66] 42 U.S.C. § 3604(f)(3)(B); 42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 8.24(a); and 28 C.F.R. § 35.150.

modifications. Such accommodations, or modifications, need only be "reasonable" in the sense that a housing provider is not required to undergo great financial and administrative hardship in order to provide the accommodation. Nor must a housing provider make a fundamental alteration in the nature of its program.[67]

However, the provider must make *some* special provisions for persons with disabilities requiring accommodation and may have to bear some costs. Some accommodations may also place a burden on the tenant to participate in the accommodation. For example, if a housing provider is asked to make a change in tenant acceptance policies to allow a disabled tenant with past behavior problems to reside in the housing, the provider may require the tenant to demonstrate ongoing treatment or engagement with services for the condition that caused the behavior problem. Housing providers are not required to inform tenants of their rights to a reasonable accommodation or modification, but a statement in the application form informing applicants of these rights is a prudent practice that may eliminate some discrimination claims, and initiate communication between the applicant and the provider before a claim is filed.

If a project receives federal funds, it is also subject to Section 504 of the Rehabilitation Act of 1973. Section 504 includes an implicit reasonable accommodation requirement that generally has a broader scope than the Fair Housing Act provisions. Section 504 requires a housing provider, in certain instances, to pay for necessary physical modifications to a disabled tenant's unit or the surrounding structure.

In determining what a reasonable accommodation or modification is, courts will balance the financial and administrative burden on housing providers against the benefit to a person with a disability. What constitutes a "reasonable" accommodation or modification has been the subject of a great deal of litigation and controversy. However, in its Multifamily Occupancy Housing Handbook (4350.3), HUD provides some examples of what would constitute an undue burden. For example, HUD indicates that an undue financial burden may exist if the landlord must increase rent to cover the cost of the modification.

In addition, a Joint Statement from HUD and the Department of Justice on Reasonable Accommodations under the Fair Housing Act issued on May 17, 2004, states that housing providers should look at their financial resources, the cost of the accommodation, the benefits to the requester, and the availability of other less expensive alternative accommodations that would effectively meet the applicant's or resident's disability-related needs. The Joint Statement on Reasonable Accommodations also states, however, that an individual with a disability "is not obligated to accept an alternative accommodation suggested by the provider if it will not meet her needs and her preferred accommodation is reasonable" (See Appendix Five for a complete copy of the HUD and Department of Justice Joint Statements on Reasonable Accommodation under the Fair Housing Act dated May 17, 2004 and their Joint Statement on Reasonable Modification under the Fair Housing Act, dated March 5, 2008). In addition, the housing provider cannot argue that an accommodation is not reasonable because the provider needs to save money for future accommodations or wants to avoid setting a precedent for other tenants. A housing provider must handle each reasonable accommodation request on its own merits at the time it is requested.

The most successful approach for housing providers is to regard reasonable accommodation or modification policies and protocols as a partnership between the provider and the tenant, with each party working toward a result that allows the tenant to access, use, and enjoy the dwelling.

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[67] Smith & Lee Associates v. City of Taylor, 102 F.3d 781 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Question 2. How does reasonable accommodation apply to applicant screening?

The screening process itself must be accessible to all applicants. Additionally, the housing provider should determine if a reasonable accommodation would allow the applicant to occupy the unit.

During the applicant screening process, housing providers must satisfy two levels of reasonable accommodation requirements. First, the screening process itself must be accessible to all applicants. For example, if an applicant is hearing impaired, the housing provider will need to provide sign language interpretation or some other method for communicating with the applicant to ensure that the applicant has an opportunity to participate in the tenant selection process.

Second, the housing provider must determine if a reasonable accommodation or modifications would allow the applicant to occupy the dwelling, either by changing the rules of the program or physically modifying the housing unit. Housing providers do not have an affirmative obligation to ask applicants if they need a reasonable accommodation, or to try to determine what the reasonable accommodation might be. But housing providers also should not ignore obvious disabilities.

If an applicant requests a reasonable accommodation as part of the screening process, the housing provider should first determine if the applicant has a disability as defined under the Fair Housing Act or any state anti-discrimination statute. If the answer to that question is yes, then the housing provider should consider whether the requested accommodation or modification is necessary in order for the applicant to fully enjoy and use the premises. Finally, if the accommodation or modification does not impose an undue financial or administrative burden on the housing provider, the housing provider should grant the request. For example, if an applicant requests as a reasonable accommodation that the housing provider allow the applicant to occupy the most desirable unit in the development because it has a nice view that will lend inspiration to the applicant, this may not be a reasonable accommodation even if the applicant has a disability which would entitle the applicant to an accommodation. Conversely, if the applicant requests the best unit in the development because it is the only unit that can accommodate the applicant and the applicant's live-in care attendant, the housing provider should honor the request, even if units are usually assigned randomly.

If an applicant requests a reasonable accommodation or modification, a housing provider may request documentation or some proof that the applicant has a disability and the link between the disability and the requested accommodation. The housing provider may not, however, require an applicant to submit medical records as proof of his or her disability; such records are private. Instead, the housing provider should request a doctor's letter indicating the need for the accommodation or modification, a Supplemental Security Income award letter, or some similar verification. Even when the housing provider is seeking proof of the applicant's disability, the provider may not ask about the particular type or severity of disability or other specifics, unless the housing is designated only for a person with a particular disability, or unless the specific information relates to the provision of the requested accommodation or modification.[68]

[68] Robards v. Cotton Mill Associates, 1998 ME 157 (1998) (holding that a landlord can require physician's authorization that an applicant is disabled, but cannot require the applicant to provide a description of the disability).

A safe way for a housing provider to elicit information about applicants' disabilities in a nondiscriminatory manner is to disclose to all applicants—whether or not they appear disabled—information about the housing provider's duty to make reasonable accommodations or modification. Additionally, in informing an applicant that the housing provider has rejected the application, the provider should include a general information statement regarding the availability of reasonable accommodations or modification.

Question 3. On what grounds may a housing provider reject an applicant who is disabled?

Subject to reasonable accommodation requirements, a housing provider may reject a disabled applicant for failure to meet eligibility requirements or inability to meet the terms of tenancy required of all applicants.

Property managers can refuse to accept applicants for occupancy if the applicant does not meet the requirements for occupancy the housing provider adopted. Those requirements must, of course, be legal and be applied to all applicants for housing. Insufficient income, a history of nonpayment of rent, or a history of evictions for failure to maintain the premises are all legal reasons for refusing occupancy.

Other reasons for refusing occupancy may not be as clear. Making the determination of who is a "good" prospective tenant without violating fair housing laws presents a challenge to property owners and managers. Before denying an applicant's request for occupancy, the housing provider or manager should ask whether the applicant's conditions or behaviors leading to the denial could be related to a disability. If so, the next question is whether a reasonable accommodation or modification could allow the applicant to live in the facility. Although the fair housing laws do not require the property owner or manager affirmatively to offer reasonable accommodations or modification if the tenant or applicant does not request them, thinking through whether reasonable accommodations could help the tenant comply with the terms of tenancy may avoid some discrimination claims. In addition, housing providers should not ignore obvious disabilities.

Property owners and managers may also deny housing to anyone whose tenancy would constitute a direct threat to the health and safety of others. Determining that someone poses a direct threat to others must be based on an individualized assessment rather than a sense that the person might be violent or destroy property. A Joint Statement from HUD and the U.S. Department of Justice on Reasonable Accommodations under the Fair Housing Act, dated May 17, 2004, states the individualized assessment must consider, "(1) the nature, duration, and severity of the risk of injury; (2) the probability that the injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat." Thus, an applicant's history of eviction from other housing for violent behavior coupled with a lack of evidence that the tenant has addressed the violent behavior may be sufficient grounds for denying occupancy. However, if the applicant merely displays behavior at the intake interview that the interviewer finds inappropriate or scary, but which does not constitute threatening behavior, and the provider does not have any documented previous history of the applicant's threatening behavior, then denying occupancy to the applicant on the basis of posing a threat to others may not be appropriate. If a reasonable accommodation would eliminate the threat to others, then the provider should offer such an accommodation to the applicant.

In at least two reported federal court decisions, courts have refused to evict tenants with disabilities who physically assaulted other tenants. In those cases, the owners of the housing failed to show that a

reasonable accommodation would not have removed the threat to others.[69] These court decisions do not indicate whether the tenants requested an accommodation before the eviction. Such a request should be a requirement since, without a request, the owner has no way of knowing whether the violent behavior is the result of a disability. Also, these courts did not give any indication of what the reasonable accommodation would be in this situation. Determining a reasonable accommodation in such a situation will require owners to weigh the needs of the individual tenant versus the needs of all the tenants to live in a safe environment. An example of a reasonable accommodation for a tenant with a history of violence may be to allow the tenant to remain in the housing as long as the tenant is receiving counseling on the violent behavior. Such an accommodation would be reasonable only if the accommodation adequately ensured the safety of the other residents.

Question 4. May an applicant be rejected if he or she has a poor tenancy record caused by a disability?

If an applicant's poor tenancy record is the result of a disability, the housing provider may be required to offer the tenant a reasonable accommodation that would allow the tenant to live in the housing.

