

2010 California 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 October 2009.

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Chapter One: *Why Read This Guide?*

This edition of *Between the Lines* is an update to the first edition published in 2003. *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, permanent supportive housing is defined as housing that is affordable and does not limit a tenant's length of stay. Supportive housing offers support services on and off-site to formerly homeless people and others with special needs in order 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. For specific issues, 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.

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). The State of California also offers programs to house individuals who historically have had a difficult time obtaining housing, including the Mental Health Services Act Housing Program, the Emergency Housing Assistance Program, and the Multifamily Housing Program for Supportive 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 can't 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 you consider 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."

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 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 numbers of homeless people increased, federal and state government, as well as private organizations, sought solutions to homelessness. Over the course of developing solutions to homelessness, local, county, state, and federal governments have widely adopted supportive housing as a model based on data demonstrating that it is a cost-effective solution to ending 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 to considerable legal risks which 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 *Between the Lines*. The update includes an Appendix One, specifically addressing the questions raised by the California Mental Health Services Act Housing Program.

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. 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.

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 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 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 October 2009.

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 siting of supportive housing.

Between the Lines also offers additional resources in its appendices. Appendix One answers questions raised by California's Mental Health Services Act Housing Program. Appendix Two provides summaries on other key categories of laws that apply to supportive housing—planning and zoning, siting, landlord-tenant,

and physical accessibility. Appendix Three provides a summary of Fair Housing Laws. Appendix Four provides a primer on reading laws and statutes. Appendix Five contains a DOJ/HUD joint statement on reasonable accommodations and modifications. Appendix Six is the Fair Housing Act and regulations. Appendix Seven provides legal definitions for 'disability' and other related terms. Appendix Eight is the HUD memo on the use of medical marijuana. Appendix Nine shows how to obtain HUD information and understand state and 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 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, or a natural, living, breathing 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.

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 which establishes the legal framework for all other laws adopted at the state level of government. Many cities also have city charters which are mini-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.

This Guide is a self-help tool for working with the specific laws that affect supportive housing. This 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. This Guide was published in December 2009, 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 the laws of most state and local governments. 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. For example, the California Fair Employment and Housing Act pre-empts California cities and counties from adding additional protected classes via their local fair housing ordinances. 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 program regulators 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).

HUD is sometimes able, upon request, to waive regulatory requirements. Just as HUD cannot interpret a regulation in a way inconsistent with the authorizing statute under which the regulation was adopted, HUD cannot waive requirements established by the authorizing statute. Only a statutory amendment can alter such a requirement. In addition, a waiver is not enforceable unless in writing and signed by an authorized person (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 in 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 just 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 the 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). California has four federal districts, but many states have only one federal district.

What state trial courts are called depends on the state. In California, trial courts are called "superior" courts. Each county in California has a superior court system. 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). California's four federal districts are part of the Ninth Circuit, and the Ninth Circuit includes not only California's four districts, but also all districts in Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. 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, the appeals court is called the "Court of Appeal." The California Courts of Appeal are divided into six districts. Each district consists of several counties. 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 depends on the state. In California, the court of last resort is called the California Supreme Court. This Court's decisions bind all lower level courts in California. A California Supreme Court decision, though, does 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 the United States Supreme Court hands down.

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 fair housing law.

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 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 "semi-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; 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 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, Overview of Other Relevant Laws, Physical Accessibility 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. The federal Court of Appeals for the Ninth Circuit (which includes California) may uphold a facially discriminatory law or policy if the law or policy achieves either of the following: (1) the policy benefits the class of people; or (2) the requirement responds to legitimate safety concerns related to the people affected that are not based on stereotypes.³ A facially discriminatory policy usually will not withstand a court's scrutiny.

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 that they were rejected, 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

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).

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).

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 does prove 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. California state law, however, places a greater burden on a housing provider (See Question Six of this Section).

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.

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 which 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.

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).

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, Overview of Other Relevant Laws, Physical Accessibility 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. In addition, the 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 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.

⁶ 24 C.F.R. § 8.4.

⁷ 24 C.F.R. § 8.20.

⁸ 24 C.F.R. §§ 8.21 and 8.24.

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 were a government entity for ADA purposes. For example, one 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, Overview of Other Relevant Laws, Physical Accessibility 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

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

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.

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 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, requiring each federal agency to identify and develop strategies to rectify governmental activities affecting human health or the environment that 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 is the California Fair Employment and Housing Act?

The housing provisions of the Fair Employment and Housing Act (California Government Code Sections 12955 *et seq.*) (FEHA), a California statute adopted in 1980 (replacing the earlier Rumford Fair Housing Act), prohibit discrimination based on race, color, religion, sex, national origin, familial status, and disability (the same categories as the federal Fair Housing Act), and also on the basis of marital status, ancestry, and, as of January 1, 2000, sexual orientation and source of income. FEHA also prohibits land use decisions that discriminate based on the protected classifications. FEHA applies to all housing accommodations except owner-occupied single-family homes with only one roomer or boarder. The requirements of FEHA are substantially the same as the requirements of the federal Fair Housing Act, including both non-discrimination provisions and the affirmative duty to provide reasonable accommodations in rules, policies, practices, or services to permit a disabled person the equal opportunity to use and enjoy a dwelling. The Fair Employment and Housing Act also includes physical accessibility requirements.¹⁰

FEHA prohibits both intentional discrimination and facially neutral policies that have a disparate adverse impact on a protected group (which is different from the federal Fair Housing Act, where the statute is silent on disparate impact). FEHA also requires greater justification than does the Fair Housing Act if a policy causes a discriminatory disparate impact. A business establishment (which includes a nonprofit provider) must show that the policy causing the disparate impact is "necessary" to the operation of the business and "effectively carries out" the significant business need. No court has yet applied this test to a nonprofit housing provider whose mission is to serve a particular population. A non-business establishment, such as a government agency, must show that a policy that creates a disparate impact, (1) is "necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect;" and (2) effectively carries out the purpose it is supposed to serve. The court must also consider whether feasible alternatives would equally accomplish the purpose and be less discriminatory.¹¹

Question 7. What is the Unruh Civil Rights Act?

The Unruh Civil Rights Act (California Civil Code Sections 51 *et seq.*) is one of the earliest statutes to prohibit discrimination in all "business establishments" (including housing accommodations operated by both for-profit and nonprofit entities) on the basis of sex, race, color, religion, ancestry, national origin and disability. Court cases in California have interpreted the law broadly to prohibit all arbitrary discrimination, regardless of whether the discrimination is based on one of the specifically enumerated classes (e.g. sex, race, color, or religion). Courts reached this conclusion based on the Fourteenth Amendment to the United States Constitution, which prohibits irrational, arbitrary or unreasonable discrimination.¹² This broad interpretation of the Unruh Act has allowed courts to extend the Unruh Act's protection to homosexuals, students, individuals of a particular occupation, and children. The Unruh Act includes an exemption for

¹⁰ California Government Code § 12955.1.

¹¹ California Government Code § 12955.8(b).

¹² *In Re Cox*, 3 Cal. 3d. 205 (1970).

senior housing meeting very specific requirements.¹³ The Unruh Act senior housing exemption is also narrower than the federal exemptions for senior housing and is not pre-empted by federal law. See Chapter Three, Section D, Question Four for a detailed explanation of senior housing rules.

Question 8. What other California anti-discrimination statutes are most relevant for housing providers?

California law includes numerous anti-discrimination provisions. Nearly every financing source codified in State or local law will include an anti-discrimination provision and housing providers should be certain to understand which laws and regulations apply to their programs.

Section 11135 of the California Government Code applies to housing that receives State financing. This Section of the Government Code prohibits discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability in "any program or activity that is conducted by the state or a state agency or financed by the state." Regulations implementing 11135 are found at 22 CCR 981020, et. seq. Housing providers should be certain to review the regulations, because, among other provisions, they require reasonable accommodations as well as translation or interpretive services in certain instances. Unlike the California Fair Employment and Housing Act, Section 11135 does not prevent discrimination on the basis of familial status, marital status, or source of income. Section 11135, however, also requires that any activity or program the State (or State agency) runs or finances comply with Section 202 of the Americans with Disabilities Act. Section 202 applies to public entities and generally prohibits discrimination on the basis of disability. It also incorporates the ADA's Title II accessibility provisions. As such, State-financed housing programs should comply with Title II of the ADA (in addition to meeting other accessibility requirements). Section 11135 should not be interpreted in a manner that would "adversely affect lawful programs which benefit the disabled, the aged, minorities, and women."¹⁴ (Appendix Two includes more information on the Title II accessibility provision.)

California law also specifically forbids discrimination in land use decisions based on disability, the income levels of the expected occupants, or receipt of governmental financial assistance.¹⁵ Other State statutes regulating local planning and zoning forbid discrimination in zoning ordinances and zoning actions in other ways. For example, local governments cannot deny or attach conditions to make creation of supportive housing, transitional housing, and emergency shelters for homeless people infeasible, unless the local government makes specific findings.¹⁶ (Chapter Six includes detailed descriptions of these laws.)

Question 9. What are local housing discrimination ordinances?

Some cities and counties have adopted local ordinances prohibiting discrimination in housing, which include protections for groups not specifically protected by State or federal housing law. For example, some local ordinances prohibit discrimination based on gender identity, physical appearance, or weight. The California Fair Employment and Housing Act pre-empts local jurisdictions from protecting additional groups not named in the Fair Employment and Housing Act or Unruh Act. Therefore, anti-discrimination protections for these additional groups of people are probably not enforceable against private owners of

¹³ California Civil Code §§ 51.2-51.4.

¹⁴ California Government Code § 11139.

¹⁵ California Government Code §65008.

¹⁶ California Government Code § 65589.5(d).

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 3: *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?

Both the federal Fair Housing Act and the California Fair Employment and Housing Act prohibit discrimination in the renting, selling, and advertising of dwelling units on the basis of race, color, religion, sex, familial status, or national origin, or disability (the Fair Housing Act uses the term "handicap"). The Fair Employment and Housing Act adds marital status, ancestry, sexual orientation, and source of income as additional bases of illegal discrimination. Also, both laws provide 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."¹⁷

Section 504 of the Rehabilitation Act of 1973 prohibits any program that receives federal funding from discriminating against people with disabilities. Section 504 also prohibits reserving housing for people with disabilities in general, or people with particular disabilities, unless authorized by federal statute or an executive order. (However, the discussion in this Introduction must be supplemented with the analysis in the succeeding questions if a provider receives federal funding and seeks to limit occupancy to persons with disabilities.)

The Unruh Civil Rights Act, a California statute that prohibits discrimination in all "business establishments," also prohibits all arbitrary discrimination.¹⁸ Arbitrary discrimination is discrimination against a group of people with similar personal characteristics for no legitimate reason. For instance, rejecting applicants because they have long hair would be arbitrary since their long hair bears no relation to their qualifications for tenancy. 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.

Both federal and state 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

¹⁷ 42 U.S.C. § 3601(c); California Government Code §12955(c).

¹⁸ California Civil Code §51, *et seq.*

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 specific laws state which criteria are acceptable. 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 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, a limitation on occupancy to people with a particular disability would not be permitted under Section 504 unless federal statute or executive order specifically authorized such limitation or if other special circumstances exist. In addition, State funded projects may also 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 the consequence of the limitation is that a segment of the population is excluded from the housing disproportionately. Restrictions which are not intended to discriminate against a protected classification of people, but that result in exclusion of a protected classification 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. In California, the Fair Employment and Housing Act also requires that no less discriminatory alternatives exist. 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.

If a project does not receive federal funding, the Fair Housing Act, the California Fair Employment and Housing Act and local fair housing law 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. If the State of California is financing the housing, then California Government Code Section 11135 will apply.

The Fair Housing Act prohibits discrimination against disabled people in a section separate from the other anti-discrimination provisions. This separation of disability-based discrimination from other types of discrimination, as well as the language of the section itself, emphasizes that, with respect to disability-based discrimination, the actions prohibited are discriminatory acts against persons with disabilities, rather than a requirement that a provider ignore a person's disability status. 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."¹⁹

Additionally, the federal regulations which implement 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 permit housing providers to avoid efforts to meet the needs of people with disabilities.

The California Fair Employment and Housing Act, unlike the Fair Housing Act, does not segregate the prohibition on discrimination against people with disabilities from the prohibition on other types of discrimination. Rather, discrimination *on the basis of* disability is prohibited. The broad prohibition could be used to argue that housing that excludes non-disabled people is illegal. However, a court is unlikely to find such a practice illegal because the California Fair Employment and Housing Act also states that the Act should not be construed to afford fewer rights or remedies than the Fair Housing Act.²⁰ As noted above, the Fair Housing Act permits discrimination in favor 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 any class of people with 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

¹⁹ Preamble II 24 C.F.R Chapter One, Subchapter A, Appendix I, 54 Fed. Reg. § 3246 (Jan. 23, 1989).

²⁰ California Government Code § 12955.6; Auburn Woods I Homeowners Assn. v. Fair Employment & Housing, 121 Cal. App. 4th 1578 (2004).

particular class of disabilities, with benefits or services that are as effective as those provided to others.²¹ 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.

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.²²

In California, Government Code Section 11135 applies to any State program or any project that receives financial assistance from the State. California Government Code 11135 prohibits discrimination based on disabilities in State-funded programs, and requires that State-funded programs comply with Section 202 of the Americans with Disabilities Act. To comply with Section 202 of the ADA, housing providers reserving housing for people with disabilities should do so under the authority of a federal, State or local law or program or because such a reservation is necessary to provide access to housing that is equal to the access a non-disabled person would enjoy.²³

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 a particular class of disabled persons only 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).²⁴

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 if the restrictions result in a disparate impact.

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 allowed inquiry implies that the Fair Housing Act allows housing providers to limit housing to people experiencing a particular category of disability. As noted in Question One of this Section, the California Fair Employment and Housing Act is not intended to afford fewer rights or remedies than the Fair Housing Act and, thus, would allow a housing provider to reserve housing for persons with a particular disability. Title II of the ADA and California Government Code Section 11135 should permit housing providers to serve people with a particular type of disability, but housing providers

²¹ 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).

²² Easley by Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994).

²³ California Government Code § 11139.

²⁴ 29 U.S.C. § 794(a).

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.)

Additionally, restricting occupancy to a population with a particular disability is allowed under the California Unruh Act if the restriction is not arbitrary. Housing providers should have a reasonable basis for limiting housing to people with a particular type of disability; otherwise, the restriction could be considered arbitrary. Thus, if the services provided are unique in filling the needs of a particular population (e.g., if the county's behavioral health department is providing services to people with mental illness for those units), or if the design features of a physical environment are particularly helpful to a certain population, the limitations to persons with a particular type of disability would not be arbitrary.

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).

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 provide 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 it is required by a *state* or *local* funding source. 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.²⁵ 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 HIV/AIDS and their families.²⁶ 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 a housing provider does not have federal authority but wants to limit units to people with disabilities or a particular type of disability, or state or local funding requires such restriction, 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 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 which 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

²⁵ 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.

²⁶ 42 U.S.C. § 12901.

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."²⁷ 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."²⁸ The Section 504 Regulations also include reasonable accommodation and modification requirements.²⁹ The concept of reasonable accommodations and modifications recognizes that, in order for persons with disabilities to obtain equal opportunity or equal access to benefits that others enjoy, individualized treatment that is distinct from practices applied to non-disabled persons or persons with other types of disabilities is sometimes required. A housing provider may accommodate a person's disability through physical modifications or through waivers of generally-applicable rules or policies.

Housing reserved for people with specific disabilities should generally promote integration and equal access to housing. Question Two of Section B in *Housing and the Mental Health Services Act*, attached as Appendix One, provides an example of when housing should be permitted to be reserved for people with a particular type of disability in federally financed housing, absent other federal authority. As is detailed in Appendix One, a housing provider can justify reserving a small number of MHPA-funded units for households which include a person with a serious mental illness in a larger project as necessary to afford such persons equal opportunity for affordable housing. A HUD regional office in California recently agreed with this analysis and has stated that it will approve federal funding for MHPA-funded units if the MHPA-funded units comprise a small percentage of units in the development. The same HUD regional office in California has advised that reserving all (or even most) project units for people with a specific disability could be contrary to the integrationist policies of Section 504. Housing providers who would like to serve other categories 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. Housing providers are cautioned that HUD may resist any restrictions which are not specifically authorized by federal statute.

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.³⁰ 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

²⁷ 24 C.F.R. § 8.4(b)(iv).

²⁸ 24 C.F.R. § 8.4(b)(2).