A tenant may have a bad tenancy record as a result of a failure to take proper medication. If the tenant provides evidence to the housing provider that he or she has made arrangements that ensure that the tenant will take the needed medication, such as daily nurse visits, the housing provider may need to waive rules requiring rejection of applicants with bad tenancy records. Housing providers are not required to seek out information to determine whether the applicant's bad tenancy record is the result of a disability. However, it is a good business practice to include in notices rejecting applicants for bad tenancy records a statement that, if the ground for rejection is the result of a disability, the applicant may be entitled to a reasonable accommodation or modification. In addition, housing providers should not ignore obvious disabilities.

Question 5. How does reasonable accommodation apply to screening tenants with drug and alcohol addiction?

Reasonable accommodation considerations apply to applicants with alcohol or drug addictions the same way they apply to other disabled applicants, unless current illegal drug use is involved.

Some applicants who have had problems with drug addiction or alcohol abuse may have a history of poor tenancy or criminal convictions that stem from the drug or alcohol problem. The housing provider, in reviewing the prospective tenant's application, may find the applicant undesirable because of this past behavior. However, because alcoholism and drug addiction are disabilities under the Fair Housing Act, the housing provider has a duty to accommodate these disabilities by considering them as mitigating factors to a poor tenancy record if the applicant discloses the drug or alcohol problem.

As a reasonable accommodation, the housing provider should focus on the applicant's current behavior and ability to meet the terms of the tenancy. The landlord will need to know what mitigating circumstances

[69] Roe v. Boulder Housing Authority, 909 F. Supp. 814 (D. Col. 1996); Roe v. Sugar Mill Associates, 820 F. Supp. 636 (D.N.H. 1993).

exist and whether past alcohol or drug use was responsible for the applicant's criminal conviction and bad tenancy history. The landlord can ask an applicant to explain the bad tenancy history and criminal conviction inviting an applicant's disclosure of the disability.

If the applicant's past behavior is not related to a disability, then the housing provider may deny the application. If the housing provider rejects an applicant because of past negative behavior, the provider should disclose that an applicant's disability could entitle the applicant to a consideration of mitigating circumstances and to a reasonable accommodation.

If the applicant gives a reason for past poor behavior that is related to a disability even if the applicant does not specifically request a reasonable accommodation, the provider must consider whether a reasonable accommodation is appropriate. For example, if the applicant shows that alcoholism caused the negative behavior, and the applicant is participating in a program that addresses this condition, it may be reasonable for the provider to waive its policy that all applicants with poor tenancy histories be rejected for tenancy.

Question 6. May a housing provider exclude tenants with disabilities because they need care and supervision?

No, unless the applicant cannot meet the requirements for tenancy.

In *Cason v. Rochester Housing Authority*, a federal court found that a housing authority's requirement that a tenant be able to live independently was discriminatory.[70] In this case, the housing authority deemed the need for in-home caregivers or assistance as a disqualification from a public housing project, even if the applicant demonstrated that he/she was receiving the necessary assistance. The court ruled that the independent living requirements resulted in discrimination against those with disabilities.

Fair housing attorneys have generally read the *Cason* case to mean that housing provider policies cannot include an independent living requirement. However, this case does not require a housing provider to admit a tenant who cannot care for him or herself and who is not receiving assistance that enables him or her to reside in a non-licensed housing unit. If the applicant cannot meet the terms and conditions of tenancy and the only reasonable accommodation that would allow the tenant to reside in the housing unit is for the housing provider to provide care and supervision, this accommodation would not be reasonable. An accommodation is only reasonable if it does not require a fundamental alteration in the housing provider's program. The provision of care and supervision, which would require licensing and is most likely well outside the scope of the provider's mission, would be a fundamental alteration. However, if the applicant requires care and supervision and has made arrangements to receive this care and supervision, the housing provider would be required to accept the applicant, even if the care and supervision arrangements may violate the development's rules.

In one recent court case, a housing development had specific rules about who could have keys to the main entrance of the building. The housing provider threatened eviction of a resident for giving a key to a care attendant. The court found that allowing the care attendant to have a key was a reasonable accommodation.[71] This same decision provides clear guidance on how housing providers can deal with

[70] Cason v. Rochester Housing Authority ,748 F. Supp. 1002 (W.D.N.Y. 1990).
[71] Niederhauser v. Independence Square Housing Corporation, No. C 96-20504 RMW (N.D. Cal. 1998) (order granting in part and denying in part plaintiff's motion for summary judgment).

care and supervision issues. According to this trial court decision, providers may ask questions to determine if an applicant meets the criteria for the development, including whether the applicant is disabled, if a criterion for tenancy. The provider may also inform applicants that the provider does not provide personal care services. However, housing providers may not (a) inquire into the severity of disabilities to determine if the applicant needs services that the provider is not required to provide; or (b) prohibit a tenant from arranging for services. This guidance from the trial court is not binding on other courts and other courts may interpret care and supervision issues differently.

If the tenant's disability requires a live-in care attendant, the housing provider may have to waive occupancy rules to allow the live-in attendant. However, a waiver of building codes or health and safety codes, such as allowing a live-in care attendant in a room limited by law to one person, would not be reasonable if it violates applicable building code requirements.

Housing providers operating assisted living facilities or other licensed facilities should exercise caution in applying screening standards that may violate the prohibitions on independent living requirements. Licensed facilities that provide housing are generally subject to fair housing laws. Requirements in assisted living facilities that residents meet a certain level of self-care may violate these fair housing laws.

The federal government has been active in challenging assisted living requirements, even for offenses less egregious than in *Cason*. In *U.S. v. Resurrection Retirement Community* (unpublished but reported in the Journal of Fair Housing and Fair Lending), the court sanctioned a housing provider for violating the Fair Housing Act by discouraging wheelchair-dependent prospective tenants from applying and for imposing medical exams as a leasing precondition.

Chapter Five: *Operation and Management of Housing*

This Chapter discusses a range of operating and management issues, including termination of tenancy. Again, fair housing law, especially as it relates to reasonable accommodation and modifications, is a major factor in this discussion. Generally, landlord tenant law and licensing laws are state laws and vary from state to state. This National edition of *Between the Lines* does not discuss these laws but readers should consult their state and local laws in addition to reviewing the information in this chapter when addressing issues related to the operation and management of supportive housing.

SECTION A. REASONABLE ACCOMMODATION AND MODIFICATION DURING OCCUPANCY

Question 1. How does reasonable accommodation or reasonable modification apply after the tenant has moved in?

A tenant's need for a reasonable accommodation or modification can arise any time during tenancy. The housing provider has the same obligation to consider a request for a reasonable accommodation or modification during both occupancy and tenant selection.

The obligation to provide a reasonable accommodation or a reasonable modification to a tenant arises even if the tenant did not disclose a disability during the screening process. It also arises if a tenant becomes disabled or a tenant's disability status changes after occupying the housing and then requests the accommodation. If a tenant requests a reasonable accommodation or modification, the housing provider may request documentation verifying the disability and the need for the accommodation or modification. As discussed in Chapter Four, Section B, Question Two above, a housing provider cannot require the tenant to submit medical records to prove a disability. A medical practitioner's or social worker's letter confirming the disability without disclosing the nature or severity of the disability is sufficient. Housing providers should respond promptly to all requests for reasonable accommodations or modifications because a delay in response may be deemed a failure to provide a reasonable accommodation or modification and result in a discrimination claim.[71]

See Chapter Four, Section B, Question One for a more general discussion of reasonable accommodations and modifications.

[71] Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Accommodations sunder the Fair Housing Act", May 17, 2004; Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Modifications sunder the Fair Housing Act", May 5, 2008.

Question 2. What is a reasonable accommodation or modification for a person with a physical disability?

A reasonable accommodation or modification for a person with a physical disability will depend upon the disability and what is necessary to allow the person to occupy the dwelling.

The first requirement to satisfy a requested accommodation or reasonable modification is that fulfilling the request be necessary to allow the tenant's equal enjoyment of the housing. Indeed, a landlord's duty to accommodate or modify extends only to providing an equal opportunity for persons with disabilities to enjoy housing. It does not extend to providing special advantages unrelated to a person's disability.[72] Such necessary accommodations may include, for example, allowing a visually or hearing impaired tenant to keep an assistive animal despite a "no pets" rule or providing a specially designated parking space despite a condominium association's deed restrictions. A reasonable modification may include allowing a tenant to install a ramp to gain access to their unit and/or community space (e.g., laundry room).

The Fair Housing Act does not require the landlord to fund physical changes. Landlords are only obligated to allow tenants to make reasonable modifications or allow accommodations that do not cause the landlord an undue financial burden.[73] However, Section 504, which applies to all federally funded developments, requires the landlord to pay for modifications unless to do so would cause financial hardship.

In addition to being necessary, an accommodation must be reasonable. A requested accommodation's effect on third parties and the financial burden imposed upon the landlord determines whether a requested accommodation is reasonable. In one case, a court held that, to accommodate a tenant with multiple chemical sensitivities, a landlord could not reasonably be expected to evict a downstairs neighbor whose cleaning products irritated the upstairs neighbor's condition and who lived in the building before the disabled tenant moved in. Such an eviction would unreasonably compromise the vested rights of third parties. HUD and the Department of Justice have attempted to provide some guidance as to what is financially reasonable. Chapter Four, Section B, Question One reviews the HUD and Department of Justice guidance in greater detail.

Question 3. What is a reasonable accommodation for a person with a mental disability?

A reasonable accommodation for a person with mental disabilities might involve the waiver or flexible application of a rule or policy but could also include modifications.

The same principles applicable to accommodations and modifications for tenants with physical disabilities guide reasonable accommodations and modifications for people with mental disabilities. A housing provider must make changes in rules and policies or allow physical modifications to provide the tenants with disabilities equal access to housing. A physical modification may sometimes be necessary. For

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[72] Bryant Woods Inn v. Howard County, 124 F.3d 597 (4th Cir. 1997); Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995); Auburn Woods I Homeowners Assn. v. Fair Employment & Housing, 121 Cal. App. 4th 1578 (2004); Gittleman v. Woodhaven Condominium Assoc., Inc., 972 F. Supp. 894 (D.N.J. 1997); HUD v. Ocean Sands, Inc., P-H: Fair Housing – Fair Lending Rptr. par. 25,055, at pp. 25539-44 (HUD ALJ 1993).

[73] Rodriguez v. 551 West 157th St. Owners Corp., 992 F. Supp. 385 (S.D.N.Y. 1998), (landlord not required, as a reasonable accommodation, to install wheelchair ramps and lifts).

example, extra soundproofing may be necessary to accommodate a mentally disabled tenant who speaks very loudly in his or her unit. As with physical disabilities, the limitations on the duty to accommodate arise from the cost of the accommodations or modifications and the countervailing rights of other tenants. If the project receives federal funding and is subject to Section 504, the housing provider may be obligated to pay for physical modifications if to do so would not cause a financial hardship.

Question 4. How does reasonable accommodation apply to tenants with substance use problems, including alcohol?

Reasonable accommodation applies to tenants with substance use problems in much the same way as to those with other disabilities, but never requires permitting a tenant to use illegal drugs.

Generally, if a tenant has a substance use disability and requests a reasonable accommodation, the housing provider must consider the request and grant it unless the accommodation fundamentally alters the housing program or places an undue burden on the owner. Allowing a tenant to continue the illegal use of drugs on the premises would not be a reasonable accommodation. Current use of illegal drugs is specifically exempted from definitions of disability. A current drug user would not be entitled to a reasonable accommodation solely by virtue of drug addiction. An alcoholic, though, who is currently using could be considered disabled under the definitions of disability in the Fair Housing Act (See Chapter Three, Section B, Question Nine and Chapter Four, Section A, Question Thirteen, regarding the treatment of alcoholism in the Fair Housing Act). A housing provider may have to accommodate some behaviors that often accompany drinking under the reasonable accommodation requirements. A recovering alcoholic's request however, that the housing provider prohibit all other tenants from using alcohol on the premises would not be reasonable, as it would infringe on other tenants' rights.

Certain federal programs, including Section 811, do not consider a person to be disabled solely based on alcohol or drug dependency when determining eligibility for units or programs targeted to people with disabilities. These federal program requirements do not mean, however, that a housing provider would be relieved of its obligation to provide a reasonable accommodation for alcoholics or former drug users who reside in their units.

Question 5. May someone be evicted because s/he needs care and supervision that the facility doesn't provide?

No, unless the tenant cannot meet the terms and conditions of occupancy.

A tenant cannot be evicted simply because he or she needs care and supervision. However, if the tenant needs care and supervision that the facility does not provide and the lack of care and supervision affects the tenant's ability to meet the terms of occupancy, the housing provider may have a basis for evicting the tenant. For example, a tenant who needs care and supervision due to a disability may be unable to maintain the apartment, requiring a care attendant. Before instituting eviction proceedings, housing providers should explore whether the housing provider could offer a reasonable accommodation to the tenant to help the tenant meet occupancy requirements. For example, a housing provider may refer a tenant to care attendants to help the tenant meet the maintenance obligations under the lease. If the landlord and tenant cannot find a reasonable accommodation and the tenant is not maintaining the

apartment, the housing provider may have grounds for eviction due to the tenant's failure to maintain the apartment, not because the tenant requires care and supervision.

Providers should be careful not to assume all tenants with disabilities need care and supervision in order to meet the terms of tenancy. Rather, upon occupancy, providers should look to a tenant's previous rental history to determine the tenant's ability to meet the tenancy terms.

HUD's Section 202 and Section 811 programs all promote independent living. Some have interpreted this policy as disqualifying tenants who require the services of in-home care attendants. As discussed in Chapter Four, Section B, Question Six, a housing provider probably could not institute such an "independent living requirement" based on the *Cason* case. Several Section 202 housing operators have spent considerable time and money attempting to evict residents who needed, but were not receiving, care and supervision. Disability rights advocates have been able to stop or stall these evictions to the point that the housing providers have withdrawn the evictions. In one instance, disability rights advocates obtained a federal district court order declaring an independent living requirement in a Section 202 project illegal under Section 504 of the Rehabilitation Act of 1973.[74]

SECTION B. PROVIDING SERVICES TO TENANTS

Question 1. May a housing provider require residents to participate in services by including the requirement in the lease?

Certain funding programs prohibit this practice, while others permit it. If a project's funding does not prohibit mandatory participation in services, the project may require tenants to participate in services, but enforcement may be difficult. Mandating participation in services could also raise licensing issues depending upon the applicable state licensing laws.

Some supportive housing providers seek to require residents to participate in services offered by the housing provider or third parties, such as psychotherapy, drug rehabilitation, or money management services. The issue of requiring tenants to use services as a condition of their tenancy (or "service linkage") is a controversial and complicated one that presents problems that cannot always be easily solved. As discussed below, some funding programs permit service linkage and others prohibit it.

Except under certain funding programs which specifically allow the lease to require participation in supportive services (see discussion in the next question), a requirement that a tenant participate in a service program may present legal problems for housing providers and may not be enforceable. Although the requirement that a tenant participate in a service program is not on its face discriminatory (so long as the requirement applies to all tenants), a court may be reluctant to enforce such a provision if the housing provider attempts to evict a resident for noncompliance. This reluctance is because the provision of services does not fall within the realm of the ordinary landlord-tenant relationship that judges are used to interpreting. The judge may not view the services provision as "material" to the landlord-tenant relationship (e.g., related to the payment of rent, maintenance of the unit, and other standard rental obligations).

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[74] Niederhauser v. Independence Square Housing Corporation, No. C 96-20504 RMW (N.D. Cal. 1998), (order granting in part and denying in part plaintiffs' motion for summary judgment).

Additionally, since tenants who need services often qualify as disabled under the Fair Housing Act, the tenant may argue that his/her failure to participate in services is due to his/her disability and that the landlord did not provide a reasonable accommodation necessary for the tenant to continue to occupy the housing. A reasonable accommodation may include non-participation in the services offered.

Generally landlord-tenant law does not prevent a landlord from inserting into a lease agreement the requirement that a tenant participate in services, but providers should check their state's landlord tenant laws on this matter. If participation in services is required in the lease (and permitted by the funding program), a provider may legally terminate a lease for failure to participate in services, although the enforcement issues discussed above may emerge. To maximize the possibility of enforceability, a housing provider seeking to require residents to use services should ensure that the requirement is part of the original lease agreement, whether in the body of the agreement or an attachment. However, the housing provider should be prepared for a judge to refuse to enforce the requirement.

The Shelter Plus Care program regulations specifically allow the tenant's lease to require participation in supportive services as a condition of continued occupancy, although the regulations do not require this lease provision.[75] The Section 202 and 811 programs explicitly prohibit requiring tenants to participate in services as a condition of occupancy.

An additional consideration in requiring residents to use services is the possibility that such a requirement could in some states trigger licensing requirements. However, if a facility is licensed, mandatory services are typically required by licensing regulations.

Question 2. May a tenant's rental assistance or Section 8 assistance be terminated for failure to participate in supportive services?

Only in the Shelter Plus Care program.

The Shelter Plus Care program regulations specifically allow the tenant's lease to require participation in supportive services as a condition of continued occupancy.[76] The regulations also provide that rental assistance to a tenant may be terminated if the tenant violates program requirements or conditions of occupancy; however, the regulation states that rental assistance should only be terminated in the most severe circumstances. Some providers have requested that the local housing authority or other agency administering the rental component of the Shelter Plus Care program terminate the rental assistance of a tenant who fails to comply with his or her lease, including failure to participate in supportive services. Although a housing authority or other Shelter Plus Care administering agency must provide tenants with a notice and hearing prior to termination of rental assistance, this process is generally quicker than a court eviction for a lease violation. Once rental assistance is terminated, if the tenant cannot pay the unsubsidized rent, he or she may be evicted for nonpayment of rent.

If a tenant receives rental assistance under a HUD program other than Shelter Plus Care, the rental assistance may not be terminated for failure to participate in services. The regulations governing the

[75] 24 C.F.R. § 582.315(b). Note that the Shelter Plus Care regulations will be replaced with new regulations implementing the HEARTH Act (described in Chapter Three, Section C, Question Three above) sometime late in 2010.
[76] 24 C.F.R. § 582.315(c); 24 C.F.R. § 582.320. Note that the Shelter Plus Care regulations will be replaced with new regulations implementing the HEARTH Act sometime late in 2010.