²⁹ 24 C.F.R. § 8.33.

³⁰ 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 Redellegation of Authority Notice, 59 Fed. Reg. 62739, 62743, and FR-4274-D-01; 42 U.S.C. § 8013(i)(2).

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.³¹ 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 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, who have chronic problems with alcohol, drugs, or both, or who have acquired immunodeficiency syndrome and related diseases)."³² 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.³³ In other words, the regulations indicate that a housing provider must, in most circumstances, permit occupancy of any disabled person who is not a member of the targeted group.

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.

³¹ 24 C.F.R. § 891.410(c)(2)(ii).

³² 42 U.S.C. § 11403(g).

³³ 24 C.F.R. § 582.330.

The HEARTH Act, signed in May 2009, collapses the Shelter Plus Care program, the Supportive Housing Program, and the Moderate Rehabilitation program into one new Continuum of Care program (described in Question Three in Section C below). HUD has eighteen months to develop regulations to implement the HEARTH Act. Under the HEARTH Act, 30% of the funding nationally for new permanent housing will be set aside for individuals with a disabling condition or families with an adult member who has a disabling condition. Until HUD enacts new regulations, providers will continue to be subject to the Shelter Plus Care regulations. The first NOFA the new regulations will affect will be released in 2011.

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") (which are 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.

PVB 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:³⁴

- 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

³⁴ 24 CFR § 983.251(c).

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.

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.³⁵ 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.³⁶

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.³⁷ The ADA's definition of 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

³⁵ 24 CFR § 983.251(d).

³⁶ 24 CFR 983.251(d).

³⁷ *Bragdon v. Abbot*, 524 U.S. 624 (1998).

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.³⁸ The existence of the HOPWA program, which implies the need for housing designated for persons with HIV/AIDS, may also 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.³⁹ 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. For 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 or alcoholism or drug addiction, 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.⁴⁰ 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 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."⁴¹

³⁸ 42 U.S.C. § 12901.

³⁹ The Shelter Plus Care program is to be replaced by the Continuum of Care program authorized under the HEARTH Act adopted in May 2009. New regulations from HUD are to be enacted within 18 months of the adoption of the HEARTH Act.

⁴⁰ 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.

⁴¹ 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.

Unlike the Fair Housing Act, the State Fair Employment and Housing Act prohibits discrimination on the basis of disability using broad language that could be interpreted to prohibit housing reserved for persons with a particular disability, such as people with developmental disabilities. However, the State Fair Employment and Housing Act also provides that the Act should not be construed to afford fewer rights or remedies than the federal Fair Housing Act. On this basis, a provider could argue that, since the federal Fair Housing Act allows discrimination that benefits developmentally disabled persons, it provides greater rights than the State law and therefore would control. In addition, several statutes, both federal and State, permit programs serving developmentally disabled people, including the HUD Section 811 program that allows funding for projects reserved for people with developmental disabilities. At the State level, numerous statutory schemes are designed to provide services and facilities for people with developmental disabilities, which provide some basis for providers to discriminate in their favor in housing, although no particular State housing programs for developmentally disabled people exist other than regional pilot programs. Providers creating and operating housing for people with developmental disabilities will have to rely upon these statutory preferences in the event their program is challenged under the State Fair Employment and Housing Act.

Finally, if a public entity operates the housing or if the housing receives State 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 also 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.⁴² 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.⁴³ 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.⁴⁴ 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.

⁴² 42 U.S.C. § 3602(h)(3).

⁴³ 42 U.S.C. § 12114.

⁴⁴ 24 C.F.R. § 100.201.

If a public entity operates the housing or the project receives State 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).

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 other 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, state and local laws and building codes 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 California and federal law permit 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. In California, the Fair Employment and Housing Act and the Unruh Act prohibit discrimination in housing on the basis of similar categories, as well as sexual orientation and source of income, and any other "arbitrary discrimination" based on personal characteristics. The California Supreme Court has held that economic status is not "arbitrary discrimination" under the Unruh Act, and, moreover, that landlords have a legitimate business rationale for admitting tenants based upon their economic status or financial condition.⁴⁵

The California Fair Employment and Housing Act was amended effective January 1, 2001, to prohibit discrimination in housing based upon the source of income (e.g., earnings, Supplemental Security Income, Cal Works) of a potential occupant. Rental subsidies, such as Section 8 Housing Choice Vouchers, are not considered a source of income. The amendments also make it illegal for a housing provider to use a financial or income standard in the rental of housing that fails to account for the aggregate income of all persons residing in the household whether or not they are married. In addition, if a potential tenant receives a government rent subsidy, the amendments specify that the landlord may only apply an income standard that is based on the portion of rent the tenant will pay, rather than the entire rent. Therefore, if a landlord requires that a tenant earn at least three times the monthly rent, the landlord must base the eligibility determination only on the tenant-paid portion of the rent.⁴⁶ To date, courts have decided few reported cases on source of income discrimination in California. In one case, a court found that a mortgage lender's failure to consider income a home childcare worker earned was source of income discrimination.⁴⁷

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. Most State and local programs in California use the State law definition found at 25 California Code of Regulations Section 6914. 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.

⁴⁵ Harris v. Capital Growth Investor XIV, 52 Cal.3d 1142 (1991).

⁴⁶ California Government Code §12955.

⁴⁷ Sisemore v. Master Financial, Inc., 151 Cal. App. 4th 1386 (2007).

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."

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

The current Notice of Funding Availability for the Continuum of Care Homeless Assistance Programs defines a homeless person as, "a person sleeping in a place not meant for human habitation or in an emergency shelter and a person in transitional housing for homeless persons who originally came from the street or an emergency shelter." The HUD Supportive Housing Desk Guide also specifies that people residing in the following circumstances are not considered homeless, for purposes of the Supportive Housing Program: (1) in housing, even though the individual or family is paying an excessive amount for their housing, the housing is substandard and in need of repair, or the housing is crowded; (2) in jail or prison; (3) with relatives or friends; (4) in a board and care facility, adult congregate living facility, or similar place; (5) discharging from an institution which is required to provide or arrange housing upon release; or (6) using Housing Choice Vouchers, except Katrina evacuees that received special Katrina Housing Choice Vouchers.

The HEARTH Act expands the definition of homelessness. It 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 the following:

- (1) Individuals who resided in a shelter or place not meant for human habitation before temporarily residing in an institution they are now exiting.
- (2) Individuals or families who will imminently lose their housing and lack resources and support networks that would assist them in finding other housing, including housing owned, rented, or lived in without paying rent, shared with others, and rented as hotel/motel rooms not paid for by federal, State, or local government programs for low-income individuals or by charitable organizations. An individual or family can prove imminent loss of housing by
 - (i) presenting a court order resulting from an eviction action that notifies the individual or family that they must leave within 14 days,
 - (ii) demonstrating lack of resources necessary to continue to reside in a hotel or motel for more than 14 days; or
 - (iii) offering 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 credible oral evidence from the person or family seeking assistance that is found to be credible
- (3) Unaccompanied youth and homeless families with children and youth defined as homeless under other federal statutes who,
 - (i) have experienced a long period without living independently in permanent housing,
 - (ii) have frequently moved, or
 - (iii) can be expected to remain unstably housed for an extended period 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 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 in jeopardy, and 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. Proposed regulations are expected by November 2009, within six months of the HEARTH Act's passage.

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. However, the HUD Supportive Housing Program Desk Guide includes persons detained for fewer than 30 days in the definition of a homeless person if the person was homeless when entering the institutional facility.

The HEARTH Act codifies a definition of "chronic homelessness." In the past, NOFAs included a definition of a chronically homeless individual, but the Act adds families to the definition. An individual or family is "chronically homeless" under the HEARTH Act if that individual or family (1) lives in a place not meant for human habitation, a safe haven, or an emergency shelter, (2) has been homeless continuously for at least one year or on at least four separate occasions in the last three years, and (3) suffers from, or, in the case

of families, includes an adult head of household (or a minor head of household if no adult is present) with, a diagnosable substance use disorder, serious mental illness, developmental disability, post traumatic stress disorder, cognitive impairment resulting from a brain injury, chronic physical illness, or other disability. The HEARTH Act states that a person will still be considered chronically homeless, even if living in an institutional care facility (e.g., a jail, substance abuse facility, mental health treatment facility, or hospital) for fewer than 90 days, if that person was chronically homeless when institutionalized.

The HEARTH Act also defines “at risk of homelessness.” Under the definition, an individual or family is at risk of homelessness if the individual or family: (1) has an income below 30% of median income; (2) has insufficient resources 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. Additionally, any family with children who would be considered homeless under any other federal statute would also be “at risk of homelessness” under the HEARTH Act. Individuals and families who are at risk of homelessness will be entitled to services funded through the new Emergency Solutions Grant. Communities may use up to 10 percent of their McKinney funding to serve people who would be considered homeless under any other federal statute.

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 the current HUD NOFA 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” and may also permit persons who are “at risk of homelessness” to qualify for the program. For example, in California both the Multifamily Housing Program (MHP) and the Mental Health Services Act (MHSA) Housing Program have specific definitions of “homeless” and “at risk of homelessness” that are broader than the federal McKinney-Vento Act definition.

The MHP Program at 25 California Code of Regulations Section 7341 defines “homeless” as: (1) moving from an emergency shelter; or (2) moving from transitional housing; or (3) “currently homeless.” The program defines “currently homeless” as: (1) an individual who lacks a fixed, regular, and adequate nighttime residence; or (2) an individual who has a primary nighttime residence that is (a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill), (b) an institution that provides a temporary residence for individuals intended to be institutionalized, or (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. “At Risk of Homelessness” is defined as: (1) households with incomes at or below 20% of median income with no rental subsidy available to the household; or (2) households with incomes above 20% but not exceeding 30% of median income who (a) face immediate eviction and have been unable to identify a subsequent residence, (b) face imminent release from an institution (i.e. jail, hospital, or foster care system) where other housing placement resources are not available, (c) reside in an overcrowded setting (more than two persons per living/sleeping area) in which the household does not hold a lease, (d) reside in substandard housing subject to a current official vacation notice, or (e) pay more than 50% of income in housing costs. Chapter One, Section Five of Appendix One, provides the definition of homeless and at risk of homelessness under the Mental Health Services Act.

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 which can be found at HUD'S Homeless Resource Exchange website (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 don't 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 in Section C above), providers should be cautious to use the new HEARTH Act definitions of homelessness, at risk of homelessness, and chronically homeless along with the Desk Guide. These definitions appear in the HEARTH Act itself, and will likely be further defined in future HUD regulations. The HEARTH Act and its HUD implementing regulations will take precedence over advice included in the Desk Guide.

The MHSA Housing Program provides a mechanism for a county mental health services director to certify persons who have been assessed and are receiving services at a county mental health department as "at imminent risk of homelessness" (see Appendix One, Housing and the Mental Health Services Act, Section A, Question Six).

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 participation in the program by owners 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.⁴⁸

⁴⁸ P.L. 105-276; HUD FY 1996 Appropriations Act, Section 554 striking § 8(t) of the Housing Act of 1937.

Refusal to rent to Housing Choice Voucher holders is not a violation of State or federal anti-discrimination law because voucher holders (or poor people in general) are not a specifically protected classification, and discrimination based on economic status is not "arbitrary discrimination" under California State law (see discussion of economic discrimination under Section B, Question One of this Chapter regarding homelessness). The amendments to the California Fair Employment and Housing Act prohibiting discrimination in housing based on "source of income" described in Question One above in this Section, only include income paid directly to the tenant and therefore do not cover tenants with vouchers. 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 and Fair Employment and Housing Act.

Local housing discrimination ordinances may attempt to prohibit discrimination against voucher holders. 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.⁴⁹ 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.⁵⁰ 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 income, the provider can meet both requirements by renting to tenants with incomes below 35% of area median income.

⁴⁹ Montgomery County, Maryland vs. Glenmont Hills Assocs., 402 Md. 250 (2007).

⁵⁰ I.R.C. § 42(h)(6)(B)(iv).

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.

Another issue housing providers should be aware of is that State and federal programs often use different definitions of "median income" and may require the provider to use different household size assumptions for calculation of permissible rents. The difference in median income definitions can result in significant disparities between affordable rents in projects based on their funding sources. This conflict results because state and federal laws use different formulas for calculating certain low and very low income standards. In such a situation, the different income standards will result in different rents and the provider usually has to use the lowest rent. To complicate the problem even further, some programs have regulations that permit housing providers to use the federal definitions if the provider uses federal and state funding in the same project. For example, while projects funded with redevelopment housing funds must use the state definition of "median income" (as opposed to the federal definition of "median income") for determining maximum rent, such projects may defer to the household size assumptions that are also used to calculate maximum rent in federal programs if those federal programs are also providing funding to the same 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, the California Fair Employment and Housing Act (Government Code Section 12955) specifically prohibits 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 (such as applies in the Mental Health Services Act Housing Program). 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.

Question 8. May housing be limited to people who receive Medi-Cal benefits or who are eligible to receive Medi-Cal benefits?

Possibly, but this practice is not recommended.

Some housing providers wish to limit occupancy in a project or in specific units in a project to persons with disabilities who are receiving Medi-Cal benefits because the Medi-Cal benefits may sometimes be used to pay for services provided to the tenant at the housing development or at a medical facility operated in proximity to the housing development. Since Medi-Cal payments are made directly to health care providers, it is unclear whether courts would consider the payments to be a "source of income" under the California Fair Employment and Housing Act, which prohibits discrimination in housing based on source of income.

Requiring that applicants for housing receive Medi-Cal or be "Medi-Cal eligible" is problematic because Medi-Cal eligibility is tied to a number of factors that may conflict with eligibility requirements and non-

discrimination requirements of other funding programs. For example, factors that affect a person's eligibility for Medi-Cal include income, disability, age, pregnancy, immigration status, and care for minor children. Medi-Cal eligibility standards are also subject to State budgetary constraints and other political considerations and may change from year to year, making Medi-Cal eligibility an unstable and unreliable qualification for tenancy.

SECTION D. RESTRICTING HOUSING TO OTHER GROUPS

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

Generally, no.

Under both federal and State 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.⁵¹ 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 safety concerns. While the court did state that privacy concerns may 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 State and local fair housing laws that prohibit discrimination on the basis of marital status.

⁵¹ Community House, Inc. v. City of Boise 490 F.3d 1041 (9th Cir. 2007).

Under the federal Fair Housing Act, the State Fair Employment and Housing Act, and the Unruh 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. The California Fair Employment and Housing Act and many local non-discrimination ordinances 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, yes, if the youth are "Homeless Youth" as defined under California law.

While age restrictions in housing are generally not allowed, California's Government Code Section 11139.3 authorizes housing for "homeless youth." "Homeless youth" are young adults who are not older than 24 year of age who (i) are homeless or at risk of homelessness, (ii) are no longer eligible for foster care on the basis of age, or (iii) have run away from home. Where a youth under 18 years of age has been emancipated and is homeless or at risk of homelessness, he or she is also defined as a "homeless youth" under Section 11139.3. Homeless youth and other young adults living on their own between ages 16-24 are often referred to as "transition age youth."

Housing providers may target or restrict their housing to transition age youth as long as the population targeted or served fall under the definition of "homeless youth." In other words, the target population must meet the criteria set forth in California Government Code Section 11139.3. As a result, housing providers should ensure that, at the time of application, each transition age youth applicant (i) is homeless or at risk of homelessness, (ii) is no longer eligible for foster care on the basis of age, or (iii) has run away from home. The age restrictions set forth in Government Code Section 11139.3 were intended to apply to initial occupancy of the youth; Government Code 11139.3 does not require that housing operated for homeless youth remove residents who turn age 25. Housing providers targeting or serving transition age youth should be cautious about designing a program that requires the eviction of a resident upon reaching age 25. Such a requirement may result in age discrimination claims since the sole basis for the eviction would be the age of the resident.

Although Government Code Section 11139.3 was enacted in 2002, HUD's position on housing targeted or restricted to "homeless youth" remains unclear. 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 in California: federally financed housing may include age limits if the age restriction is authorized by any law, including state or local laws. Because California's Government Code Section 11139.3 is a state statute

authorizing an age restriction, 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.

Finally, housing providers serving homeless youth may not exclude transition age youth with children or transition age youth who are pregnant. California and 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 both the federal and State 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 State law (the Unruh Act and the Fair Employment and Housing Act) and the Fair Housing Act. The requirements related to senior housing are an exception to the provisions of both State and 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 the 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. Although the federal and State laws conflict with each other in ways explained below, both federal and State laws only allow 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.

State Requirements

The Unruh Act includes different requirements for projects to qualify as senior housing, depending on the size of the project and the date the project was built. If a project has fewer than 35 units, it may qualify as senior housing if it requires at least one person in each unit to be 62 years of age or older. If the project has 35 or more units, it may qualify as senior housing if the project requires at least one person in each unit to be 55 years of age or older.

Senior housing developments must also include special design and construction requirements to meet the physical and social needs of senior citizens. Projects built before February 8, 1982 are permanently exempt from the construction requirements. Effective January 1, 2001, the Unruh Act was amended to provide specific design requirements presumed to meet the physical and social needs of senior citizens. These design requirements include accessibility features, railings and lighting, and social features to encourage interaction among residents.

Pursuant to the Unruh Act, a senior citizen project must have written policies setting forth the limitations on occupancy. The limitations may not be more exclusive than requiring that one person in residence in each unit be a senior citizen (either 62 or 55 depending upon the size of the development) and that all other

persons in the unit be a "qualified permanent resident," a "permitted health care resident," or a person under 55 years of age present since 1985.

A "qualified permanent resident" is a person who resides with the senior citizen and is over age 45 (except that a spouse, cohabitant, or person providing primary physical or economic support to the senior citizen need not be over 45 years old). Also, a disabled person who is a child or grandchild of the senior citizen, and who must live with the senior citizen because of the disability or illness, is considered a qualified permanent resident and may reside in a senior housing development, even though he or she may be under age 45.

A "permitted health care resident" is (1) a person hired to provide live-in, long term, or terminal health care to the senior citizen, or (2) a family member who provides such care. The care provided must be substantial in nature and must include either assistance with necessary daily activities or medical treatments, or both.

As stated above, Section 51.3 of the Civil Code provides that the restrictions cannot be more exclusive than requiring that one person in residence in each dwelling unit be a senior citizen as defined in the Unruh Act. Section 51.3 goes on to state that the limitation may be less exclusive, but shall at least require that the persons commencing any occupancy of a dwelling unit include a senior citizen who intends to reside in the unit. Thus, although California law goes to great lengths to describe qualified permanent residents, California law does not require a housing provider restrict non-senior members of a household to qualified permanent residents or permitted health care workers. As long as one member of the household is at least 55, the housing provider may allow anyone of any other age to live in the unit.

Federal Requirements

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.

Harmonizing Federal and State Requirements

To comply with federal and State laws, housing providers in California operating senior housing with developments of fewer than 35 units must require all residents be 62 years of age or older, since State law for projects of fewer than 35 units requires at least one member of each household be 62 years of age or older, and federal law requires all providers of "over 62 housing" to limit all occupancy to people at least 62 years old. The only exceptions to the requirement that all occupants be 62 years of age or older would be if, as a reasonable accommodation, a resident required a live-in aide.

If a housing provider is developing a project with 35 or more units, the provider has two options: the housing provider can restrict the units to households where at least one occupant in each unit is 55 or older

and the other occupants are either unrestricted or are qualified permanent residents; or the housing provider can elect to restrict all residents to persons 62 years or older. In all senior-restricted developments (whether restricted to 55- or 62-year olds), the housing provider must have rules or covenants that clearly restrict the occupancy in accordance with the senior housing requirements. Additionally, under California law, all such development must meet special design requirements to meet the physical needs of seniors.

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 a similar age restriction. The California Mental Health Services Act (MHSA) program relies upon a definition of seniors from the Welfare and Institutions Code that defines an older adult as anyone 60 years or older. Thus, when using MHSA funds for housing, providers need to be aware of the differing definitions of seniors and ensure that the housing component of this program meets the age requirements of the federal and State Fair Housing laws.

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

Not in California.

In California, it is 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 State 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 and the California Fair Employment and 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 this purpose is furthered by the practice. This standard makes justifying a geographic preference difficult.

If the preference for local residents is imposed by a public agency, the California Fair Employment and Housing Act (FEHA) imposes an even stricter standard. To justify the disparate impact, the agency must show that the local preference is needed to achieve a local purpose sufficiently compelling to override the discriminatory effect, that the preference carries out the compelling purpose, and that there are no feasible alternatives that would equally well accomplish the purpose. This standard is very difficult to meet for a geographic preference.

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

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.⁵² No California court has ruled on this issue under the State constitution.

The right to travel, however, is a fundamental right. Courts have found the right to travel to be affected by a durational residency requirement for admission to public housing (requiring not merely local residency, but residency for an extended period). 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 (such as, perhaps, providing housing for local safety workers). The smaller the geographic preference area (for example, a

⁵² Lindsey v. Normet, 405 U.S. 56 (1972).

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.⁵³ 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 discriminatory alternative existed for achieving their goals. This case is not a California case, and therefore is not likely to have precedential value for California courts, but it may provide guidance for other district courts 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 use by the Owner.

⁵³ Langlois v. Abington Housing Authority, 234 F. Supp. 2d 33 (D. Mass. 2002).

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.⁵⁴ 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.

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 a Low-Income Housing Tax Credits if full-time students are the only inhabitants of the unit.⁵⁵ 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

⁵⁴ Title V, Section 501 of H.R. 4194, which was the HUD appropriation bill for FY 98-99.

⁵⁵ I.R.C. § 42(i)(3).

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.⁵⁶ 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.

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. If the preference is imposed by a government agency, the California Fair Employment and Housing Act would require the agency to show that the veterans preference is necessary to achieve a purpose sufficiently compelling to override the discriminatory effect, that the preference carries out the compelling purpose, and that no feasible less discriminatory alternatives exist that would equally accomplish the purpose.

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.⁵⁷

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

⁵⁶ I.R.C. § 42(i)(3)(D)(i).

⁵⁷ 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).

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. California's Emergency Housing and Assistance Program will also fund housing for veterans if "the veterans served possess significant barriers to social reintegration and employment due to physical or mental disability, substance abuse, or the effects of long-term homelessness that requires specialized treatment and services."⁵⁸

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 veterans preference to public policy and organizational goals will help defend against a disparate impact discrimination claim or an arbitrary discrimination claim under the California Unruh Act, 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 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 may affect their ability to house former prisoners. Although of questionable enforceability, some cities have enacted zoning ordinances that restrict the residency of former prisoners. Further, California law prohibits sex offender parolees from living together in any single family dwelling unless legally related by blood, marriage, or adoption or the dwelling is a licensed residential facility (as defined in the California Community Care Facilities Act, Health and Safety Code Section 1502(a)(1)), which serves six or fewer persons.⁵⁹

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 who was not a former prisoner in favor of one who was. In addition, a funding source may outright prohibit former prisoners from occupying a project. For example, parolees from State and federal prisons (but not persons on probation from jail) are prohibited from receiving Mental Health Services Act services, including housing funded with Mental Health Services Act funds.⁶⁰

⁵⁸ California Health and Safety Code § 50801.5.

⁵⁹ California Penal Code Section 3003.5; California Attorney General Opinion, No. 05-1106, September 1, 2006.

⁶⁰ 9 California Code of Regulations § 3610.

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 that 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 4350.3.⁶¹

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, 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.

⁶¹ Private Letter Ruling 8944042; Private Letter Ruling 8945036; Private Letter Ruling 8950057; see also Internal Revenue Bulletin 1989-2.

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 "arbitrary" under the California Unruh Act. These conditions are difficult to satisfy.

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 Nineteen 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 and potential tenant 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, such as a county administering Mental Health Services Act (MHSA) funds, has identified the social service provider as its designee for screening MHSA-eligible persons, this practice may serve as a legitimate business necessity and overcome the claim of disparate impact. However, whether a county-imposed 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. May a county administering the Mental Health Services Act (MHSA) Housing Program require a housing provider to rely upon referrals from a particular service provider?

Generally, yes, but housing providers still need to ensure that the referring service provider is not discriminating in its selection policies.

Generally, a county can restrict MHSA Housing Program housing to MHSA-eligible households referred from one particular social service organization or county full service partnership if the referrals are part of an overall county referral plan that is balanced and, when taken as a whole, does not have a disparate impact on any protected classification of people. Housing providers should perform the analysis in Question Twelve of this Section to ensure that discrimination does not occur.

MHSA-funded housing must comply with the priorities identified in the particular county's Community Services and Support portion of the three year plan. Presumably each county's plan identifies a target population most in need of MHSA services. The county plan may also identify particular social service providers with experience providing services to people with serious mental illness. As part of the overall program, a county may expect an MHSA housing provider to serve the targeted population and, as a means of ensuring that the tenants have services, the county may request the housing provider to accept referrals for the MHSA-funded units only from the selected service providers. The County and the housing provider must each analyze potential fair housing violations, as their risks differ.

Under the MHSA program, counties are required to analyze the population in most need of MHSA services and provide those services in a targeted manner to ensure the need is addressed. A county may decide that the best method of addressing the need may be to use specific social service agencies, including some agencies that may have a bias in their clientele toward a particular ethnic group. The county may designate a variety of service providers and establish goals for certain targeted populations that, when examined from the perspective of the county's entire program, do not result in discrimination. As part of such a comprehensive program, a county may allocate funds to a particular housing provider with a requirement that the provider accept referrals from a particular social service agency meeting one prong of the county's multi-faceted program that addresses, as a whole, the needs of the population experiencing mental illness. In such a situation, the county may not be discriminating because the overall county program does not result in a disparate impact on any protected group. However, a housing provider required to accept referrals from a particular social service agency may be violating fair housing laws if that agency's selection policies result in a disparate impact on a protected class.

Housing providers should also consider whether relying upon referrals from a single service provider or even multiple service providers for their MHSA units violates the MHSA prohibition on mandatory services. Although in this situation the housing provider is not mandating that the tenant participate in services, an MHSA tenant may argue that the requirement for a service agency referral is a backdoor method for mandating services. Some practitioners believe relying on referrals from a single service provider violates the MHSA prohibition on mandatory services.

Question 15. 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.

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.⁶² 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 (see 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 California funds (who are subject to California Government Code Section 11135) 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 D, Question One.

Question 16. 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 California fair housing laws generally prohibit intentional discrimination against disabled persons, and when a non-disabled person vacates a unit, intentional discrimination against disabled persons would occur if the housing provider preserved the unit for a non-disabled person or by categorically excluding 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 17. May a housing provider maintain separate waiting lists for different populations?

⁶² Community House, Inc. v. City of Boise 490 F.3d 1041 (9th Cir. 2007).

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 MHSA assistance. The housing provider may seek to maintain two waiting lists, one for MHSA-eligible households and one for other households. This approach facilitates the housing provider's leasing process: when a tenant vacates an MHSA-assisted unit, the housing provider offers the applicant at the top of the MHSA waiting list the unit, and when a non-MHSA 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 MHSA waiting list (who are protected by the fair housing laws) because the provider is not offering the non-MHSA units to the people on the MHSA 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 MHSA eligibility: when an MHSA-assisted unit is vacant, the manager offers the unit to the highest MHSA-eligible applicant on the waiting list, and when a non-MHSA unit is vacant, the manager offers the unit to the applicant at the top of the waiting list (whether or not MHSA-eligible). Another defensible approach would be to maintain a separate MHSA waiting list, but also to permit MHSA-eligible applicants to apply for both the general waiting list and the MHSA waiting list.

Question 18. 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 the State Fair Employment and Housing Act 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.⁶³ 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 also 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

⁶³ 42 U.S.C. § 3604(c); California Government Code § 12955(c).

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 19. 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 regulations in 1972 which 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: (i) a project to be publicized to minority persons using minority media and other minority outlets; (ii) the use of the HUD equal opportunity logo or slogan in all advertising and literature and posting in conspicuous locations; (iii) maintenance of nondiscriminatory hiring policy so that staff will include people of majority and minority groups and both genders; (iv) oral and written instruction to employees and marketing agents on non-discrimination and fair housing; and (v) 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 to be used by owners to inform and solicit applications from persons who are not likely to apply for the housing without special outreach.⁶⁴

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

⁶⁴ 24 C.F.R. § 92.351.

handicap, know of the availability of the program.⁶⁵ 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.⁶⁶

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.

⁶⁵ 24 C.F.R. § 574.603.

⁶⁶ 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 late in 2010.

Chapter 4: *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 (e.g., inquiries about eligibility for the Mental Health Service Act would presumably be permissible in MHSA funded housing).
- 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.)⁶⁶

If the provider asks these questions of any applicant, then the provider should ask the same question 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 a disability or that the applicant has the particular disability (if the housing is limited to people with a particular disability), rather than detailed information on the severity of the disability. So, for example, if the applicant provides a Supplemental Security Income (SSI) 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 AIDS is protected under the Fair Housing Act, even if he does not have AIDS and is therefore not actually disabled). Additionally, housing providers should be aware that the California Fair Employment and Housing Act has a broad definition of disability that includes people diagnosed with medical conditions such as cancer or people who have a record or history of cancer. The expansive definition of disability under the federal and state fair housing laws means that housing providers may have to be flexible in the type of documentation used to verify disability status.

An applicant for a housing unit funded by the Mental Health Services Act ("MHSA") must experience a serious mental illness to qualify. Determining MHSA eligibility may pose challenges to housing providers because of the limitation on questions regarding the severity of a tenant's disability. To avoid fair housing challenges, housing providers of MHSA-funded housing should rely upon certification from a county mental health department or from a medical professional.

If services are provided with the housing, service providers may request additional information regarding the applicant's disability in order to provide the appropriate level of services. Generally, however, a housing provider cannot request information regarding the severity of the disability or the applicant's medical status.

⁶⁶ 24 C.F.R. § 100.202.

A housing provider also cannot require the applicant to provide medical records to document the disability, other than a doctor's or medical professional's letter stating that the applicant is disabled.

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 any questions it desires. 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

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 which 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 staff working in each program area. 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 a 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 Six) 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 and state 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. Housing providers should not share information unless necessary. If a tenant with a disability gives the housing provider permission to reveal the information either 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, which are required as part of the Mental Health Services Act Housing Program and other programs. 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 are covered by it?

*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.⁶⁷ One Strike policies also require tenant lease provisions that address

⁶⁷ 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

circumstances related to drugs, alcohol, and criminal activity. HUD has published regulations, notices and handbooks which 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 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 to 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 the Section 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 of the community of denial or termination or the failure of the housing provider to take such action; (3) the extent of participation

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.

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.⁶⁸

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.⁶⁹

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.

One Strike regulations do not require a criminal conviction in order 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 have the authority to 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. Housing providers combining MHSAs funds with any of the programs to which One Strike regulations apply will want to tailor their One Strike policies to allow latitude for the MHSAs-eligible population.

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?

⁶⁸ 24 CFR § 5.851

⁶⁹ 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".

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, 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.

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?

The answer depends 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.

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 California law will apply.

California's Megan's Law requires certain sex offenders to register with the law enforcement agency of the city in which they reside.⁷⁰ The California Department of Justice is required to compile this information and make it available through a "900" telephone number, CD-ROMs at local police stations, and the Internet (collectively, the "Megan's Law Database"). Members of the public may access the Megan's Law Database to determine if a particular individual is a registered offender. Pursuant to Megan's Law, police officers are permitted to disclose certain information regarding registered sex offenders to the community if the police determine that the registered sex offender is a risk to others.⁷¹ The law, however, prohibits the use of information from the Megan's Law Database for purposes relating to housing, except to protect a person at risk. The federal One Strike rules preempt this prohibition so a property manager may use the Megan's Law Database for housing purposes for units subject to One Strike rules.

Housing providers that do not receive federal funds, but seek to prohibit admission of sex offenders, face a few hurdles. First, housing providers may only use information regarding sex offenders obtained from Megan's List to protect a person at risk. Housing providers desiring to exclude a sex offender should obtain the information regarding the individual's status as a sex offender from sources other than Megan's List, such as criminal records. Second, how the courts will view a landlord's prohibition of sex offenders is uncertain. The California Attorney General has issued an opinion stating that the provision which prohibits the use of Megan's List for housing decisions, except when necessary to protect a person at risk, does not make sex-offenders a protected class.⁷² The courts have not yet weighed in on this issue. Moreover, the California Attorney General did not opine whether prohibiting admission of sex offenders would be deemed arbitrary and therefore impermissible under California's Unruh Act. Given the lack of legal clarity as to treatment of sex offenders with regards to housing decisions, 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.

California's "Jessica's Law" (also known as Proposition 83), which California voters enacted in November of 2006, bars any person required to register as a sex offender from living within 2,000 feet of any school or park where children regularly gather.⁷³ Certain high-risk sex offenders cannot live within 2,640 feet from a school or park.

⁷⁰ California Penal Code §§ 290 and 290.4.