Section 8 Project-Based Voucher Program specifically provide that disabled residents shall not be required to accept the particular services provided at a project.[77]

SECTION C. CLEAN AND SOBER REQUIREMENTS

Question 1. Is clean and sober housing legal?

Clean and sober requirements are most likely to be legal if backed by studies supporting their efficacy in maintaining recovery and if clearly disclosed to tenants prior to occupancy. Enforceability is sometimes difficult.

Many supportive housing providers operate clean and sober housing programs designed to assist alcoholics and drug users in recovery to maintain sobriety. If the housing is limited to recovering alcoholics and drug addicts, the first question is whether such restriction is legal. If fair housing laws consider recovering alcoholics and drug users to be disabled, then a housing provider must conduct the analysis discussed earlier regarding whether housing providers may restrict housing to people with specific types of disabilities (See Chapter Three, Section B, Question Nine for a discussion of this issue).

Regardless of whether occupancy of the housing is limited to recovering alcoholics and drug addicts, providers need to determine whether a clean and sober requirement as a condition to occupancy is legal and enforceable. Clean and sober requirements are most likely legal if backed by solid evidence that the policies are an effective way to maintain drug and alcohol recovery. The policies should also be clearly explained to the tenants in writing prior to occupancy and included within leases or rental agreements. Although recent amendments to the Low Income Tax Credit laws allow housing providers to target units to groups with special needs, in at least one instance, an IRS compliance officer has questioned whether a housing development requiring sobriety meets the "general public use" and is therefore eligible for tax credits.

Although they may be legal, clean and sober policies can present problems for housing providers. Housing providers can prohibit the use of illegal drugs on the premises, but the use of alcohol falls into another category. Alcohol is a legal substance, and alcoholics who are still drinking are persons with a disability. Although a policy of no alcohol may be reasonable, particularly when it is part of a service program designed to meet the needs of a disabled population (e.g., alcoholics and people with substance use problems), enforcement of the policy may be problematic. This is because waiver or flexible application of a rule is a typical reasonable accommodation for a person with a disability. If a provider tries to evict a tenant for alcohol use in the housing or for being drunk, the tenant would have a reasonable argument that the tenant is disabled by virtue of being an alcoholic and that waiver of the no alcohol policy to allow the tenant to drink is a reasonable accommodation.

Although a court may find waiver of a sobriety rule a reasonable accommodation, a court may cease to find reasonable a tenant's repeated requests for waiver of the rule. In addition, the reasonable accommodation may require the tenant to comply with additional requirements, such as attending recovery support meetings or other treatment. How a court would decide an eviction case in a clean and sober facility will depend upon the court's level of sympathy with the tenant and the court's interest in furthering the housing

[77] 24 C.F.R. § 983.251(d)(2).

provider's social goals. Finally, although eviction for use of alcohol may be unsuccessful, the housing provider can evict for behaviors that violate a tenancy agreement or interfere with neighbors' peaceful enjoyment of their residence, such as excessive noise.

The use of illegal drugs in violation of a clean and sober policy should generally be easier to enforce than violation of a no alcohol rule. The use of illegal drugs on the premises is a crime and most courts will uphold an eviction for this reason. Providers should be aware, though, that proving the use of illegal drugs may be difficult and attempting to evict for behavior that the provider thinks indicates the use of illegal drugs (without having actual proof of the use of drugs on the premises) may not be successful. Providers should also be aware of state medical marijuana laws that, in some instances, may allow for the use of marijuana (See Chapter Three, Section B, Question Nine, Chapter Five, Section A, Question Four, and the balance of this Section).

To maximize the enforceability of a clean and sober requirement, housing providers should adequately disclose and explain the requirement to potential tenants prior to occupancy. Housing providers should also consistently enforce the policy. Enforcement may present a fair housing dilemma for the provider. On the one hand, a clean and sober policy may be most defensible if it is strictly enforced, thereby defeating claims that the provider is motivated by bias against a particular tenant with a disability. On the other hand, a provider must provide reasonable accommodation to tenants with disabilities, which may be best accomplished by a flexible application of clean and sober rules. Providers should also be conscious of the fact that judges also apply their own bias in eviction cases. A judge may refuse to evict an alcoholic for drinking on the theory that the provider's mission is (or should be) to help alcoholics, whether in recovery or not.

Finally, a clean and sober requirement that extends to tenants' off-premises behavior is less likely to be enforceable than a clean and sober requirement that applies only to tenant behavior within the housing development.

Question 2. May a provider impose a "clean and sober" requirement after tenancy has been established?

A provider's ability to change the terms of tenancy depends on the term of the lease, the application of applicable landlord-tenant, and just cause eviction laws.

A provider should inquire about state and local eviction and landlord-tenant law, but generally, the terms of tenancy for a tenant who rents on a month-to-month basis may be changed with a 30- or 60-day notice. If a tenant has a longer-term lease, terms of tenancy may only be changed when the lease expires and is renewed. In some jurisdictions with just cause eviction laws, a tenant cannot be evicted for the tenant's refusal to sign a new lease that materially alters the conditions of tenancy. If, after a tenant moves in, the landlord imposes a "no alcohol" rule and the tenant refuses to sign the new agreement, the tenant may have a defense to eviction on the grounds that this is a material change in the terms of the tenancy. In jurisdictions that do not require just cause for eviction, tenants probably do not have a defense against eviction on the grounds of a new lease requirement, as long as the new requirements are not unreasonable or discriminatory. Either way, a tenant may argue that requirements prohibiting a tenant from consuming alcohol are discriminatory, since alcoholism is a disability.

Some providers include a provision in their leases that "house rules" are incorporated into the lease and may be changed periodically by the provider. Such a provision gives the provider a basis to impose a new house rule during the lease term. A court, however, may still refuse to recognize the new rule and enforce it if a court determines the new house rule materially changes the terms of the tenancy.

Although a prohibition against the use of illegal drugs should be in the lease from the initiation of the tenancy, the imposition of such a rule after a tenant moves in probably would not be considered unreasonable or unenforceable, since use of illegal drugs is a crime.

Question 3. May a housing provider evict for non-sobriety?

Evictions for non-sobriety may be difficult because alcoholism is a disability.

Generally, in rental housing that is not linked to services, a housing provider cannot impose sobriety conditions on tenants, since alcoholism is a disability under the Fair Housing Act. However, if a housing provider is offering housing to recovering alcoholics, sobriety may be a reasonable condition to occupancy as part of the services the housing provider makes available to the residents. In such an instance, the housing provider would have a compelling interest in maintaining an alcohol-free environment.

Providers should exercise caution in evicting any residents solely for failure to abide by the sobriety rules. An alcoholic may be considered a disabled person entitled to a reasonable accommodation and this accommodation may require waiver of the sobriety rules. Housing providers could argue that waiver of a sobriety rule is a fundamental alteration in the nature of a clean and sober housing program, and therefore is not a reasonable accommodation; at this time, there are no reported cases on this issue. When making such an argument, a housing provider may need to offer an alternative accommodation, such as permitting continued occupancy by a tenant who breaks a sobriety rule, if he or she attends a rehabilitation program.

Some housing providers attempting to maintain sobriety policies include the sobriety rules in their lease or house rules, but do not evict for failure to comply with the rules, since such evictions are difficult to enforce and often fail. The success of such an eviction will most likely depend upon the vigor of the tenant's advocate and the judge's own inclinations regarding individual rights. Behavior problems that result from problems with alcohol may be grounds for eviction if these behavior problems interfere with other tenants' rights or affect the tenant's ability to meet the terms of tenancy.

Question 4. May a housing provider evict for illegal drug use?

Yes. However, evidence to support the claim may be difficult to obtain, thereby making an eviction for illegal drug use challenging.

The use of illegal drugs should generally be sufficient grounds for eviction; however, landlords should include a lease provision prohibiting the use of illegal drugs so that the eviction is based on a lease violation. Projects subject to One Strike regulations must include provisions in the lease that would allow for termination in the event of illegal drug use. Most jurisdictions also allow eviction for criminal activity, including illegal drug use. Additionally, housing providers should be prepared for the resident to assert the need for a reasonable accommodation in any eviction.

Housing providers may have difficulty obtaining convincing evidence of the tenant's drug use. Rarely will a tenant use drugs in front of staff, and other tenants are often reluctant to testify against fellow residents. Evidence based on behavior may not be convincing or the tenant may explain away behavior as not related to illegal drug use. Providers should have specific concrete evidence of illegal drug use before proceeding with eviction.

Question 5. How do the One Strike rules apply during tenancy?

"One Strike" lease terms designed to curtail drug and alcohol abuse and criminal activity within the leases of a number of federally funded housing programs.

In addition to shaping admission decisions, the federal "One Strike" policies address evictions or termination of assistance in response to criminal activity (including illegal drug use) and lease violations resulting from alcohol abuse. As with the regulations governing screening and eligibility criteria, however, the regulations provide discretionary authority in responding to such criminal activity, and eviction or termination is *not* a required response to every instance of illegal drug use, criminal activity, or lease violation.