⁷¹ California Penal Code §§ 290 and 290.45.

⁷² California Attorney General Opinion No. 5-301.

⁷³ California Penal Code § 3003.5.

A recent U.S. district court case held that the residency prohibition set forth in Jessica's Law is a prospective law and does not apply to registered sex offenders who were convicted and who were paroled, given probation, or released from incarceration prior to the effective date of Jessica's Law.⁷⁴ Thus, individuals that became registered sex offenders prior to the enactment of Jessica's Law are not subject to the residency prohibition, but individuals that became registered sex offenders after November 2006, when Jessica's Law was enacted, are subject to the residency prohibition and cannot reside within 2,000 feet of any public or private school or park where children regularly gather.

This distinction can lead to confusing, and often contradictory, results for a housing provider trying to comply with Jessica's Law. For example, if a housing provider owns an apartment building within 2,000 feet of a school, and an individual that became a registered sex offender before 2006 resides within the building, then this individual is not subject to Jessica's Law and the housing provider cannot terminate the tenancy solely due to the requirements of Jessica's Law. Likewise, an individual that became a registered sex offender before 2006 that applies for a unit within the same building could not be denied simply because of Jessica's Law. However, at the same building (in which a registered sex offender currently resides), a housing provider could deny an application for tenancy from an individual that became a registered sex offender after Jessica's Law became effective, as this individual is subject to the requirements of Jessica's Law and would violate the residency prohibition by residing in a building within 2,000 feet of a school.

Unfortunately, this analysis becomes even more difficult when the housing provider also applies the requirements of Megan's Law. As noted above, in evaluating whether or not to rent to a registered sex offender, a housing provider must be aware of the requirements of both Megan's Law and Jessica's Law. Thus, in the example above, the individual that became a registered sex offender before 2006 (and is not subject to Jessica's Law) could not be denied housing simply because of Jessica's Law. However, if the housing provider reasonably determined that the same individual's residency at the building posed a risk to children (or others) at the building, then the housing provider could deny a registered sex offender's application.

Depending on the facts of a specific situation, a housing provider may be exposed to liability from a registered sex offender applicant. For example, if a provider denies housing to a registered sex offender, then the registered sex offender may claim that the housing provider's decision violated Megan's Law as no person was at risk. The sex offender may claim that the housing provider denied housing simply as retribution for the individual's status as a registered sex offender. If a housing provider does permit occupancy by a registered sex offender, other tenants may challenge this decision. They may claim they are at risk or they may claim that the tenancy violates Jessica's Law (in instances where the registered sex offender was convicted after 2006 and the building is within 2,000 feet of a school or park). In addition, if the housing provider permits a registered sex offender to reside within a building, and the registered sex offender commits a new crime against another resident within the building, then the housing provider could face a negligence claim for failing to protect the other tenant adequately. In developing and implementing tenant selection policies, a housing provider must exercise care in balancing the requirements of Megan's Law and Jessica's Law against the housing provider's obligation to provide a safe living environment for all residents.

⁷⁴ Doe v. Schwarzenegger, 476 F. Supp. 2d 1178 (E.D. Cal. 2007).

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 certainly 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 if he or she is currently using or is addicted to an illegal controlled substance.⁷⁵ 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 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.

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.”⁷⁶ 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.⁷⁷

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 “needle in the arm or a bong in the mouth” to be a current user, but there is no bright-line test emerging in case law.⁷⁸ 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.⁷⁹

⁷⁵ 24 C.F.R. § 100.202.

⁷⁶ 28 C.F.R. § 36.104.

⁷⁷ 24 C.F.R. § 9.103; 24 C.F.R. § 5.853.

⁷⁸ *Shafer v. Preston Memorial Hospital Corporation*, 107 F.3d 274 (4th Cir. 1997).

⁷⁹ *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992).

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.⁸⁰

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 of time; (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.

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. 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 California, where

⁸⁰ 24 C.F.R. § 891.305; 24 C.F.R. § 891.505.

laws 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, project-based Section 8, 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.

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.⁸¹ 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.⁸² Please see the detailed discussion of One Strike policies in Question Six of this Section.

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

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

Section 1940.3 of the California Civil Code, which went into effect January 1, 2008, prohibits landlords from requiring any tenant or potential tenant to state, certify, or represent immigration status to a landlord. In addition, landlords may not make 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.

AB 976, the bill that enacted Section 1940.3, was introduced in response to the City of Escondido's adoption of an ordinance that prohibited landlords from renting to undocumented immigrants. The Escondido ordinance was challenged in court and a federal judge issued a temporary restraining order. (While the order was in effect, the City Council rescinded the ordinance.) The Legislature enacted Section 1940.3 of the Civil Code to prohibit the passage of similar local ordinances and to prohibit landlords from discriminating against applicants based on their citizenship status. Therefore, rental housing providers may not distinguish applicants based on their immigration status, or ask if applicants are citizens.

⁸¹ 24 C.F.R. § 8.3.

⁸² 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.

However, there is an exception to the general rule. Federal law, which takes precedence over this state law, prohibits 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 programs offering HUD to assist 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.⁸³ 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 which 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 State and federal requirements, but also promotes equal treatment of all applicants.

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. So, 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 tenant selection committees for pre-screening. With tenant selection committees, the housing provider loses control of the initial selection process, the process may be affected by the tenants' individual prejudices, 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

⁸³ 24 C.F.R. § 5.500 et seq.

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.

California law may require housing providers of unlicensed shared housing to permit tenants to advertise for and select co-tenants. As discussed in Chapter Five, Section A, Question One, California Health and Safety Code Section 1504.5 states that supportive housing is exempt from the community care licensing requirements, as long as tenants have their own room or apartment and are individually responsible for arranging any shared tenancy. The requirement that a tenant be responsible for arranging a shared tenancy mandates some degree of tenant participation in selecting roommates. Consequently, supportive housing providers who operate unlicensed shared housing will need to craft co-tenant screening programs carefully, taking into account privacy and liability issues.

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.

Both the Federal Fair Housing Act and the California Fair Employment and Housing Act prohibit discrimination against persons with disabilities in the provision of housing, but they also go further and create an affirmative duty for housing providers to accommodate persons with disabilities. "Failure to accommodate" is a separate and distinct charge under both laws. 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.⁸⁴ These structural changes are called reasonable 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.⁸⁵

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

⁸⁴ 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.

⁸⁵ Smith & Lee Associates v. City of Taylor, 102 F.3d 781 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

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 which generally has a broader scope than the Fair Housing Act and Fair Employment and 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 the Department of Housing and Urban Development 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 Statement 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.

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.

The housing provider's second level of responsibility is to 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 FEHA. 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.⁸⁶

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

⁸⁶ *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).

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 and 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.⁸⁷ 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.

⁸⁷ 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).

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 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.⁸⁸ 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 developments 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.⁸⁹ This same decision provides clear guidance on how housing providers can deal with 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 health and safety code requirements, 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.

⁸⁸ *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

⁸⁹ *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).

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 5: *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. This Chapter also reviews relevant provisions of California landlord tenant law and State community care facility licensing requirements.

SECTION A. COMMUNITY CARE LICENSING ISSUES

Question 1. **When is community care licensing required?**

Community care licensing is required whenever "care and supervision" are provided. The State may require community care licensing for residential facilities that accept and retain tenants needing care and supervision. However, supportive housing as defined in the law, is exempt from the requirements of community care licensing.

The California Department of Social Services (DSS) issues a community care facilities license for each community care facility. To qualify for a license, the facility must meet local building code and staffing standards that are more rigorous than the corresponding standards for unlicensed rental housing. It is costly to meet these rigorous standards. In addition, meeting licensing standards may substantially alter the housing environment. Therefore, many providers of supportive housing wish to avoid triggering a community care license requirement. Additionally, some programs, including the Mental Health Services Act (MHSA) Housing Program and the Multifamily Supportive Housing Program (MHP-SH), will not fund licensed facilities. The Legislature has enacted recent changes in the community care licensing laws to exempt supportive housing projects from licensing requirements. Despite these changes, licensing remains an area of the law that presents challenges for supportive housing providers.

The term "community care facility" is defined by law as a facility providing "care and supervision." The term "unlicensed community care facility" is defined by law to include both of the following types of facilities: (i) an unlicensed facility where care and supervision are provided; and (ii) an unlicensed facility that accepts and retains residents who demonstrate the need for care and supervision, even though the facility does not provide care and supervision. "Care and supervision" means the facility provides any of the following activities to meet the needs of its clients/residents: (1) assistance in dressing, grooming, bathing, and other personal hygiene; (2) assistance with taking medication; (3) central storage and/or distribution of medications; (4) arrangement of and assistance with medical and dental care; (5) maintenance of house rules for the protection of clients (as opposed to for the benefit of the housing provider); (6) supervision of schedules and activities; (7) maintenance and/or supervision of cash resources or property; (8) monitoring food intake or special diets; or (9) providing the basic services required to be provided in a community care facility.⁹⁰

⁹⁰ In *Grimes v. State Department of Social Services*, 70 Cal. App. 4th 1065 (1999), a court discussed the "care and supervision" trigger for licensing. The court ruled in *Grimes* that Department of Social Services abused its discretion by refusing to exempt from licensing housing in which a person with special needs (who was mentally competent) lived as a tenant in the home of two close friends who provided care and supervision in addition to housing.

The law provides several exceptions to the licensing requirements. Of greatest relevance to supportive housing providers is Health and Safety Section 1504.5, an exception which became effective in 2003, that specifically exempts supportive housing.⁹¹ To qualify for the exemption, supportive housing must meet the following requirements:

- It is rental housing that is affordable to persons with disabilities;
- Each of the tenants holds a lease or rental agreement in his or her own name and is responsible for paying his or her own rent;
- Each tenant has his or her own room or apartment and is individually responsible for arranging any shared tenancy;
- The housing is permanent, in that the tenant can remain in the housing as long as he or she complies with the terms of the lease and pays the rent;
- The housing is subject to State and federal landlord tenant laws; and
- Participation in services is not required as a term of tenancy.

Supportive housing meeting the terms above may provide "community living support services" without triggering a license requirement. The tenant must be able to choose whether to engage in the services and what services to use. Services may include (but are not limited to):

- Support services designed to develop and improve independent living and problem solving skills;
- Education and training in meal planning and shopping, budgeting and managing finances, medication self-management, transportation, vocational and educational development, and the appropriate use of community resources and leisure activities;
- Assistance with the tenant's individual basic needs such as financial benefits, food, clothing, household goods and housing and locating and scheduling appropriate medical, dental and vision benefits and care.

Legislators designed Section 1504.5 to exclude supportive housing from licensing laws. As a result, providers have become confident that their housing program will not be subject to licensing actions. However, providers should carefully examine their housing program to make sure that the program meets the requirements of Section 1504.5. Some program components could result in providers falling outside the safe harbor of Section 1504.5. Housing providers may need to alter their programs to meet the parameters of the Health and Safety Code Section 1504.5 exemption.

"Care and supervision" versus "community living support services" in many instances are gradations on the same scale of services. For instance, supportive housing providers, pursuant to Health and Safety Code Section 1504.5, may provide assistance with tenants' basic needs, which includes "locating and scheduling for appropriate medical, dental, and vision benefits and care" without a license. However, the "arrangement of and assistance with medical and dental care" is considered "care and supervision," triggering the need for a community care license under Section 1503.5. Distinguishing between these two levels of service is difficult. Many supportive housing providers assist tenants with scheduling medical appointments and may also contract with onsite psychiatric and medical providers to furnish necessary medical care. To date, the State has not brought any licensing cases against supportive housing providers,

⁹¹ California Health and Safety Code § 1504.5.

so the Department of Social Services has not provided any guidance on how it will interpret these fine distinctions.

California law also provides an exemption to community care licensing requirements for housing for elderly and/or disabled persons if (a) the housing is financed under the Section 202, 221(d)(3), 236, or 811 programs, and (b) the project owner or operator does not contract for or provide supportive services (although the project owner or operator may coordinate, or help residents gain access to, supportive services). Furthermore, the DSS Director has the discretion to administratively exempt "any similar facility."⁹²

Another statute provides that a license is not required even where a housing provider offers meals, transportation, housekeeping, recreational and social activities, the enforcement of house rules, counseling on activities of daily living, and/or service referrals, as long as the provider meets two conditions. First, after any referral for services, residents must "independently obtain care and supervision and medical services" without assistance from the housing provider or any person or entity with an organizational or financial connection with the housing provider. The statute states that a memorandum of understanding between the housing provider and a service agency establishing an agreement that a housing provider would refer residents does not necessarily itself constitute an "agreement for care and supervision of the resident." An agreement that merely provides that the facility owner will refer residents to an agency but does not include requirements that residents use the services of the agency should not run afoul of this exemption. The second condition for this exemption is that no resident can have an unmet need for care and supervision. Thus, a resident's inability or failure to obtain all needed care and supervision could provoke a licensing requirement.⁹³

As an overlay to licensing issues, a housing provider's refusal to rent to a person demonstrating a need for care and supervision triggers fair housing law issues (see discussion in Chapter Four, Section B, Question Six). Thus, a housing provider without a license faces conflicting legal requirements when an applicant or tenant demonstrates a need for care and supervision. On the one hand, the housing provider may violate fair housing laws (and face civil liability) by not admitting or retaining the person. On the other hand, the housing provider may violate licensing laws and face civil and criminal liability by admitting or retaining the person. This risk is most acute when the person has not independently arranged for the care and supervision, or has an unmet need for care and supervision. When faced with such a dilemma, a housing provider should determine whether the person in need of care and supervision can meet the terms and conditions of the tenancy and make any decisions to reject on the basis of the tenant's ability to comply with tenancy requirements rather than their need for care and supervision.

Question 2. How does landlord-tenant law apply to a licensed community care facility?

Housing providers should follow landlord-tenant law in a licensed community care facility. Where licensing regulations conflict with landlord-tenant law, the provider must comply with the licensing regulations.

If a facility requires a license, the housing provider will be required to follow licensing regulations. The housing provider may also be required to follow landlord-tenant laws. Attorneys have conflicting views on

⁹² California Health and Safety Code §§ 1568.03(c)(5) and (6).

⁹³ California Health and Safety Code § 1568.03.

the applicability of California landlord-tenant law to licensed community care facilities. No case law provides guidance on this issue.

The California Department of Social Services, Community Care Licensing Division, maintains that residents of licensed community care facilities are non-tenant residents of a non-medical facility who do not occupy real property, and that licensees are operators of facilities that provide non-medical care and supervision. The State Community Care Licensing Division therefore maintains that residents of licensed community care facilities have no rights under landlord-tenant law. However, because the Community Care Licensing Division has no enforcement power over individual residents relative to the transfer or eviction process, it "invites" its licensees to use the Code of Civil Procedure unlawful detainer eviction process. The unlawful detainer process is used in California to evict tenants under landlord-tenant law. The statutes setting forth landlord-tenant law also do not make an explicit exception for licensed facilities.

Given the foregoing, and in the absence of clarification from the legislature or judiciary, the prudent course of action for a licensed provider is first to comply with licensing regulations. In addition, a licensed provider should generally follow landlord-tenant law's rules and respect the tenant rights set forth in landlord-tenant law (such as providing 30-days notice before changing terms of occupancy, or allowing tenants to deduct rent for required repairs). However, where complying with licensing regulations prevents the housing provider from complying with landlord-tenant law, the provider should follow the licensing regulations, rather than the landlord-tenant law. For example, if licensing regulations require the provision of care and supervision by entering a resident's room without notice, but landlord-tenant law generally prohibits unnoticed entry, then the provider need not provide notice to enter the room. However, in the spirit of recognizing tenant rights under landlord-tenant law, it is advisable to inform residents in writing and, when possible, prior to their occupancy, that the provider's policy and practice is to comply with applicable licensing requirements by entering residents' rooms without notice to monitor the health and safety of the residents. This approach will avoid a risk to the provider's license. It will also strengthen the provider's position before a judge. The provider can argue that, while he/she she did not comply with landlord-tenant law, licensing requirements required the action.

An operator of a licensed community care facility should be familiar with both landlord tenant rules and licensing rules. An operator should also ask its attorney for guidance on how the two sets of rules apply in a particular situation. In addition, an operator should ask the Community Care Licensing Division for any necessary guidance on licensing regulations.

SECTION B. 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 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.⁹⁴

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

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 it 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.⁹⁵ 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 and Fair Employment and Housing Act do not require the landlord to fund physical changes. Under these laws, landlords are only obligated to allow tenants to make reasonable modifications or allow accommodations that do not cause the landlord an undue financial burden.⁹⁶ 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.