For housing financed with Section 202, Section 811, Project-Based Section 8, Section 236, and Section 221(d)(3) and (5), the One Strike regulations require the following lease provisions:

- Drug-related criminal activity engaged in, on, or near the premises by any tenant, household member, guest or other person under the control of the tenant is grounds for the provider to terminate the lease.
- The provider may terminate the tenancy when it determines that a household member is illegally using a drug or when it determines that a household member's pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- The provider may terminate the tenancy if the provider determines that a household member's behavior resulting from a pattern of alcohol abuse interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- The provider may terminate a tenancy if any tenant, household member, guest or other person under the control of the tenant engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of (a) the premises by other residents, or (b) the residences of neighbors who reside in the immediate vicinity of the premises.
- The provider may terminate a tenancy if a tenant is fleeing to avoid prosecution, custody, or confinement after conviction of a felony or attempted felony.
- The provider may terminate a tenancy if a tenant is violating a condition of probation or parole imposed under federal or state law.

In addition to the lease requirements described above, in Section 8 Moderate Rehabilitation programs, the housing program administrator must immediately terminate assistance for a household if the administrator determines that any member of the household has ever been convicted of drug related criminal activity for manufacture or production of methamphetamines on the premises of federally assisted housing. Public housing units and Tenant-Based Section 8 units are subject to substantially similar rules, but housing providers working with those programs should be certain to check the applicable regulations for those

programs. Owners of housing financed with Section 514 and 515 should also refer to the regulations governing the Section 514 and 515 programs, as One Strike is implemented differently in those programs.

Under the One Strike regulations, the following applies: a) entire tenant households can be evicted or terminated from assistance for the activities of one member of the household or a non-household member; and b) tenants can be evicted or terminated regardless of whether the person has been arrested or convicted of such activity. In 2002, the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*, upheld evictions where the One Strike anti-crime or anti-drug lease provisions had been violated. The Supreme Court wrote that One Strike "requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."

After the Supreme Court ruling, however, HUD emphasized housing providers' discretionary authority to terminate tenancies due to One Strike violations in a letter (dated June 6, 2002) from Assistant Secretary Michael Liu. The letter states (*emphasis added*):

> "… [T]he Court unanimously affirmed the right of public housing authorities, under a statutorily-required lease clause, to evict entire public housing households whenever any member of the household, or any household guest, engages in drug-related or certain other criminal activity. The *Rucker* decision upholds HUD regulations that, since 1991, have made it clear both that the lease provision gives PHAs such authority and that PHAs are not required to evict an entire household--or, for that matter, anyone—every time a violation of the lease clause occurs....PHAs remain free, as they deem appropriate, to consider a wide range of factors in deciding whether, and whom, to evict as a consequence of such a lease violation. Those factors include, among many other things, the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy. …"

The HUD One Strike regulations detail these mitigating factors. Mitigating factors that a housing provider may consider in implementing the One Strike lease provisions include: (1) the seriousness of the offending action, (2) the effect on the community of termination or the failure to terminate, (3) the extent of participation by the leaseholder in the offending action, (4) the effect of termination of tenancy on household members not involved in the offending action, (5) the demand for assisted housing by eligible households that will adhere to lease responsibilities, (6) the extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action, (7) the effect of the housing provider's action on the integrity of the program, and (8) in the case of illegal drug use or alcohol abuse, whether the household member has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully. All of these factors may be taken into account in establishing the lease policies required by the One Strike regulations. Housing providers should apply these factors consistently.

HUD's One Strike regulations prohibit the admission of sex offenders subject to lifetime registration requirements, but they do not specifically address how housing providers are to handle these sex offenders already residing in federally assisted units. A recent HUD Notice (H 20009-11) encourages providers to evict tenants who are subject to lifetime registered sex offender requirements s, to the extent permitted by

the tenant's lease and applicable state and local law. HUD also recommends that housing providers ask tenants at each recertification whether or not any household member (including minors) is subject to the lifetime registration requirement and to confirm the response through the use of the Dru Sjodin National Sex Offender Website.

Question 6. Is eviction of people who abuse drugs or alcohol required under the HUD "One Strike" requirements?

As noted in Question Five of this Section, "One Strike" rules require lease provisions that allow owners to terminate tenancies for drug or alcohol abuse, but the rules do not require evictions in all such cases.

For housing financed with Section 202, Section 811, Project-Based Section 8, Section 236, Section 221(d)(3) and (5), public housing and Tenant-Based Section 8, the One Strike statutes and regulations require the owner to include lease provisions that allow the owner to terminate tenancy for a household if the owner determines that any member of the household is using illegal drugs or if the owner determines that the household member's use of illegal drugs or abuse of alcohol interferes with other residents' health, safety, or right to peaceful enjoyment of the premises. The law does not require the household member to be criminally convicted before a termination. This law requires specific lease provisions permitting evictions for these causes; it does not require the owner to evict or terminate assistance.

A HUD General Counsel Memorandum, written to address questions about medical marijuana emphasized that HUD has not historically extensively regulated the area of eviction or termination of assistance, leaving the ultimate determination in these cases to the "reasoned discretion" of owners and housing authorities. In the context of medical marijuana use, the opinion urges the consideration of all relevant factors in determining whether to terminate the tenancy or assistance, including, (1) the physical condition of the medical marijuana user, (2) the extent to which the user has other housing alternatives, and (3) the extent to which the owner or housing authority would benefit from enforcing lease provisions prohibiting the illegal use of controlled substances (see HUD General Counsel Memorandum in Appendix Eight).

Question 7. What does the Drug Free Workplace Act require? How does it apply to housing providers?

The Drug Free Workplace Act requires federal grant recipients to provide a workplace that prohibits employees from using or selling illegal drugs. It does not apply to tenant drug use.

The Drug Free Workplace Act of 1988 (41 USCS Section 701) requires any recipient of a federal grant to certify to the federal agency administering the grant that the grantee provides a workplace that prohibits employees from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance. If any employee is convicted of violating a criminal drug statute occurring in the workplace, the grantee is required to inform the administering federal agency of the conviction and to take appropriate personnel action against the employee, which may include discipline, termination, or a requirement that the employee participate in a drug rehabilitation program. The Drug Free Workplace Act also imposes requirements on the employer to provide specific notification to employees about its drug free workplace policy and drug free awareness program. The Drug Free Workplace Act, however, only applies

to employees of a grantee. It does not apply to tenants. Consequently, drug use by tenants (so long as they are not also employees of the grantee) would not cause a provider to be in violation of this Act.

SECTION D. OTHER MANAGEMENT ISSUES

Question 1. Is a housing provider required to disclose to potential tenants that some or all of the tenants in a building have a particular disability?

No. Housing providers must maintain tenants' confidentiality and may not disclose information regarding disabilities.

A housing provider should never reveal to other tenants or applicants for tenancy that a particular tenant has a disability or the nature of the disability, unless the tenant with the disability specifically authorizes such disclosure.

However, the provider may reveal in marketing materials that the project or some number of the units in the project are targeted to people with disabilities. While disclosures of this type are not required by law, many providers make such general disclosures to attract tenants with disabilities or to allow potential tenants who might be disturbed by such preferences to self-select themselves out of the applicant pool. Moreover, if the provider uses one application, and some units in a development are set aside for people with disabilities, applicants are likely to notice questions that pertain to whether or not the applicant is eligible for the set aside units.

Question 2. May a housing provider disclose one tenant's disability to other tenants?

No, not without the written permission of the tenant.

Under federal privacy laws, housing providers are required to keep confidential any personal information about a person that is obtained in a confidential manner or from a confidential source. Applicable state privacy laws may contain similar prohibitions. If the tenant with the disability gives the housing provider permission to reveal the information, the permission should be in writing. Once the housing provider obtains permission, the housing provider can inform other tenants, but the housing provider should be cautious in disclosing any information only to people the tenant authorized and in only disclosing that information the tenant authorizes to be disclosed. Providers should be particularly careful of these privacy concerns in considering tenant participation plans, which may include peer counseling activities or housemate selection in shared housing programs. Peer counseling and other tenant-to-tenant programs may inadvertently result in disclosure of private information.

Question 3. How much information about a tenant's disability should a case manager release to a property manager?

Case managers should not disclose any information to property managers that would violate their professional duties of confidentiality, unless they have properly obtained waivers of confidentiality.

A case manager's release of information to a housing manager is not a fair housing violation but may be a violation of the case manager's professional standards and duties. Question Five in Chapter Four, Section A discusses when and if a case manager may share information with a property manager.

Question 4. Are restrictive guest and overnight policies legal? Can a landlord impose a curfew?

Restrictive guest and overnight policies are generally legal, unless they violate fair housing laws. However, a judge may refuse to evict a tenant solely because of a violation of guest and overnight policies. Landlords most likely cannot impose curfews.

Guest Policies

Some supportive housing providers, either at their own behest or at the request of tenant groups, try to restrict visitors. Housing providers may limit the number of visitors at one time, deny a tenant's right to receive visitors who have a reputation for illegal or disruptive activity, charge for guest visits, require visitors to register with a desk clerk, limit the hours during which visits may occur, or limit the frequency of overnight guests. Whether these policies are legal will depend upon state and local landlord-tenant laws.