⁹⁴ Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Accommodations under the Fair Housing Act", May 17, 2004; Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Modifications under the Fair Housing Act", May 5, 2008.

⁹⁵ 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).

⁹⁶ 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).

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' neighbors 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 enable the tenants with disabilities equal access to housing. Sometimes a physical modification may be necessary. For 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 arises 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 or Fair Employment and 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 in the Bay Area 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 1973.⁹⁷

SECTION C. 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

⁹⁷ *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).

tenants to participate in services, but enforcement may be difficult. Mandating participation in services can also raise licensing issues.

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 which 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). 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 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.

Nothing in landlord-tenant law prevents a landlord from inserting into a lease agreement the requirement that a tenant participate in services. 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.⁹⁸ The Section 202 and 811 programs explicitly prohibit requiring tenants to participate in services as a condition of occupancy. The California Multifamily Housing Supportive Housing Program also prohibits requiring participation in services as a condition of tenancy.⁹⁹ The MHSA Housing Program prohibits mandatory services for MHSA-financed units unless mandatory services are required by other funding programs.

An additional consideration in requiring residents to utilize services is the possibility that such a requirement could trigger community care facility licensing requirements, as discussed above in Section B, Question One of this Chapter. However, if a facility is licensed, mandatory services are required by licensing regulations.

⁹⁸ 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) in late 2010.

⁹⁹ 25 California Code of Regulations § 7341(a)(4).

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.¹⁰⁰ 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 to 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 Section 8 Project-Based Voucher Program specifically provide that disabled residents shall not be required to accept the particular services provided at a project.¹⁰¹

SECTION D. 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 to be 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

¹⁰⁰ 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 in late 2010.

¹⁰¹ 24 C.F.R. § 983.251(d)(2).

explained to the tenants in writing prior to occupancy and included within leases or rental agreements. Although recent amendments to the Low Income Housing 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 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 medical marijuana laws that, in some instances, may allow for the use of marijuana. For additional discussion of this issue, see Chapter Three, Section B, Question Nine, Chapter Five, Section B, 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 work with 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 local landlord-tenant and just cause eviction laws.

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 which 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; however, 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.

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 requires 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 E. 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 and State 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. 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. These policies are generally legal under State law, but providers should check whether local laws may restrict landlord-imposed guest policies. For example, a local San Francisco ordinance imposes specific standards on landlord-imposed policies restricting guests and overnight visitors; if a housing provider wants to adopt a guest policy that differs from the city's "model policy," the housing provider must apply to the city for special approval of the policy.

Nothing in California landlord-tenant law prevents a landlord from adding to a lease agreement a provision to restrict visitors in any of the ways described above. However, 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 tenancy is month-to-month and the tenant lives in a city without local rent control or eviction protections, which would allow the landlord to change the terms of tenancy with a 30-day notice. 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. In California, whether a guest has become a tenant depends on specific factors, including (most importantly) whether the guest has remained in residence for more than 30 consecutive days. 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 is probably not allowed under California landlord tenant law. A court would likely deem this restriction 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 reasonably 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 (like CalHFA and DMH under the MHSA Housing Program) 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 MHSA-eligible residents, and not on non-MHSA residents, 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. Will a landlord be 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 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.

No general requirement exists under landlord-tenant law 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, as does the State Emergency Housing Assistance Program (EHAP).

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." The HOME program, for example, includes specific authorization to terminate tenancies in transitional housing projects following expiration of the specified transitional term of occupancy.¹⁰²

¹⁰² 24 C.F.R. § 92.253(c).

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 the Uniform Housing Code, guidance from HUD and the California Department of Fair Employment and Housing (DFEH).

The Uniform Housing Code occupancy limits are State of California building code requirements which are based on the square footage of a housing unit. The Uniform Housing Code limits may result in more people living in a unit than most housing providers desire. For example, under the Housing Code seven people can legally reside in a 420 square foot efficiency unit, which is about the same size as a two-car garage.

Although the Uniform Housing Code provides an occupancy standard that most providers would find unworkable, a provider should select an alternate standard with care so as not to exclude inadvertently (and illegally) families with children. For example, if a landlord restricts the occupancy in its one bedroom apartments to one person, no families with children will ever be permitted to reside in the unit. A housing provider may be able to defend this restriction by showing that the occupancy limits are necessary to further health and safety and to preserve the character or the value of the housing. However, a court may not find this defense sufficient to override a discrimination claim.

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."¹⁰³

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.

DFEH has made informal statements that a "two per bedroom plus one" standard is generally reasonable. A DFEH notice from January 30, 1989, supports the standard and sets out guidelines directing DFEH staff to accept for investigation only complaints which allege that a housing provider has a more restrictive occupancy standard than two persons per bedroom plus one.

¹⁰³ The Keating Memo is adopted pursuant to Federal Register 70255, December 18, 1998.

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 Uniform Housing Code. However, if a housing provider does not want to adopt the Uniform Housing Code, it should consider enacting the HUD "two per bedroom" or DFEH "two per bedroom plus one" standard. The housing provider adopting HUD's or DFEH's 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" or "two per bedroom plus one" standard and then increases or decreases the occupancy limits based on the size, layout or other 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.

The State of California, HUD, 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. The California Department of Housing and Community Development Multifamily Housing Program (MHP) also sets minimum housing size requirements. For example, under the MHP regulations, a two-bedroom unit must have at least two people, a three-bedroom unit must have at least four people and a four-bedroom unit must have at least six people.

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, due to California's prohibition of discrimination on the basis of marital status, single people are protected under fair housing laws 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 provide 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. Under State law, if a housing provider receives any financial assistance from the State, then the housing provider must ensure that alternative communication services are available unless the State determines providing such services would place an undue hardship on the housing provider.

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 is not offering any 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 identify 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.

Under the implementing regulations for California Government Code Section 11135, any recipient of State financial assistance (including a housing provider) must take appropriate steps to ensure that alternative communication services (such as an interpreter or a multilingual employee) are available to prospective tenants that are limited in English proficiency, or otherwise do not speak English or are unable to effectively communicate in English because English is not their native language. The failure to provide such alternative communication services to persons with limited English proficiency constitutes unlawful

discrimination unless the State agency providing the State funding to the housing provider determines that such a requirement would place an undue burden on the housing provider.

In addition, California Civil Code Section 1652 states that, if a housing provider negotiates, either orally or in writing, the terms of the lease primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, then the housing provider must translate the proposed lease into the same language used during the negotiations. Unlike Government Code Section 11135, Civil Code Section 1652 applies regardless of whether a housing provider receives State funding. The housing provider must offer the prospective tenant a copy of the translated lease before execution. In addition, at the time and place the housing provider and the prospective tenant execute the lease, the housing provider must first provide notice to the prospective tenant of such translation in the language the lease was negotiated. This statute applies to the negotiation of any lease or other rental obligation (such as a sublease or other tenancy agreement) of a dwelling unit normally occupied as a residence for a period greater than one month. If the housing provider negotiates a lease in Spanish, Chinese, Tagalog, Vietnamese, or Korean and then fails to translate the lease or fails to provide a copy of the translated lease to the prospective tenant prior to execution, then the tenant may subsequently rescind the lease. Depending on the specific circumstances, the tenant may then be able to continue occupying the dwelling without a lease, which raises a host of potential issues for the housing provider. The requirements of California Civil Code Section 1652 do not apply to a housing provider if a prospective tenant provides his or her own interpreter during the negotiation of the lease.

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. The MHSA Housing Program prohibits master leasing.

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 recipients rents the unit 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 have 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. 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 resulted in some IRS staff taking the position that any "exclusionary criteria that limits access" to tax credit units violates the "available to the general public" rule and makes such units ineligible for tax credits. The IRS chief compliance officer has stated that she deems master leasing as an "exclusionary" practice which 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 which may affect their tax credits.

Staff at the California Tax Credit Allocation Committee (TCAC) have indicated that TCAC does not agree with this interpretation and that master-leasing of units will not, in and of itself, result in a compliance violation. TCAC will require, however, that a housing provider sublet any master leased units to qualifying tenants pursuant to rental arrangements that ensure the tenants have standard tenant protections.

The Department of Mental Health and the California Housing Finance Agency prohibit master leasing of Mental Health Services Act Housing Program-funded units. However, counties may permit master leasing when using non-Housing Program MHSA funds.

Chapter 6: *Zoning and Land Use*

Local zoning laws exist to regulate how land may be used and to allow compatible uses to occur in a given zoning district as well as 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, such as 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, the California Fair Employment and Housing Act (FEHA), and California 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 FEHA also create 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 on the fundamental purpose of the zoning against the benefit of the accommodation.

California statutes specifically forbid discrimination against people with disabilities in zoning ordinances and zoning actions. In addition, local governments cannot deny permits or zoning approvals for supportive housing, transitional housing, and emergency shelters for people who are homeless, or attach conditions that make supportive, transitional, or emergency housing infeasible, unless the local government is able to make specific findings. Finally, California communities preparing new housing elements (local housing plans that are part of the community's general plan) are required to include specific provisions regarding emergency shelters and supportive and transitional housing.

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, because the State of California has adopted legislation specifically intended to protect persons with disabilities, this Chapter also discusses specific statutory protections for supportive and transitional housing and for shelters serving people who are homeless.

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

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

For instance, 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 one federal circuit court has accepted the deinstitutionalization rationale¹⁰⁵, other federal courts that have considered this issue have found insufficient evidence that such spacing requirements benefit people with disabilities, and have held that the requirements are an impermissible restriction.¹⁰⁶

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.¹⁰⁷

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.¹⁰⁸ Even if a community can articulate a nondiscriminatory reason for its actions, the housing provider may be able to prove that the reason is a mere pretext.¹⁰⁹

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 Family Style of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991)

¹⁰⁶ 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).

¹⁰⁷ 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 facilities housing abused and delinquent children).

¹⁰⁸ 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 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).

¹⁰⁹ Community House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

When a court finds that a local government has acted with discriminatory intent, the court will require justification for the actions. The only legitimate justification for actions taken with discriminatory intent are that: 1) the actions benefited people with disabilities; or 2) the actions responded to legitimate safety concerns and were not based on stereotypes. This is a difficult standard 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 a 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.¹¹⁰

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" in the policy. FEHA, however, requires greater justification once a court finds that the local policy causes a disparate impact. The local government must show that the policy, (1) is "necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect," and (2) effectively carries out the purpose it is supposed to serve. Under FEHA, a court would also consider whether the local government could have implemented feasible alternatives that would equally accomplish the purpose and are less discriminatory.¹¹¹

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 that a local government 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.

¹¹⁰ *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997).

¹¹¹ California Government Code § 12955.8(b).

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 that represents only a minor change to existing zoning, such as a greater building size (for instance, to permit space for treatment or accessibility), a reasonable accommodation 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 property 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 paved driveway 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 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.

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).

Question 3. How does California's right to privacy impact local ordinances defining "family"?

California's constitutional right of privacy provides protection for people living in group homes by prohibiting cities from treating unrelated people living together differently than related people.

Based on the privacy clause in the State Constitution, California case law requires cities to treat unrelated people identically to related people when unrelated people function as one household. Local ordinances that define a "family" in terms of blood, marriage, or adoption, and that treat unrelated groups differently from "families," violate California law. California cities cannot limit the number of unrelated people who live together while allowing an unlimited number of family members to live together.

In the lead case of *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980), the court held that twelve "congenial people" who became "a close group with social, economic, and psychological commitments to each other," and who shared expenses, rotated chores, and ate evening meals together could be considered a family. The court found that Santa Barbara could have addressed its justifications for an ordinance restricting the number of unrelated adults who live together (such as a concern about parking) with neutral ordinances applicable to all households, not just unrelated individuals.

Even though this case has been in effect for almost 30 years, many local ordinances still rely on legally defective traditional definitions of family and treat differently those not related by blood or marriage. These ordinances are almost certainly invalid. The *Adamson* case may be used to protect residences where individuals are living together and supporting each other in a way that is indistinguishable from a family, including many group homes.

Question 4. May a local government legally require a use permit for supportive housing?

Whether a local government may require a use permit for supportive housing 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, the requirement's effects on persons with disabilities, and whether the supportive housing is eligible for certain special protections California law provides.

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 housing facilities *may* be illegal if the requirement for the permit has a discriminatory intent or effect, or if the requirement violates certain special protections in California law. Even if a local ordinance requires a use permit, California law limits the ability of local governments to deny a use permit for certain types of supportive housing.

California law requires that all licensed facilities serving six persons or fewer be treated for zoning purposes like single-family homes. So, unless the local government requires a use permit for a single-family home,

the law bars use permits for licensed facilities which serve six or fewer persons. This protection applies to intermediate care facilities for individuals who have developmental disabilities, residential facilities for persons with disabilities and for abused children, community care facilities, residential facilities for persons with chronic life threatening illness (HIV/AIDS), residential facilities for the elderly, and alcohol and drug treatment facilities. These statutes do not protect an unlicensed supportive housing facility or a licensed facility serving seven or more persons.

Another provision of California law (Government Code Section 65583(a)(5)) provides some protections from use permit requirements for certain types of unlicensed supportive housing and larger licensed facilities. This law requires local governments, as part of their preparation of a state-required "housing element" (a housing plan which is part of the community's general plan), to remove constraints to creating supportive housing, so that the city treats supportive housing like other residences of the same type in the same zoning district. For example, if the supportive housing is located in a single-family home, the city cannot require a use permit for the supportive housing unless it also generally requires a use permit for all other single-family homes. If supportive housing is located in an apartment, the city cannot require a use permit or impose other barriers to development unless the city requires the same restrictions on all other apartments. This requirement applies to communities that submit a draft housing element to the State for review after March 31, 2008.

To qualify for this equal treatment with other types of unlicensed housing, the supportive housing must meet the definition of "supportive housing" contained in Health and Safety Code Section 50675.14. This definition is different from the definition of "supportive housing" used to exempt projects from licensing requirements, which is included in Health and Safety Code Section 1504.5 (discussed in Chapter Five, Section A). To meet the Section 50675.14 definition, the supportive housing must meet all of the following:

- Have no limit on the length of stay;
- Be linked to onsite or offsite services that assist residents in improving their health status, retaining the housing, and living and working in the community; *and*
- Be occupied by the "target population," defined as either: (1) adults with low incomes having one or more disabilities, including mental illness, HIV or AIDS, substance abuse, or other chronic health problems, or (2) other persons with developmental disabilities that began before the person turned 18.

A local government may not deny a discretionary permit or approval to supportive housing meeting the above definition unless it can make one of the following five findings:

- The jurisdiction has met its low income housing needs;
- The supportive housing would have a specific, adverse impact on public health or safety, and there is no feasible way to mitigate the impact;
- Denial of the discretionary permit or approval is required to comply with state or federal law, and there is no way to comply without making the housing unaffordable;
- The housing is proposed on land zoned for agriculture and is surrounded on two sides by land being used for agriculture, or there is inadequate water or sewer service; or

- The housing is inconsistent with both the zoning and the land use designation of the site, is not shown in the housing element as an affordable housing site, and the community has a housing element in substantial compliance with State law.¹¹⁶

Even if the local government makes one of the above-listed findings, California law also specifically forbids discrimination in land use decisions based on disability, the income levels of the expected occupants, or because the housing receives governmental financial assistance.¹¹⁷ These laws may allow a housing provider to challenge a local government's denial of a discretionary permit when the supportive housing development does not meet the definition of "supportive housing" or the local government has made one of the above-listed findings. The housing provider should review the local agency's rules for supportive housing alongside those for comparable residences to ensure that the local government did not base any requirements for use permits on disability, income levels, or governmental financing.

A city must also comply with the broad anti-discrimination requirements of the Fair Housing Act and the California Fair Employment and Housing Act (FEHA) when it requires a use permit for a supportive housing project.

In assessing whether a court would find a use permit requirement permissible under the Fair Housing Act or FEHA, the primary question is whether the permit requirement applies *only* to housing for persons with disabilities. If a use permit is not required for comparable uses, such as boarding houses and retirement facilities, courts generally will strike down the use permit requirements.

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. However, the requirements may still be subject to challenge if a 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 physically substantially 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 5. May a local government legally require a use permit for transitional housing for people who are homeless?

The answer to this question must be determined on a case-by-case basis similar to the analysis for supportive housing.

Requiring a use permit for transitional housing for people who are homeless may be illegal if the requirement is discriminatory, or if the requirement violates certain special protections California law offers.

¹¹⁶ California Government Code § 65589.5(d).

¹¹⁷ California Government Code § 65008.