A state's landlord-tenant law governs whether a landlord can add to a lease agreement a provision to restrict visitors in any of the ways described above. However, even in cases where a landlord may add these restrictions, a judge or jury may not rule in favor of evicting a tenant whose sole lease violation was related to restrictive guest policies. The judge or jury may not view the policies as "material." In addition, it is even less likely that a judge or jury would permit an eviction where the restrictive guest policies were not part of the original lease agreement, unless the landlord is able to change the terms of tenancy with a 30-day notice, tenancy is month-to-month and the tenant lives in a community without rent control or eviction protections. To maximize enforceability, a housing provider seeking to impose restrictive guest policies should ensure that the policies are part of the original lease agreement (whether in the body of the agreement or an attachment) and that the agreement states the guest policies clearly.

Even when landlord-tenant law permits guest policies, they may violate fair housing or civil rights laws. A housing provider wishing to deny a tenant the right to receive visitors with a reputation for illegal or disruptive activity must necessarily exercise discretion to determine who is an acceptable visitor and who is an unacceptable visitor. The basis for these decisions may be discriminatory, either intentionally or unintentionally. Similarly, a guest policy that explicitly disfavors members of a protected class of people would probably be illegal (such as a prohibition against children visiting, which would likely be classified as discrimination based on family status or a prohibition against female visitors or against male visitors).

Some guest policies may also violate funder or program requirements. For example, a fee for receiving visitors may be defined as "rent" in funder contracts or program regulations and such fees could cause the rent to exceed the permissible rent ceiling under the funder contracts or program requirements. Additionally, providers may have to waive guest policies as a reasonable accommodation if a tenant needs a caregiver or other services.

One reason why housing providers have guest policies is to prevent a guest from becoming a tenant with rights under landlord-tenant law. Whether a guest has become a tenant depends on specific factors and varies by state, but the duration of a guest's residence is usually an important factor. Depending upon the applicable state law, a housing provider can require the tenant to disclose guest names in writing, or prohibit guest stays of more than a few weeks. Each of these measures could decrease the likelihood of a guest becoming a tenant.

Curfews

If a landlord attempts to restrict all residents to their apartments by a certain time, such a practice may not be allowed under the applicable state landlord tenant laws. Courts would likely deem these restrictions unreasonable and the practice is rare in non-service related residential complexes. An individual leases an apartment for residential use with the expectation that he or she can come and go freely and a landlord has no reasonable legitimate purpose for requiring that all the residents be in their units at a certain time. Housing providers typically impose curfews as part of a requirement for services, when such services are provided in a residential setting. If a lender prohibits mandatory participation in services, then imposition of a curfew as part of the service component would not be allowed. Finally, imposition of a curfew may raise fair housing issues; for example, imposition of a curfew only on tenants with certain disabilities would be deemed discriminatory. It also would violate a fundamental principle of fair housing cases and laws for people with disabilities: to minimize or eradicate institutionalization.

In contrast, a housing provider's prohibition on use of common areas during certain hours would be a reasonable restriction, as it directly relates to other residents' quiet enjoyment of the complex. For the same reasons, imposing certain quiet hours would also be reasonable.

Question 5. Is a landlord able to enforce a lease provision limiting the duration of the tenant's occupancy in a transitional housing program, where tenants must vacate their units after a certain period?

Durational limits on occupancy of rental housing are generally enforceable, but may conflict with just cause eviction requirements in funding programs and local landlord-tenant and rent control laws.

Some supportive housing providers seek to provide transitional housing in which residency is limited to a maximum duration (generally 24 months). Whether such a time limit is enforceable depends on the facts.

Few, if any, general requirements exist under state landlord-tenant laws that a landlord renew a lease agreement when the lease term expires. Therefore, a landlord can generally refuse to renew a lease agreement when it expires. However, a judge may not permit an eviction from a supportive housing development where the tenant's sole lease violation was holding over after the expiration of a time limit. A housing provider's ability to enforce a limited term of tenancy in transitional projects is strengthened if the

rental agreement includes an explicit statement of the limited term for the tenancy and project funders require the provider to impose the durational residency limit in the lease. For example, certain McKinney-Vento programs limit occupancy in transitional housing projects to two years.

In addition, supportive housing providers are sometimes bound by "good cause eviction" protections that prohibit eviction of tenants without good cause. The common sources of these protections are contracts with government subsidy providers, whether as a matter of policy or in fulfillment of funding program requirements (e.g., the HOME program, the Low Income Housing Tax Credit Program), and local rent control laws. If good cause eviction protections apply, then whether the expiration of the housing provider's durational limit constitutes the "good cause" necessary to justify an eviction will depend on the applicable definition of "good cause" in the contract or programmatic regulation. The HOME program, for example, includes specific authorization to terminate tenancies in transitional housing projects following expiration of the specified transitional term of occupancy.[78]

Question 6. May a housing provider limit the number of people who reside in a unit?

Housing providers are generally safe in establishing a "two persons per bedroom plus one" maximum occupancy limit, with adjustments reflecting the number and size of sleeping areas or bedrooms, the overall size of the dwelling unit, the age of any children involved, and the configuration of the unit.

In an effort to ensure that housing is not overcrowded or underutilized, supportive housing providers often attempt to regulate the number of people who may live in a unit. When determining maximum occupancy standards, housing providers should look to guidance from HUD and their state building codes.

In the HUD Multifamily Housing Handbook (4350.3) and its recent Supportive Housing Desk Guide, HUD states that a two-person-per-bedroom rule is generally acceptable and that an owner may establish a different standard for assigning unit size based on specific characteristics of the property (e.g. some bedrooms are too small for two persons). Both guides also suggest that housing providers can rely on a 1991 Memorandum from the HUD Office of General Counsel often referred to as the "Keating Memo."[79]

While far from clear, the Keating Memo generally endorses a two-person-per-bedroom standard, with the caveat that this standard is rebuttable and HUD will consider a number of factors in determining whether an occupancy policy is reasonable, including the number and size of sleeping areas or bedrooms, the overall size of the dwelling unit, the age and gender of any children living in the unit, the configuration of the unit, other physical limitations of the housing (like hot water heater capacity), and applicable state or local government occupancy requirements.

In determining its maximum occupancy limits, a housing provider's safest course of action from a fair housing perspective would be to adhere to the state housing code. However, if a housing provider does not want to adopt the applicable state housing code, it should consider enacting the HUD "two per bedroom" standard. The housing provider adopting such a standard should also examine the capacity of each of its units and then determine a consistent occupancy standard that starts with the two per bedroom standard and then increases or decreases the occupancy limits based on the size, layout or other

[78] 24 C.F.R. § 92.253(c).
[79] The Keating Memo is adopted pursuant to Federal Register 70255, December 18, 1998.

limitations (like hot water heater capacity, shared bathrooms etc.) of the unit. A housing provider's occupancy standards will be more defensible if the housing provider performs a reasonable and thoughtful analysis of its units and bases its occupancy standards on the characteristics of those units.

Question 7. May a housing provider require that a unit be occupied by a minimum number of people?

Housing providers may adhere to their lenders' requirement, but should be certain that the lenders' requirements do not discriminate on the basis of disability or marital status.

HUD, state, and other housing development funders may require that units be occupied by larger households to maximize the distribution of public resources. For example, the HUD Multifamily Handbook states that a housing provider may not permit a single person to occupy a unit with two or more bedrooms except under certain circumstances.

In setting minimum occupancy standards, housing providers should make sure that they are not discriminating on the basis of disability or marital status. Under fair housing laws, housing providers have an obligation to make reasonable accommodations for disabled tenants who may need additional space. If an applicant requests an accommodation that would otherwise violate minimum occupancy standards, and such an accommodation is related to the disability (e.g., an additional bedroom is needed to store durable medical equipment) and would not cause an undue administrative burden or financial hardship, the housing provider must provide the larger unit. In addition, some states prohibit discrimination on the basis of marital status, thus prohibiting discrimination against single people, along with married and unmarried couples. As a result, housing providers whose programs will not permit one person to occupy a unit in the development could be accused of creating a disparate impact on single persons and must demonstrate that the occupancy limit is based on business necessity and that the limits further the business necessity. Presumably, if a public lender to a housing development is requiring the occupancy limits, then the housing provider should be able to rely on a defense that it could not have financed the development without the assistance of public lenders who desire to serve as many people as possible with the affordable and supportive housing units they finance.

Question 8. What translation or language services should a housing provider offer to tenants with limited English proficiency?

If a housing provider receives federal financial assistance, the housing provider should take steps to create and implement a language assistance plan which provides certain translation and interpretation services. State laws may impose additional obligations.

HUD's Guidance Concerning National Origin Discrimination Affecting Limited English Proficient (LEP) Persons became effective on March 7, 2007 and is applicable to federally-financed housing programs. It also applies to any entity receiving HUD funding, regardless of whether such funding is received directly from HUD or indirectly through a state or local government entity. As a result, developers and managers of housing financed with federal funds distributed by local or state government agencies (such as HOME, CDBG or HOPWA funds) are expected to comply, as are cities, counties, housing authorities, and other organizations that receive such funds directly from HUD. The Guidance is intended to extend to all

programs and activities of an entity that receives HUD funds, even if only one program has been financed with HUD assistance.