Even if a local government may require a use permit, California law limits the ability of local governments to deny a use permit for most transitional housing.

Transitional housing (whether or not it serves people who are homeless) is afforded protections very similar to supportive housing:

- If the transitional housing is a *licensed* facility serving six or fewer clients, it must be treated for zoning purposes like a single-family home.
- Government Code Section 65583(a)(5) provides the same protections to certain types of unlicensed *transitional* housing and larger licensed transitional facilities as it does to certain types of supportive housing as discussed in Question Four of this Chapter. This Section of the Government Code requires that transitional housing be treated identically to other residential buildings of the same type in the same zone in communities that submit a draft housing element to the state for review after March 31, 2008.

To qualify for this protection, the transitional housing must meet the definition of “transitional housing” contained in Health and Safety Code Section 50675.2. The Section defines transitional housing as rental housing that is operated under program requirements that call for termination of assistance and recirculation of the unit to another eligible person at some predetermined point of time, at least six months in the future. This definition should include almost all types of transitional housing, except those where stays are limited to shorter than six months.

Local government cannot deny a discretionary permit to a transitional housing development unless the city or county can make one of five findings included in Government Code Section 65589.5 as discussed in Question Four of this Chapter regarding supportive housing.

In addition, a local government cannot apply requirements to transitional housing that do not apply to other comparable uses if the requirements are based on the occupants’ disability or level of income or because the transitional housing receives governmental financial assistance (Government Code Section 65008). Although no court cases have interpreted this provision, a court might conclude that a requirement for a use permit is based on the income of the occupants or governmental financing if it treats transitional housing differently from similar uses such as hotels, boarding houses, time-share projects, or single-room occupancy housing with short-term occupancies.

If the transitional housing is occupied primarily by persons with disabilities, any requirement for a use permit would also need to comply with federal and state fair housing laws (as discussed in Question Four of this Chapter).

Question 6. May a local government legally require a use permit for an emergency shelter for people who are homeless?

The answer to this question must be determined on a case-by-case basis. California law requires some communities to provide at least one zoning district where emergency shelters must be allowed without any discretionary permit. Even if a local government may legally require a use permit, it cannot refuse to grant such a permit without making special findings.

Cities and counties commonly require a use permit for an emergency shelter for people who are homeless (also called a homeless shelter), and some communities do not allow an emergency shelter anywhere in the community. Requiring a use permit or banning homeless shelters entirely *may* be illegal if the requirement for the permit is discriminatory or if the requirement violates certain provisions of California law.

Under California law, a homeless shelter is called an "emergency shelter." It is defined in Health and Safety Code Section 50801 as, "housing with minimal supportive services for homeless persons that is limited to occupancy of six months or less by a homeless person," and where no person is denied residence because of inability to pay.

Cities and counties in California that submit a draft housing element to the State for review after March 31, 2008 must take some action to accommodate emergency shelters. Every community (regardless of the size of its actual homeless population) must take one of the following three actions:

- Include in its housing element: (a) a specific zoning district where emergency shelters will be allowed without a use permit or other discretionary permit; and (b) a program to amend the community's zoning ordinance accordingly within one year after adopting the housing element.¹¹⁸ The zoning district must be of sufficient size to accommodate enough emergency shelters to meet the community's entire need for emergency shelters. The city or county may adopt certain fixed standards, such as a maximum number of beds, off-street parking, waiting areas, client intake areas, onsite management, maximum length of stay, lighting, and security. However, the local government must approve, without any discretionary permit, any shelter that meets these standards; *or*
- Enter into a multijurisdictional agreement with up to two other adjacent jurisdictions to fund capital and operating costs to construct additional shelter capacity within two years of the adoption of the housing element that will accommodate the city's or county's entire need;¹¹⁹ *and* identify a zoning district in the community where emergency shelters are allowed *with* a use permit; *or*
- Have enough emergency shelters in the community to meet the community's entire need; *and* identify a zoning district where emergency shelters are allowed *with* a use permit.

Even if a city or county justifies a use permit or other discretionary permit requirement for an emergency shelter, it may not deny a permit to an emergency shelter unless it can make one of the five findings included in Government Code Section 65589.5 (listed in Question Four of this Chapter regarding supportive housing).

Like transitional and supportive housing, emergency shelters are protected by federal and state fair housing statutes¹²⁰ and state land use laws. A local government cannot apply requirements to emergency shelters

¹¹⁸ California Government Code § 65583(a)(4).

¹¹⁹ California Government Code § 65583(d)(1).

¹²⁰ *Community House, Inc. v. City of Boise*, 490 F. 3d 1041 (9th Cir. 2007).

that do not apply to other comparable uses, if those requirements are based on the occupants' disability or level of income or because the emergency shelter receives governmental financial assistance.¹²¹

If persons with disabilities primarily occupy the emergency shelter, any requirement for a use permit would need to comply with federal and state fair housing laws and would not be permitted if the requirement has a discriminatory intent or effect (as discussed in Question Four in this Chapter). In the case of emergency shelters, a housing provider may have difficulty demonstrating that different requirements are based on disability, income, or governmental assistance because emergency shelters are different from most other uses typically allowed in cities and counties.

Question 7. May a city or county legally require public hearings before siting a supportive or transitional housing development?

As with the use permits discussed in the previous questions, 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 practice, if they are applied arbitrarily, if they lack legitimate justification grounded in objective facts, or if they violate specific provisions of California law. 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 a number of cities, officials have imposed public hearing requirements not on project land use approvals, but as a precondition to local financial assistance. 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 which 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 that results in public hearings only when neighbors object, and where, in practice, cities only hold hearings for housing developments serving people with disabilities or another protected group. When the local government has failed to identify objective criteria for holding a hearing and, in practice, the hearing requirement only applies to housing serving protected groups, courts are highly likely to find this requirement to violate fair housing laws.

¹²¹ California Government Code § 65008.

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

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HOUSING AND THE MENTAL HEALTH SERVICES ACT

AN APPENDIX TO *BETWEEN THE LINES: A QUESTION AND ANSWER GUIDE ON LEGAL ISSUES IN SUPPORTIVE HOUSING (CALIFORNIA EDITION)*

PREPARED BY GOLDFARB & LIPMAN, LLP FOR THE CORPORATION FOR SUPPORTIVE HOUSING

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CHAPTER 1: OVERVIEW OF DOCUMENT AND THE MENTAL HEALTH SERVICES ACT

1. Who Should Use This Appendix?

This appendix was developed to assist developers, lenders, county mental health service providers, other social service providers, investors and property managers who work with housing financed with Mental Health Services Act funds and/or who work with and seek housing for persons with severe mental illness.

2. How Does This Appendix Relate To *Between The Lines: A Question And Answer Guide On Legal Issues And Supportive Housing*?

This Appendix is intended to be a "pull-out" supplement for those working with Mental Health Services Act financed housing and/or households eligible to live in this housing. Users of this Appendix should also review *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing (California Edition)*, prepared by Goldfarb & Lipman, LLP for the Corporation for Supportive Housing, in its entirety to understand the basic legal issues related to providing supportive housing and housing for persons with disabilities. In particular, a careful reading of the Chapter entitled "Legal Overview" of *Between the Lines*, will provide important background on the laws discussed in the Appendix. *Between the Lines* is available for free download at www.csh.org/publications.

CSH is currently working on a 2009 update of the 2001 California Edition of *Between the Lines*. The 2009 update will reflect changes in California law, and recent interpretations from California and Federal courts concerning various fair housing laws.

3. What Is The Mental Health Services Act?

In the November 2004 election, California voters approved Proposition 63, the Mental Health Services Act ("MHSA" or the "Act"). MHSA was intended to transform the mental health system in California. The Act provides a dedicated source of funds to reduce the long term impacts of untreated serious mental illness and to expand successful, innovative, service programs for people with serious mental illness. MHSA funds are generated by a tax imposed on millionaires in California, who are required to pay a 1% tax on their annual income in excess of \$1,000,000, with the funds dedicated to use for services and supports for persons with serious mental illness (Revenue and Taxation Code § 17043).

MHSA is codified in Welfare and Institutions Code and the California Revenue and Taxation Code. Under the California Act, MHSA funds are used for a variety of components, including prevention and early intervention programs, education and training of individuals who will provide services people with serious mental illness, and capital facilities and technologies needed to provide services and programs (Welfare and Institutions Code § 5847). A portion of the funds are dedicated to "innovative" programs developed by counties and designed to increase access to underserved groups, expand access to services, improve the quality of services provided and outcomes, and promote interagency collaboration (Welfare and Institutions Code § 5830). The Act also requires that funding be provided for services and supports which are intended to promote recovery and wellness for adults and older adults with severe mental illness and resiliency for children and youth with serious emotional disorders and their household members (Welfare and Institutions Code §§ 5878.1-5878.3 and § 5813.5). Notably, the Act prioritizes the use of MHSA funds for persons who are unserved or underserved by the existing mental health system (Welfare and Institutions § 5878.3 and § 5847(e)) and specifically prohibits using MHSA funds to supplant other sources of state or county funds that have been used to provide mental health services (Welfare and

Institutions Code § 5891.)

Under the Act, each county must develop a three-year plan and use its MHSA funds in a manner that is consistent with such three-year plan. (Welfare and Institutions Code § 5847.) The three year plan includes a "Community Services and Supports" part which describes the services and supports which will be provided to adults, seniors, children, and transition age youth with serious mental illness (9 Cal. Code of Regulations 3200.080). The "Community Services and Supports" consists of four categories: Full Service Partnerships, General Systems Development, Outreach and Engagement, and the use of funds under the MHSA Housing Program. (9 Cal. Code of Regulations §§ 3200.225 and 3615.)

In planning to provide services with MHSA funds, counties must also adopt the following five core elements intended to promote the overall MHSA goals (the California Code of Regulations define each at Title 9, Chapter 14, § 3200, et. seq.):

- (1) A focus on wellness and recovery;
- (2) Cultural competency, which means providing equal access to equal quality services without disparities, planning for and evaluating treatment and outreach interventions that effectively engage and retain diverse populations, incorporating an understanding of diverse belief systems and of the impact of discrimination on programs and clients' mental health, training staff to address the needs and values of populations being served, and developing strategies to promote equal opportunities among those delivering services;
- (3) Community collaboration, which means including clients, family members, agencies, organizations, and businesses in the process of sharing information and resources to reach a shared county vision and goals;
- (4) Client and family-driven processes that provide the client with the primary decision-making role in identifying needs and in planning for and providing services; and
- (5) An integrated service experience that allows a client to access a full range of services from multiple agencies and organizations in a coordinated, comprehensive manner.

4. What is the Mental Health Services Act Housing Program?

California Executive Order S-07-06 created the Mental Health Services Act Housing Program. The goal of the Mental Health Services Housing Program is to create 10,000 supportive homes. The MHSA Housing Program uses MHSA funds to finance permanent supportive housing developments for homeless people with serious mental illness. The Department of Mental Health is collaborating with the California Housing Finance Agency ("CalHFA") and California counties on the Program. In connection with the MHSA Housing Program, county mental health departments allocate a portion of MHSA funds to CalHFA to administer the Program on the counties' behalf. A portion of these funds are being used for capitalizing operating subsidies and the balance will be used for the development costs of housing. The Executive Order proposes up to \$75 million in MHSA funds be allocated to the MHSA Housing Program per year to finance development costs associated with the development, acquisition, construction and rehabilitation of housing for MHSA households. While the Executive Order did not call for capitalized operating funding, the MHSA Housing Program includes an additional \$40 million per year in MHSA funds for capitalizing operating subsidies for some of the units created by the MHSA Housing Program. The application packet for the MHSA Housing Program funds was released on August 6, 2007 (the "MHSA Housing Program Application"), which included funding for a \$75 million capital allocation and a \$40 million operating reserve allocation per year for three years. The MHSA Housing Program Application includes extensive information regarding MHSA Housing Program requirements. The MHSA Housing Program Application packet

and all other documents related to the MHSA Housing Program may be found on the MHSA Housing web page at the California Department of Mental Health Website at http://www.dmh.ca.gov/Prop_63/MHSA/default.asp. Applications for MHSA Housing Program funds may be submitted by counties at any time. The state review process is non-competitive but each proposed housing project must be consistent with the Community Services and Supports component of the county's three year plan. Counties may continue to submit applications to CalHFA until they have committed all funds.

The MHSA Housing Program will provide funds for permanent financing and operating subsidies for "rental housing developments" and "shared housing developments." All housing must be permanent supportive housing. Transitional housing and licensed facilities do not qualify for financing under the MHSA Housing Program, nor do master-leased units.

- "Rental Housing Developments" are buildings with five or more units, at least 10% of which (or no fewer than five) must be set aside for members of the target population (homeless people with serious mental illness). One unit may be made available for a manager's apartment/bedroom at the Housing Provider's option. If the rental housing development has 100 or more units, a minimum of 10 units must be set aside for members of the target population. Each unit in a rental housing development must include a sleeping area, kitchen area, and a bathroom. Rental Housing Developments smaller than five units may be considered on an exception basis.
- "Shared Housing Developments" consist of buildings with four or fewer units. One unit buildings such as single family homes and condominiums must have at least two bedrooms in order to qualify as a shared housing development. Each unit in a shared housing development must be a "shared housing unit" occupied by two or more unrelated MHSA-eligible adults. Each bedroom in a shared housing unit must be targeted to an MHSA-eligible adult. Shared housing units may be one-bedroom units with only one tenant, provided that other larger units in the shared housing development are also shared housing units. Shared housing developments are intended primarily to serve unrelated adult roommates; however, the spouse or child of an MHSA-eligible tenant is permitted to share a bedroom with the tenant. A shared housing development must provide a separate lockable bedroom for each adult, and each adult must have a lease and be responsible for paying rent. Finally, each shared housing unit must also contain a kitchen and bathroom (units with three or more bedrooms must contain a full bathroom and a half bathroom and units with five or more bedrooms must contain two full bathrooms).

More information about rental housing and shared housing developments may be found on the MHSA web page on the California Department of Mental Health website at http://www.dmh.ca.gov/Prop_63/MHSA/default.asp.

The MHSA Housing Program is not the only manner in which MHSA housing may be financed. The MHSA Housing Program rules may not be applicable to all housing funded by the Mental Health Services Act. For example, prior to the creation of the MHSA Housing Program, many counties financed housing programs with MHSA funds. As a result, MHSA funding paid for a variety of housing models, including transitional housing, even though the MHSA Housing Program provides funding only for permanent supportive housing. In addition, DMH Information notice 08-12 and 08-31 set forth a variety of housing activities that may be financed with MHSA funds, including master leasing and tenant subsidies. While, under the Act, counties may choose to use non-Housing Program MHSA funds for master leasing and tenant subsidies, MHSA Housing Program funds may not be used to finance these activities.

5. Who Is Eligible To Reside In Housing Financed With MHSA Housing Program Funds?

Both the Act and DMH regulations make clear that individuals receiving MHSA-funded services and supports must

be adults with severe mental illness or seriously emotionally disturbed children. A household may only qualify to occupy an MHSA Housing Program unit if the household includes an adult who has serious mental illness or a child with serious emotional disturbance. Under the MHSA Housing Program, the individual or family must also be homeless or is at risk of homelessness.

Counties are also able to impose their own eligibility requirements, so long as those requirements are consistent with their three year plans and do not violate federal and state housing laws. The county's mental health department shall determine whether an individual or family is eligible for tenancy and must certify households as meeting eligibility criteria.

(a) Seriously Mentally Ill Adult or Seriously Emotionally Disturbed Child. If the household is a single individual, the single individual must qualify as an adult with serious mental illness. If the household is a family or group operating as a single housekeeping unit, the household must include at least one person who is an adult with serious mental illness or a child who is seriously emotionally disturbed.

(1) Seriously Mentally Ill Adult. A seriously mentally ill adult must have a "serious mental disorder" or require or be at risk of requiring "acute psychiatric inpatient care, residential treatment, or outpatient crisis intervention because of a mental disorder with symptoms of psychosis, suicidality, or violence." (Welfare and Institutions Code §§ 5813.5(c) and 5600.3(b) and (c).) The following additional definitions apply:

- A "serious mental disorder" for adults and seniors is a severe and persistent disorder that may cause behavior that substantially interferes with the primary activities of daily living and may result in an inability to maintain a stable adjustment and independent functioning without an extended term of treatment, support and rehabilitation.
- The disorder must be identified in the "Diagnostic and Statistical Manual of Mental Disorders," excluding substance use disorders, developmental disorders, or certain types of traumatic brain injury (unless that person also has a serious mental disorder).
- The person with the disorder must have "substantial functional impairments or symptoms, or a psychiatric history which demonstrates that without treatment there is an imminent risk of decompensation to having substantial impairments or symptoms" resulting from the disorder. (Welfare and Institutions Code §§ 5600.3(b) 3)(B)(i).)
- "Functional impairment" is defined as substantial impairment (as a result of the mental disorder) in independent living, social relationships, vocational skills or physical condition, caused by the mental disorder. (Welfare and Institutions Code §§ 5600.3(b) 3)(B)(ii)).
- A person with a serious mental disorder must also be likely to become, because of his or her mental functional impairment and circumstances, so disabled as to require public assistance, services or entitlements. (Welfare and Institutions Code §§ 5600.3(b)(3)(C)).

(2) Seriously Emotionally Disturbed Child. Under the Act, minors under 18 years of age who are "seriously emotionally disturbed" are qualified to receive MHSA-funded housing and other services. "Seriously emotionally disturbed" is defined as a mental disorder identified in the "Diagnostic and Statistical Manual of Mental Disorders," excluding primary substance use disorders or development disorders. (Welfare and Institutions Code §§ 5600.3(a).) Such mental illness must also result in behavior inappropriate to the child's age and meet at least one of the following criteria:

- The mental illness must substantially impair any two of the following: (a) the child's self-care; (b) the child's school functioning; (c) the child's family relationships; and (d) the child's ability to

function in the community. In addition, the child must have been removed from home or be at risk of removal from home or the mental illness must have been present for more than six (6) months and be likely to continue for more than one (1) year without treatment (Welfare and Institutions Code § 5600.3(a)(2)(A)); or

- The child displays psychotic features, risk of suicide or risk of violence due to mental illness. (Welfare and Institutions Code § 5600.3(a)(2)(B)); or
- The child meets the special education eligibility requirements set forth in Chapter 26.5 of the California Government Code (see § Government Code 7570 et seq.).

(b) Homelessness and at Risk of Homelessness. The MHSA Housing Program imposes additional criteria that must be met for households to be eligible to reside in housing funded with MHSA funds obtained through the MHSA Housing Program. The MHSA Housing Program Application for August 6, 2007 includes the following statement:

The State of California recognizes that there is currently, and will continue to be for the foreseeable future, inadequate funding to provide permanent supportive housing for all those with serious mental illness who need it. The MHSA Housing Program is primarily intended to provide funding to create permanent supportive housing and services for individuals with serious mental illness who are homeless. Secondly, and in keeping with the values of MHSA, the State believes that individuals should not have to 'fail first' and become homeless in order to become eligible for the housing and supports available under this program. (Application, § 2.2)

Therefore, the Housing Program requires eligible tenants to be homeless or at risk of homelessness to be eligible for housing financed with Housing Program funds.

- Homelessness. The MHSA Housing Program Term Sheet defines homelessness as living on the streets or lacking a fixed, regular, and adequate night-time residence, including living in a shelter, motel, or other temporary living situation in which the individual has no tenant rights.
- At risk of homelessness. The MHSA Housing Program Application defines "at risk of homelessness" to include: (i) transition-age youth exiting the child welfare or juvenile justice systems; (ii) individuals discharged from institutional settings, including hospitals, acute psychiatric hospitals, psychiatric health facilities, skilled nursing facilities with a certified special treatment program for the mentally disordered, mental health rehabilitation centers, and crisis and transitional residential settings; (iv) individuals released from local city or county jails; (v) individuals temporarily placed in residential care facilities upon discharge from one of the institutional settings cited above; and (vi) individuals who have been assessed and are receiving services at the County Mental Health Department and who have been deemed to be at imminent risk of homelessness, as certified by the County Mental Health Director. (MHSA Housing Program Application, § 2.2)

CHAPTER 2: SERVING MHSA-ELIGIBLE HOUSEHOLDS

1. May Housing Be Reserved For Or Restricted To MHSA-Eligible Households?

In many instances, yes. MHSA Housing Program funding requires that housing providers designate or reserve MHSA funded units for persons who are MHSA-eligible. Complying with this requirement may raise fair housing issues for providers. To determine whether housing may be reserved or restricted to MHSA-eligible households, providers must consider the fair housing implications of such a reservation as well as the restrictions that may be imposed by other sources of funding used by the provider to develop and operate the housing. The fact that the MHSA program, which is sanctioned by the state of California, restricts the housing funded with MHSA dollars to persons who are MHSA-eligible may not protect a provider from fair housing complaints.

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, or national origin, or on the basis of the renter or buyer being disabled (the Fair Housing Act uses the term "handicap" rather than "disabled"). Additionally, the Fair Housing Act provides that it is unlawful to "make, print, publish or cause to be made, printed or published any notice, statement, 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"¹ (42 U.S.C. 3601(c)). The Fair Housing Act prohibits discrimination against disabled people in a section separate from the other anti-discrimination provisions. This separation of disability-based discrimination from other types of discrimination, as well as the language of the section itself, emphasizes that, with respect to disability-based discrimination, the actions prohibited are discriminatory acts against persons with disabilities, rather than a requirement that a person's disabled or non-disabled status must be ignored with regards to housing decisions. This is reinforced by the preamble to the Fair Housing Act which specifically states that a housing provider "may lawfully restrict occupancy to persons with handicaps."² Additionally, the federal regulations which implement the federal Fair Housing Act imply that it is permissible to designate units as available only for people with disabilities. The provisions of the regulations that allow housing providers to ask questions to determine whether an applicant for housing 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 a specific population, indicates that such restriction is permissible. The Fair Housing Act also requires that persons with disabilities receive reasonable accommodations that may be necessary for them to enjoy the full benefits of the housing, giving further evidence that the Fair Housing Act provisions regarding disability based discrimination were not intended to require housing providers to remain neutral in meeting the needs of the disabled community.

Under Title II of the Americans with Disabilities Act (the "ADA"), public entities are permitted to provide different or separate benefits or services to people with disabilities, or any class of people with disabilities, if such action is necessary to provide people with disabilities with benefits or services that are as effective as those provided to others. Although the ADA does not specifically address housing programs, it does apply to public entities and publicly-supported programs. The provisions of the ADA that allow for separate benefits for persons with disabilities or particular types of disabilities permit public entities to provide specialized housing serving only people with disabilities, or people with a particular class of disability, so long as people with disabilities are not then excluded from benefits or services available to the general public, and so long as the public entity also

¹ The Fair Housing Act allows occupancy in certain housing developments to be limited to senior citizens (42 U.S.C. 3607(b)(2)).

² Preamble II 24 CFR ch.1, subch A, app. I, 54 Fed. Reg. 3246 (Jan. 23, 1989).

provides housing available without restrictions on the basis of disability. (See 28 CFR 35.130 and Appendix A to 38 CFR Part 35.)³

The state Fair Employment and Housing Act, unlike the Fair Housing Act, does not differentiate the prohibition on discrimination against people with disabilities from the prohibition on other types of discrimination. Rather discrimination on the basis of disability is prohibited. The broad prohibition could be used to argue that housing that excludes non-disabled people is illegal. However, the MHSA statute specifically targets assistance to persons with severe mental disabilities. The MHSA authorizing statutes have equal priority with the Fair Employment and Housing Act. Under the rules of statutory interpretation, the specific authorization provided by the MHSA statute for services to be provided to a specific segment of the population, will carry greater weight than the general language of the Fair Employment and Housing Act. Thus, under state law, the reservation of units for MHSA-eligible tenants would be allowed.

The Unruh Civil Rights Act (California Civil Code §§ 51 *et seq.*) prohibits arbitrary discrimination in all "business establishments." Arbitrary discrimination is discrimination against a group of people with similar personal characteristics for no legitimate reason. For instance, rejecting applicants because they have long hair would be arbitrary since their long hair bears no relation to their qualifications for tenancy. Restriction of housing to MHSA-eligible residents would not be considered arbitrary discrimination. First, the funding available to providers for MHSA housing requires that the provider restrict the housing. This funding requirement alone will provide a defense to an arbitrary discrimination claim since it is part of the provider's business purpose to restrict the housing, as evidenced by its receipt of MHSA funds. Secondly, MHSA funds require that the housing include services beneficial to persons with severe mental disabilities. This service component provides a non-arbitrary reason for excluding people outside the target population.

If the development receives federal financial assistance, additional fair housing considerations apply, as discussed in the next question below.

2. May Housing Be Financed With Federal Financial Assistance And MHSA Funds?

Housing units in a federally-funded development that are also assisted with MHSA funds may be reserved for MHSA-eligible households if necessary to provide MHSA-eligible households with access to housing that is equal to the access currently enjoyed by non-MHSA-eligible households. To support an "equal access" argument, housing providers should disperse the MHSA units throughout a development or, if all units in a project are MHSA-restricted, the project itself must be small. In each instance (whether the development is a large "mixed" population development or a small development with 100% units restricted to MHSA households), providers need to document why reserving units for MHSA households is necessary to provide equal access to housing. Housing providers reserving MHSA units should also offer access to voluntary services which are appropriate for MHSA-eligible households.

If a project, whether publicly or privately owned, receives federal financial assistance, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) applies. Section 504 provides that no otherwise qualified individual with handicaps shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Each federal department is required to adopt regulations implementing Section 504 with respect to its department's activities and programs. HUD has adopted such regulations which apply to HUD-funded housing programs, including the HOME, CDBG, HOPWA, Section 8, Shelter Plus Care and Section 811 programs. Tax

³ *Easley v. Snider*, 36 F.3d 297 (3rd Cir. 1994).

credit and bond financing are not considered "federal financial assistance" under Section 504 and therefore are not covered by the HUD Section 504 Regulations.⁴

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 it was adopted in 1973. As such, both Section 504 and the HUD regulations which 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.

Within these "integrationist" regulations, HUD specifically contemplates that housing providers may limit occupancy to the disabled or to people with a particular type of disability if a federal statute or executive order authorizes such limitation. If a housing provider does not have such federal authority, the Section 504 regulations limit that providers' ability to house only persons with disabilities or persons with a particular type of disability.

The limitations faced by providers of federally-assisted housing who seek to serve only disabled persons or persons with a particular type of disability is complicated by the fact that the HUD regulations also permit, and in some instances require, distinctions on the basis of disabilities and between disabilities in order to promote integration. The regulations specifically permit distinctions based on disabilities if such distinctions are necessary "to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to others."⁵ Another provision of the regulations state 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."⁶ The Section 504 Regulations also include the concept of reasonable accommodation.⁷ The concept of reasonable accommodation (or reasonable modification) recognizes that persons with disabilities, in order to obtain equal opportunity or equal access, sometimes require individualized treatment that is different and distinct from practices applied to non-disabled persons or persons with other types of disabilities. Reasonable accommodations may be made at times through physical modifications and at other times through waivers of generally-applicable rules or policies.

Using MHSA funds in federally-assisted housing developments raises questions under Section 504. There is no federal authority which authorizes housing providers to limit their programs to persons with serious mental illness. Yet, the Mental Health Services Act requires housing providers using MHSA funds to serve persons with serious mental illness (MHSA-eligible households).

In enacting Proposition 63, however, the voters of the state of California not only identified mental illness as a serious problem of many of the state's citizens and dedicated a permanent source of revenue to assist persons with serious mental illness, the voters of California also recognized that people with serious mental illness have access to fewer resources than persons with other disabilities and remain largely excluded from existing affordable housing programs. The requirement that MHSA funds be utilized only to fund programs to specifically serve persons with mental illness flows from these policies in the Act. The voters of California intended to provide benefits to MHSA-eligible persons at the exclusion of other persons, including non-disabled persons and persons with other types of disabilities. The voters acknowledged the extreme need faced by seriously mentally ill people and the severe problem posed to California by the lack of housing and services for persons with mental illness.

The voters' position is supported by studies which show that when housing is available to the general public but

⁴ The HUD Section 504 Regulations are found at 24 CFR 8.1 et seq.

⁵ 24 CFR 8.4(b)(iv).

⁶ 24 CFR 8.4(b)(2).

⁷ 24 CFR §§ 8.33.

includes units limited to persons within a category of disability, coupled with the provisions of voluntary social services, "that limitation is effective in reducing barriers to stable housing for people whose disabilities might otherwise be a barrier to equal access." ⁸ In addition, supportive housing designed for seriously mentally ill people, offering voluntary services and emphasizing independent living modeled on a regular landlord-tenant relationship, rather than an institutionalized or group home approach, helps ensure ongoing access to housing. It is important that services associated with such housing be voluntary because mandatory services detract from the landlord-tenant relationship and mimic institutionalized settings which conflict with Section 504's integrationist requirements.⁹

The great majority of federally funded housing units which are also funded with MHSA funds will be scattered units in larger projects (for example a 50 unit affordable housing development may include five MHSA-funded units). Where a small number of units in a larger federally funded project are restricted to MHSA-eligible households, the restriction should not violate Section 504 because the restriction is clearly necessary to provide persons with serious mental illness with housing opportunities that are as effective as those provided to others. Stated differently, the MHSA restrictions are necessary to ensure that persons with serious mental illness and their families (a population that is widely recognized as having difficulty finding and maintaining housing) are able to occupy the same housing developments that other persons without disabilities or with different disabilities are able to occupy. MHSA-restricted units scattered throughout a larger project promote, rather than defeat, the integrationist policies of Section 504.

Other housing financed with MHSA funds will be small rental housing developments and "shared housing" where each MHSA-eligible person will have his or her own room (or will share a room with another MHSA-eligible person), but there may be a shared kitchen and common areas. In these small rental developments and shared housing situations, all units may be reserved for MHSA-eligible households. In such situations, if federal funds are involved, housing providers will need to demonstrate why developments limited to MHSA-eligible households are necessary to help such households achieve a successful tenancy. For example, housing providers might demonstrate that these living situations are "safe havens" with easy access to social services and supports targeted to persons with severe mental illness and that the tenants are likely to have limited success in a more integrated and traditional landlord tenant situation.¹⁰ Housing providers of shared housing might also demonstrate that a particular shared housing development is necessary because other housing in the community is generally unavailable to seriously mentally ill people. Such housing providers could argue that without the shared housing development, seriously mentally ill households in the community will remain unserved and face homelessness. The relatively small size of these 100% MHSA-occupied projects (limited to four or fewer units within the MHSA Housing Program) also supports an argument that the MHSA-restricted units promote integration of persons with severe mental illness into the community because these small buildings will be located in residential

⁸ See Opening Doors, November 26, 2006, "Best Practice Principals for Achieving Civil Rights in Permanently Supportive Housing", by Henry Korman. (See also, "Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities" by Henry Korman, where Korman outlines why making distinctions among disabled persons and providing categories of disabled persons with special rights is sometimes necessary to make inclusion and participation possible. 26 St. Louis U. Pub. L. Rev. 3 pages 30-31.)

⁹ See US Dept. of Health and Human Services, 1994: "Making a Difference: Report of the McKinney Research Demonstration Program for Homeless Mentally Ill Adults"; See Housing Policy Debate, Vol. 13, Issue 1. 2002: "Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing" by Dennis Culhane and Stephen Matraux; See "The Benefits of Supportive Housing: Changes in Residents' Use of Public Services," where Harder and Company Community Research show supportive housing for the seriously mentally ill lead to a 56% decline in emergency room use, a 37% reduction in hospital inpatient days, a near total elimination of residential mental health care outside of hospitals, an 89% decline in days spent in residential alcohol and drug treatment, and a 44% reduction in days sentenced to incarceration.

¹⁰ See "Olmstead and Supportive Housing: A Vision for the Future" (Page 8) by Ann O'Hara & Stephen Day, Center for Health Care Strategies, Inc. Consumer Action Series.

neighborhoods where all the other units on the block will be likely private and unrestricted.

In light of the above, housing units in developments assisted with federal funds may be reserved for MHSA-eligible households, if the reservation of such units is necessary to provide MHSA-eligible households equal access to affordable housing. For MHSA-eligible households, the equal access argument is most easily made where MHSA-restricted units comprise only a relatively small percentage of the units in a development. If all units in the project are MHSA-restricted, the project should be limited to a small number of units and there must be strong evidence that the project's MHSA-eligibility restrictions are necessary for the MHSA-eligible tenants to have a successful housing experience. Large developments where 100% of the units are restricted to MHSA-eligible households are likely to be indefensible because they mimic segregated institutionalized care facilities generally prohibited by Section 504.