Under the Guidance, which can be found at Volume 72 of the Federal Register, page 2731, recipients of HUD financing should take reasonable steps to ensure that persons with limited English proficiency will have meaningful access to their programs or activities. To assess what type of assistance will provide meaningful access to these persons, HUD directs recipients to perform a four-factor balancing test. The test generally requires entities to analyze, 1) the cost of available language assistance, 2) the need for such assistance based on the eligible population, 3) the frequency with which the entity serves persons with limited English proficiency, and 4) the importance of the entity's programs or activities.

The Guidance identifies two main ways to provide language services: written translation and oral interpretation. HUD directs that all "vital" documents be translated. Vital documents, according to the Guidance, include applications and tenant health and safety notices. In contrast, documents advertising recreational activities are not necessarily vital documents.

HUD does not offer additional funds for entities to provide translation and interpretation services, or to otherwise implement the Guidance. However, HUD considers costs incurred in preparing an LEP Plan as a legitimate project expense. As a result, HUD recognizes that many organizations will have to implement its requirements over time.

HUD will expect recipients of HUD financing to develop a Language Access Plan (LAP). Among other matters, the LAP should identity persons with limited English proficiency who need language assistance and the specific assistance needed, the points and types of contacts that program staff will have with persons with limited English proficiency, the ways in which language assistance will be provided and advertised, and the documents requiring translation or oral interpretation. The LAP should set forth a schedule of when the recipient will provide translated vital documents and other needed language assistance. HUD intends for entities to voluntarily comply with this Guidance.

Question 9. May a property owner master lease units that are then subleased to tenants?

Generally yes, although master leasing may raise issues in Low Income Tax Credit developments.

Sometimes housing providers may wish to lease designated units in a project to a social service provider, who will then arrange and manage group occupancy of the units among tenants receiving services from the service provider. This practice is called "master leasing" because the social service provider will hold a "master lease" on the unit and then will sublet the unit to an individual who will take advantage of the provider's services.

Only residential rental units "available for use by the general public" are eligible for the Low Income Housing Tax Credit under Internal Revenue Code Section 42. Treasury Regulation Section 1.42-9 provides that a housing provider meets this requirement if the provider rents the units in a manner consistent with HUD policy governing non-discrimination according to HUD rules and regulations, so long as the housing provider does not limit the unit to members of a particular organization or an employer does not provide the unit to its employees. In the past, master leased units have been eligible for tax credits and

master leasing is a fairly common practice in tax credit projects, so long as the service provider and owner meet all Low Income Housing Tax Credit requirements.

Unfortunately, some IRS staff has taken a relatively new position concerning the "available for use by the general public" rule, causing some ambiguity in the practice of master leasing in tax credit projects. Some IRS staff interpreted the IRS publication of a revised Guide for Completing Form 8823 (the Low-Income Housing Credit Agency Report of Noncompliance or Building Disposition) in February 2007 as indicating that any "exclusionary criteria that limits access" to tax credit units is a violation of the "available to the general public" rule and therefore makes such units ineligible for tax credits. The IRS chief compliance officer has stated that she deems master leasing as an "exclusionary" practice that limits access to tax credit units. Though this IRS guidance is unofficial, housing providers should nonetheless take heed. Tax credit investors, whose primary goal is to preserve the tax credits a project generated, generally will take a conservative approach in interpreting tax law and regulations relating to issues that arise in supportive housing projects that may affect their tax credits. Housing providers should consult with their state tax credit allocation committee to determine how their state intends to report master leasing in compliance reports.

Chapter Six: *Zoning and Land Use*

Local zoning laws exist to regulate how land may be used, to allow compatible uses to occur in a given zoning district, and to restrict non-compatible uses. Unfortunately, these laws may also work to restrict access to housing for persons with disabilities and members of other protected classes of people. For example, many zoning decisions—granting variances, use permits, and the like—involve a large measure of discretion. This land use discretion can become a local government vehicle for discrimination against persons with disabilities and can provide an entry point for neighborhood hostility against housing for people with disabilities.

Local governments' land use and zoning actions concerning housing are subject to the federal Fair Housing Act, any additional state anti-discrimination laws, and state planning and zoning law. These laws prohibit the use of zoning for discriminatory purposes, and in some cases prohibit zoning laws that have a discriminatory effect on persons with disabilities. The Fair Housing Act (and some state anti-discrimination laws) also creates an affirmative duty for a local government to grant a reasonable accommodation for persons with disabilities, for example, by allowing a group home to locate in an area where the facility does not meet a zoning requirement. This duty is qualified; the locality is entitled to balance the administrative and financial burden required to grant the accommodation and the adverse effect of the zoning against the benefits of the accommodation.

This Chapter discusses the Fair Housing Act's prohibitions on zoning laws that intentionally discriminate against, or have a discriminatory effect on, persons with disabilities. This Chapter also discusses the scope of the Fair Housing Act's duty to accommodate. Since most of the relevant court cases interpret the federal law, the discussion focuses on the federal Fair Housing Act. However, some states have adopted legislation specifically intended to protect persons with disabilities, and it is important to consult with an attorney who is familiar with these state-specific provisions.

State planning and zoning laws control the permitting process for supportive housing and emergency shelters/transitional housing for homeless people, as well as public hearing requirements for such types of housing. As recommended above, housing providers may wish to consult an attorney who can explain local and state rules.

Question 1. How can local government land use actions violate fair housing laws?

Land use actions may violate fair housing laws if they are facially discriminatory, adopted with discriminatory intent, or have a discriminatory impact.

Land Use Actions that are Facially Discriminatory

Courts are hostile to any zoning laws that, on their face, treat housing for people with disabilities differently from other housing. Restrictions on the location of residential care facilities, for example, will trigger court scrutiny. Spacing requirements (that is, requirements that facilities be located a certain distance from each other), requirements for special use permits, neighbor notification requirements, and special conditions are

all suspect if they apply only to housing for persons with disabilities. [104] Rather, any such zoning provisions must apply on a neutral basis to all similar living arrangements.

Legitimate reasons must justify different treatment of persons with disabilities, rather than be based on stereotypes or hostility toward particular groups. In most federal circuits that have considered the issue, the local government must show either of the following: 1) the restriction benefits disabled people, or 2) the ordinance responds to legitimate safety concerns and is not based on stereotypes. These standards are difficult to meet and few instances of facial discrimination can withstand judicial scrutiny. The Eighth Circuit, however, has applied a more relaxed standard, looking at whether a challenged provision is a "legitimate means to achieve the state's goals."[105]

As an example, some local governments have attempted to enact minimum spacing requirements for residential care facilities with the allegedly benign justification that such spacing will foster the deinstitutionalization of persons with disabilities and their integration into the community. Although the Eighth Circuit accepted the restriction as a legitimate way for the state to achieve its goal of deinstitutionalization,[106] other federal courts have found insufficient evidence that such spacing requirements either benefit people with disabilities or that legitimate safety concerns justify the requirements, and have held that the requirements are an impermissible restriction.[107]

Land Use Actions with Discriminatory Intent

Courts will also scrutinize zoning laws and decisions that are neutral on their face, but are intentionally applied in a manner that discriminates against persons with disabilities. When a local government takes action that delays or discourages housing for persons with disabilities, courts will compare this treatment to treatment of other similarly situated housing.[108]

Denying a variance to a provider of housing to persons with disabilities, while routinely granting variances to similarly situated permit applicants constructing housing for people without disabilities, would be evidence of discriminatory intent. Similarly, where rational reasons do not support zoning decisions that negatively impact persons with disabilities, the decision could serve as evidence of local government discriminatory intent.[109] Even if a community can articulate a nondiscriminatory reason for its actions, the

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[104] *See, e.g.,* Larkin v. State of Michigan, 89 F.3d 285 (6th Cir. 1996); ARC of N.J., Inc. v. State of New Jersey, 950 F. Supp. 637 (D. N.J. 1996); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993); Bangerter v. Orem City, 46 F.3d 1491 (10th Cir. 1995).

[105] *See* Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991); *compare* Community House, Inc. v. City of Boise, 468 F. 3d 1118, 1125 (9th Cir. 2006), *citing* Bangerter v. Orem City Corp., 46 F.3d 1490, 1501 n.16 (10th Cir. 1995) and Larkin v. Mich. Dep't of Soc. Servs., 89 F. 3d 285, 289 (6th Cir. 1996) (discussing tests used under the Fair Housing Act).

[106] Familystyle, 923 F.2d at 94.

[107] Nev. Fair Hous. Ctr., Inc. v. Clark County, 565 F. Supp. 2d 1178 (D. Nev. 2008) (striking down a Nevada statute requiring a 1500 foot separation between residences serving people with disabilities).

[108] Children's Alliance v. Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997) (finding intentional discrimination against abused and delinquent children in the adoption of a zoning ordinance that placed severe limits on these types of facilities).

[109] United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 846 (N.D. Ill. 2001) (finding direct and circumstantial evidence that decision-makers were driven by discriminatory motives in denying a use permit for a facility to be occupied by disabled persons); Samaritan Inns v. District of Columbia, 1995 U.S. Dist. LEXIS 9294 (D. D.C. 1995), (finding that issuance of a stop

housing provider may be able to prove that the reason is a mere pretext.[110] When a court finds that a local government has acted with discriminatory intent, the court will require justification for the actions. In most federal circuit court jurisdictions, the only legitimate justifications for actions taken with discriminatory intent are, 1) the actions benefited people with disabilities, or 2) the actions responded to legitimate safety concerns and were not based on stereotypes. This standard is difficult to meet, and few governments found to have acted with discriminatory intent will be successful in defending their actions.

Land Use Actions with Discriminatory Effect

Even when a local government does not intend to discriminate against persons with disabilities, and when its zoning laws apply equally to all permit applicants, a court may find a local ordinance to violate the Fair Housing Act due to the law's disproportionate burden on people with disabilities. However, such cases are considerably more rare and difficult to prove than cases in which discriminatory intent can be inferred, and are less likely to be successful.

A plaintiff arguing discriminatory effect must show that an outwardly neutral zoning policy results in a "significantly adverse or disproportionate impact on persons of a particular type." To meet this burden demands a high level of proof. For instance, in one case, a court found that, to show the discriminatory effect of an ordinance that limited the number of persons in group homes, the operator of a group home would need to show either that disabled persons living in group homes were affected disproportionately compared to non-disabled persons living in group homes, or that disabled persons were more likely to live in group homes.[111]

Under the Fair Housing Act, even if a plaintiff demonstrates disparate impact, a defending local government can justify the policy with a nondiscriminatory "legitimate, bona fide governmental interest." Some state anti-discrimination laws, however, may require greater justification once a court finds that the local policy causes a disparate impact.

Question 2. How does reasonable accommodation apply to land use approvals?

A local government may be required to waive a planning or zoning requirement as a reasonable accommodation to a person with disabilities.

The affirmative duty under the Fair Housing Act to accommodate persons with disabilities will also cause local zoning laws to yield in many cases. Many challenges to neutral laws with a discriminatory effect will arise as reasonable accommodation cases. If a person with a disability requests a local government to waive a particular land use provision, in whole or in part, as a way to meet that person's special needs, then the local government may be required to allow the nonconformity as a reasonable accommodation. For instance, as noted below, localities have been required to allow exceptions from setback requirements so that a paved path of travel can be provided.

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work order to a home for recovering substance abusers was not based on legitimate reasons but was motivated by community hostility toward people with disabilities).

[110] Community House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

[111] Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997).

Courts determine whether a local government must grant an exception to its existing zoning scheme as a reasonable accommodation on a case-by-case basis, based on the specific facts of each case. The basic test is whether the exception is necessary to give disabled residents equal opportunity to use and enjoy a dwelling, and whether the exception will undermine the fundamental purpose of the zoning law, or will impose significant financial or administrative burdens on the local government.[112] Nearby property owners' fear of effects on their property values is not a factor local government may consider.

Establishing an entirely different use from uses allowed by an area's zoning, such as a residential use in a commercially zoned area, is usually not considered a reasonable accommodation.[113] However, evidence that the same local government has allowed similar nonconforming uses in other cases can provide evidence of discriminatory treatment and lead a court to order the exception.

Courts are more likely to consider a variance or other waiver to be a reasonable accommodation if it represents only a minor change to existing zoning, such as a greater building size (for instance, to permit space for treatment or accessibility), than allowing an otherwise prohibited use. But even modifications to less significant rules are not automatic, and typically courts will only view an exception as a reasonable accommodation when the exception requires a marginal change from existing zoning requirements. A court will not deem reasonable a request that is a major alteration from the zoning laws. Moreover, a permit applicant must be flexible, and the applicant must be willing to negotiate with the local government over the extent of the reasonable accommodation. Whether a city or a court will allow a variance for larger facility size also depends on whether the larger size is necessary to the effective operation or financial viability of the facility.[114]

Building owners may also request reasonable accommodations to allow tenants or owners to make physical modifications in their structures to provide access to persons with disabilities. Such modifications usually involve minor physical alterations, such as building a ramp allowing wheelchair access in violation of local setback requirements in the front yard of a resident who has a disability, or allowing a larger side yard rather than the rear yard local zoning requires.[115]

A local government may be able to avoid giving additional reasonable accommodations if its zoning laws already provide special benefits or exceptions to persons with disabilities. For instance, if a local ordinance

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[112] McGary v. City of Portland, 386 F. 3d 1259 (9th Cir 2004).

[113] Homeless Action Committee v. City of Albany, 1997 U.S. Dist. LEXIS 23423 (N.D.N.Y. 1997), (holding that the city was not required to grant a variance to allow a home for recovering alcoholics to operate in a commercially zoned neighborhood, but allowing that a plaintiff could show discriminatory treatment if the city had granted other variances since it had established the commercial zone). *But see* Judy B. v. Borough of Tioga, 889 F. Supp. 792 (M.D. Pa. 1995), (ordering the city to grant a variance for a 15-person home for people with disabilities, where the home would occupy a former motel in a commercial zone).

[114] The following cases provide examples of courts' responses to reasonable accommodation requests: Hemisphere Bldg. Co. v. Village of Richton Park, 1996 U.S. Dist. LEXIS 18451 (N.D. Ill. 1996); Act I, Inc. v. Zoning Hearing Board of Bushkill Township, 704 A.2d 732 (Pa. Commw. 1997); Erdman v. City of Fort Atkinson, 84 F.3d 960 (7th Cir. 1996); Bryant Woods Inn v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997).

[115] Trovato v. City of Manchester, 992 F. Supp. 493 (D. N.H 1997); U.S. v. City of Philadelphia, 838 F. Supp. 223 (E.D. Pa. 1993).

only permits group homes for persons with disabilities and all other group homes (such as boarding houses) are prohibited, the local government may deny a request for modification of the ordinance because the government may view the ordinance, itself, as a reasonable accommodation.

Question 3. May a local government legally require a use permit for supportive housing, transitional housing, or emergency shelters?

Whether a local government may require a use permit for supportive housing, transitional housing, or emergency shelters must be determined on a case-by-case basis, based on whether the permit requirement also affects those without disabilities, the justification for the requirement, and the requirement's effects on persons with disabilities.

Zoning ordinances sometimes prohibit certain types of projects from being located in a particular zone without receiving a "use permit" from the local government. A use permit may be granted by a local government at its discretion, based on the advantages and disadvantages of a particular project. Use permits can pose a major barrier to housing development. Generally, the local government must hold a public hearing prior to the issuance of a use permit.

Requiring a use permit for supportive and transitional housing facilities and emergency shelters *may* be illegal if the requirement violates the Fair Housing Act or any state anti-discrimination laws. In assessing whether a court would find a use permit requirement permissible under the Fair Housing Act, the primary issue is whether the permit requirement applies *only* to housing for persons with disabilities. Courts are more likely to uphold use permits or similar requirements that apply to a range of similar residential uses and are not limited to those serving persons with disabilities or other protected classes. If a use permit is not required for comparable uses, such as boarding houses and retirement facilities, courts may not uphold the use permit requirements.

However, even if the use permit requirement applies to similar uses, the requirements may still be subject to challenge if local government applies them in a way that appears to discriminate against persons with disabilities. For instance, one court found the local government violated the Fair Housing Act for denial of a variance for a nursing home in a residential area, where the nursing home was substantially physically similar to a retirement community, and the local government allowed retirement communities. Use permit requirements would be similarly subject to challenge in other cases based on evidence that the local government applies the requirement differently to housing for those with disabilities, or applies the requirement mainly to block such housing. Courts will also invalidate use permits and like requirements if they fail to provide standards for approval or disapproval or if local government applies the requirement arbitrarily to housing for persons with disabilities or other protected groups.

Question 4. May a city or county legally require public hearings before siting a supportive or transitional housing development or an emergency shelter?

As with the use permit requirement discussed in the previous question, the legality of a public hearing requirement is decided on a case-by-case basis.

The legal principles that apply to public hearing requirements are essentially the same as those applying to use permit requirements. If a city/county requires a public hearing in connection with a land use permit, which may include not only a use permit but also other approvals such as design review, rezoning, variance, etc., the issue will be whether the requirement for the land use permit complies with federal and state law. A court is likely to invalidate such permit requirements if they apply only to facilities for protected groups, either on their face or in the manner in which they are administered, if they are applied arbitrarily, or if they lack legitimate justification grounded in objective facts. A court is more likely to uphold the permit requirement if it applies to broad classes of facilities and is linked to stated principles for decision-making that limit the possibility of arbitrariness.

In some cities, officials have imposed public hearing requirements as a precondition to local financial assistance, rather than on project land use approvals. Such hearing requirements are still subject to challenge if limited to housing for people with disabilities or other protected groups. However, a broadly applicable requirement for a hearing before a city grants funding approval is likely to be difficult to challenge, given that local government generally has wide discretion in allocating limited financial assistance.

Courts are most likely to invalidate public notification and hearing requirements if the requirements are not linked to some criteria for decision-making on the project that is the subject of the hearing, or if the local government imposes the requirement only on affordable housing or housing serving people with disabilities or other protected groups. An example might be a public notice and hearings only when neighbors object, and where in practice cities only hold hearings for housing developments serving people with disabilities or another protected group. Courts are highly likely to find this type of requirement—where the local government has failed to identify objective criteria for holding a hearing, and which, in practice, applies only to housing serving protected groups—to violate fair housing laws.