3. May All Units In A Development Be Restricted To MHSA-Eligible Households?

If a project is federally-funded and large in size, restricting all units to MHSA-eligible tenants would likely violate Section 504 for the reasons discussed in detail under Chapter 2, Question 2 above. A small federally funded project (6-8 units) integrated into a typical residential neighborhood could probably be restricted to 100% MHSA-eligible tenants without violating Section 504, also as discussed under Chapter 2, Question 2 above. There is no bright line distinguishing "large" from "small;" however 6-8 units for a small project appears to be a reasonable number.

If a project does not receive federal funds, Section 504 will not apply, and all units may be restricted to MHSA eligible households, without violating Section 504. However, developers are cautioned that large projects restricted to 100% MHSA or special needs households may present management and community integration challenges and could raise segregation and re-institutionalization issues.

While the MHSA Housing Program does not currently include an income restriction, a county may desire to impose an income restriction in connection with MHSA housing units that it finances directly. In the event a county wishes to require that all or a majority of residents in an MHSA development be low-income, Article XXXIV of the California Constitution may require voter approval of the project. In some instances, Article XXXIV requires voter approval when a public agency, such as a county or city restricts occupancy of a majority of housing units in a project to low-income tenants. However, many jurisdictions possess Article XXXIV "authority", which allows a project to move forward without voter approval. In other cases, exceptions to Article XXXIV exist that allow a jurisdiction to avoid Article XXXIV vote requirements. Developers should consult with housing officials within their jurisdictions, and/or obtain assistance from experienced legal counsel, before including income restrictions on a majority of residents in MHSA sites.

4. How Is Eligibility To Reside In MHSA-Funded Housing Verified?

As discussed in Chapter 3, Question 1 below, housing providers are limited in the types of questions that they may ask tenant applicants. With respect to an applicant's disability, a provider may only ask whether the applicant is disabled and may not ask about the nature or severity of the disability. Because of this limitation, a housing provider should not try to determine on its own if an individual has a serious mental illness that will make the individual MHSA-eligible. Instead, a housing provider should rely on a certification of MHSA eligibility from the county mental health division in which the housing is located or from the county's designee. The MHSA Housing Program requires that developers who apply for MHSA Housing Program funds describe and include evidence of the applicable county's MHSA eligibility certification process. (See Section D.3 ("Tenant Selection Plan") of the MHSA Housing Program Application and the attachment entitled "Additional Guidance for Counties on Tenant Referral and Certification.")

5. May MHSa Funding Be Combined With Project-Based Section 8?

Yes, a provider may use MHSa funding in a development that is also assisted by Project-Based Vouchers (formerly called project-based Section 8) and may be able to provide preferences to MHSa-eligible applicants. To combine MHSa funds with Project Based Vouchers ("PBV"), providers will need to coordinate with the appropriate Public Housing Authority ("PHA") to ensure that the MHSa occupancy requirements are compatible with the PHA's Administrative Plan and tenant referral practices.

PBV subsidies are administered through PHAs. Developers of MHSa-housing should contact the appropriate PHA to determine if and how PBV subsidies are being administered within their jurisdiction. To implement Project-Based Vouchers, a PHA may need to amend its PHA Plan and submit it to HUD for approval, identifying plans to implement Project Based Vouchers and their policies for that implementation.

HUD regulations governing Project-Based Vouchers include waiting list requirements that govern the selection of tenants, and provide PHAs with the following options (24 CFR 983.251(c)):

- 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 combining MHSa funds with Vouchers will likely be to request a site-based waiting list. A site-based waiting list would allow a provider to limit the waiting list to persons with disabilities and to give a limited preference for MHSa-eligible households. 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 limited to the preference population. 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 a lesser opportunity to benefit from Vouchers.

If the Project Based Vouchers are issued with an authorization for the owner to limit occupancy to disabled households, the owner may establish preferences for disabled households who are in need of the services offered at the housing, if the preference is limited to such families and individuals (24 CFR 983.251(d)):

- (a) with disabilities that significantly interfere with their ability to obtain and maintain housing;
- (b) who would not be able to obtain or maintain housing without appropriate supportive services; and
- (c) 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. The prohibitions on granting preferences to persons with specific diagnoses or disabilities (at 24 CFR 982.207(b)(3)) applies as well. In advertising the project, the owner may advertise the project as offering services for a particular type of disability, but the project must be open to all otherwise eligible

persons with disabilities who may benefit from the services provided. (24 CFR 983.251(d)). As such, projects may not exclusively limit occupancy of these units to persons with serious mental illness.

6. May MHPA Funding be Combined With Shelter Plus Care Assistance?

Yes, and project owners may find it easier to combine MHPA restrictions with Shelter Plus Care assistance than with Project-Based Voucher assistance. This is because the Shelter Plus Care program is limited by statute to homeless persons with disabilities, and one of the target groups listed in the statute is persons who are "seriously mentally ill" (42 U.S.C. 11403g). The Shelter Plus Care regulations authorize housing providers to establish an admissions preference for one or more of the "statutorily targeted populations," but also state that "other eligible disabled homeless persons must be considered for housing designed for the target population unless the recipients can demonstrate that there is sufficient demand by the target population for the units, and other eligible disabled homeless persons would not benefit from the primary services." (24 CFR 582.330). In other words, the regulations indicate that a housing provider must, in most circumstances, permit occupancy by any disabled person who is not a member of the targeted group. In practice, administering jurisdictions report that their contracts with HUD require occupancy by only the selected target group 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 work out individualized referral systems for particular projects.

7. May MHPA Funding Be Used With HUD's Section 811 program?

Project owners may also be successful in combining MHPA funds with HUD's Section 811 program. 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 (42 U.S.C. 8013(i)(2)). The HUD Section 811 handbook specifically identifies chronic mental illness as a disability for which occupancy can be limited. The definition of chronically mentally ill under the Section 811 should generally be compatible with the definition of MHPA-eligible adults. (See HUD Handbook 4571.2.) Approval of the Secretary to serve a particular category of disabled persons typically comes in the Section 811 reservation of funds letter delivered by HUD to housing providers.

Despite the fact that the HUD handbook permits housing providers to limit occupancy to people with chronic mental illness, housing providers are cautioned that the HUD regulations implementing Section 811 state that even where the Secretary of HUD has approved limiting the housing to people with a similar set of disabilities, the housing provider must permit occupancy by any qualified person with a disability who could benefit from the housing and/or the services provided, regardless of the person's specific disability (24 CFR 891.410 (C)(2)(ii)). In practice, the handbook requirements appear to prevail over this provision of the Section 811 regulations: 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, additional approval from HUD will be required to admit that person.

Finally, HUD regional offices sometimes provide different interpretations of statutory requirements. HUD staff sometimes raise concerns when local government funders impose occupancy restrictions on Section 811 and 202 projects that require some or all of the units in a project to be occupied by persons with lower incomes than the very-low income requirements imposed by HUD. In these instances, HUD staff have questioned project feasibility because extremely low income tenants will cause a project to "use up" its budgeted Project Rental Assistance Contract ("PRAC") operating subsidy allocation more quickly (the PRAC is used to pay the difference between

tenant rents, which are 30% of actual household income, and HUD-approved operating costs). This issue could be raised if a county imposes an extremely low income requirement when using MHSA funds or if HUD views the homeless targeting requirement of the MHSA Housing Program as likely to result in a preponderance of extremely low income tenants. If HUD staff raise concerns in MHSA-funded projects, the concerns will need to be resolved on a case by case basis.

8. May Housing Be Financed With Low Income Housing Tax Credits And MHSA Funds?

Housing may be financed with both low income housing tax credits and MHSA funds; however, certain special issues may arise if these two programs are combined. Tax credit investors, whose primary goal is to preserve the tax credits generated by a project generally will take a conservative approach in interpreting tax law and regulations relating to issues that arise in supportive housing projects which may affect their tax credits, including fair housing issues. Special issues that may arise when combining MHSA funds with tax credits include:

- (a) Restriction of Units to MHSA-Eligible Households. Only residential rental units that are "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 this requirement is met if the unit is rented in a manner consistent with HUD policy governing non-discrimination, as evidenced by HUD rules and regulations, and so long as the unit is not limited only to members of a particular social organization or provided by an employer for its employees. 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. As persons with serious mental illness (and children with serious emotional disturbances) are members of a specified group for which the Mental Health Services Act supports housing, a restriction of some or all units in a project to MHSA-eligible households would not automatically cause a project to fail the "public use" requirement. However, it is still necessary to analyze MHSA restrictions in tax credit projects on a case by case basis, using the Fair Housing Act analysis described under Chapter 2, Question 1 above. If only a relatively small percentage of units in a tax credit project are restricted to occupancy by MHSA-eligible households, this restriction is not likely to jeopardize the project's tax credits. Finally, in tax credit projects, developers may be reluctant to hold MHSA-restricted units open if no MHSA-eligible households are available to move in; consequently, providers will need an aggressive marketing, referral, and waitlist program to ensure that MHSA-restricted units can always be rented to eligible households.
- (b) Master Leasing of MHSA Units. If MHSA funding has been provided for a tax credit project, the provider may wish to lease designated units in the project to a mental health service provider who will then arrange and manage group occupancy of the unit by MHSA eligible persons in a shared housing type of situation. This practice is called "master leasing" because the social service provider will hold a "master lease" on the unit and then will sublease the unit to MHSA eligible individuals who live together as one household. 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 all low income housing tax credit requirements are met with respect to the actual occupants of the unit. In particular, the aggregate income of all unit occupants and the aggregate rent paid by all unit occupants cannot exceed the applicable tax credit rent and the occupants cannot all be full time students, as defined by the IRS (see discussion in (c) below).

Unfortunately, a relatively new position of some IRS staff concerning the "available to the general public rule" has caused some ambiguity in the practice of master leasing in tax credit projects. The publication

of a revised Guide for Completing Form 8823 Low-Income Housing Credit Agency Report of Noncompliance or Building Disposition, by the IRS in February of 2007, resulted in some IRS staff taking the position that any "exclusionary criteria that limits access" to tax credit units violates the "available to the general public" rule and makes such units ineligible for tax credits. The IRS chief compliance officer has stated that she deems master leasing as an "exclusionary" practice which limits access to tax credit units. However, staff at the California Tax Credit Allocation Committee (TCAC) have indicated that TCAC does not agree with this interpretation and that master-leasing of units will not, in and of itself, result in a compliance violation. TCAC will require, however, that any master leased units be subleased to qualifying tenants pursuant to rental arrangements that ensure the tenants have standard tenant protections.

Readers should note that the MHPA Housing Program prohibits master leasing of MHPA-funded units; however, counties may permit master leasing when using MHPA funds that do not come through the MHPA Housing Program.

- (c) Full Time Students. A unit will not qualify for tax credits if it is inhabited entirely by full-time student tenants (Internal Revenue Code § 42(i)(3)). 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. Finally, there are 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 (see IRC § 42(i)(3)(D)(i)). 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 the July 30, 2008.

It is important to note that it is possible, with advice from knowledgeable legal counsel, to structure occupancy of a tax credit unit so that at least some tenants can be enrolled in school without causing the unit to lose its tax credit eligibility, so a blanket prohibition against student status is overbroad and should not be imposed on the unit by the investor or provider.

9. May MHPA-Funded Housing Be Restricted To MHPA Eligible Households Referred From The County Or Another Social Service Organization Or To MHPA Eligible Tenants Who Are Enrolled In A Full Service Partnership Program?

Generally, MHPA-funded housing units can be restricted to MHPA-eligible households referred from one particular social service organization or county full service partnership if the referrals are part of an overall county referral plan that is balanced and, taken as a whole, does not have a discriminatory disparate impact on any protected class of people.

MHPA-funded housing is required to comply with the priorities identified in the particular county's Community Services and Support portion of the three year plan. Presumably each county's plan will identify a target

population most in need of MHSA services. MHSA housing providers are expected to serve this targeted population. However, the requirements of fair housing laws may not always allow providers to meet the priorities of a particular county. For example, a county may identify men of a particular ethnic group as the most in need and expect housing providers applying for MHSA funds to serve this population. The fact that a county has identified a particular segment of the population as most needing services will not insulate a housing provider from fair housing liability. Social service agencies providing services to the MHSA-eligible population who desire to expand their services to include housing, may face similar fair housing challenges if their target population is restricted to a particular ethnic or cultural group, gender, or other category triggering fair housing protection.

Fair housing and civil rights laws prevent discrimination in housing on the basis of race, color, religion, national origin, gender, familial status, disability, sexual orientation and source of income. Under the limitations of the fair housing laws, any restrictions in housing that intentionally discriminate based on one of the above classifications is illegal, although, as noted in Chapter 2, Questions 1 and 2 above, fair housing laws do not necessarily prohibit housing providers from discriminating in favor of MHSA-eligible households. Additionally, any restriction or policy that unintentionally discriminates against members of one of the above classifications may be found to have a "disparate impact" on a protected class and therefore be found to violate fair housing laws.¹¹

Under fair housing laws, a housing provider targeting its housing to conform to the county-identified priorities or to clients of a particular social service organization may only do so if (a) there is no intentional exclusion of members of a protected class; (b) there is no disparate impact on members of a protected class, unless the disparate impact is caused by a facially neutral practice that furthers a legitimate business necessity; and (c) the tenant selection practice is not "arbitrary" under the California Unruh Act. These conditions may be difficult to satisfy if a provider limits housing to the priority population identified by a county or to the clients of a particular social service agency.

For example, consider a county where the Community Services and Support Plan identifies as the priority population Hispanic men because they are identified as a separate, unserved or underserved group. A provider accessing MHSA funds for housing may be expected to target the county-identified priority population. However, in this situation, the provider would be violating fair housing laws by the intentional exclusion of both women and ethnic groups other than Hispanics. Even a program that is targeted rather than restrictive would violate fair housing laws if the targeting is based on any of the classes protected by fair housing laws. Despite the fact that certain ethnic groups or genders are underserved and in great need, the fair housing laws do not recognize any concept of affirmative action that would override the prohibitions on marketing and restricting housing on the basis of ethnic groups or gender.

Housing providers limiting housing to applicants referred from a county or a particular social service organization should also consider whether the process used by the county's mental health department or the social service provider to select clients to refer to the provider has a disparate impact on any protected class. Some outreach and screening policies may result in certain ethnic groups being excluded unintentionally. 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 designated by a county to provide MHSA-funded services 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 a particular ethnic group may deter MHSA-eligible persons from other ethnic groups from using that agency's services. The result could be that certain protected groups are unintentionally excluded from the MHSA-funded housing resulting in a disparate impact on those groups. In this

¹¹ In determining whether or not certain classifications of people are excluded from a housing program, the housing provider should compare the demographics of the population intended to be served to the general public of the applicable county or broader market area.

example, the housing provider may face liability for fair housing violations if there is no business necessity justifying the housing provider's acceptance of referrals from a particular provider that results in the disparate impact. If the county has identified the social service provider as its designee for screening MHSA-eligible persons because the designee has been judged as the most competent provider to do this, this may serve as a legitimate business justification and overcome the disparate impact. However, it should be noted, that the issue of whether a county-imposed priority creates a legitimate business purpose sufficient to overcome a disparate impact claim, is untested. Generally, in order to overcome a finding that a policy has a disparate impact, the business justification must be compelling and the policy must be very narrowly drafted to serve that business interest.

As the above discussion illustrates, the intersection of housing and social services does not always result in a clear legal process for housing providers or counties administering MHSA funds to follow. Fair housing laws applicable to housing providers do not always inform decisions made by social service providers or counties in determining the best method of serving the MHSA-eligible population. A housing provider accessing MHSA funds will need to carefully review the county's identified priorities as well as the underlying selection process for any referrals from counties or social service agencies to determine if they result in intentional or unintentional violations of fair housing laws.

The above example also illustrates the differences between the analysis a county may undertake in crafting the Community Services and Support Plan and the analysis a housing provider must consider in establishing a housing program using MHSA funds. The county that designates the social service provider in the above example may have a variety of priorities for funding throughout the county, which may vary depending upon needs in different parts of the county. The county may designate a variety of service providers and establish goals for certain targeted populations that, when examined from the perspective of the county's entire program, do not result in discrimination. The county's allocation of funds to a particular housing provider may be just one piece in its much larger county-wide housing program that addresses needs of the population experiencing mental illness as a whole. However, the housing provider in the above example is using these funds in a single housing development, resulting in the exclusion by that particular housing provider of a protected segment of the population from housing benefits. The housing provider's risk under fair housing laws is much greater due to the limited nature of its program than the county's.

In the situation where the housing provider is required by the county to accept referrals from one particular service provider (who is also designated to provide services for the project), the provider may well have a legitimate business purpose that can overcome a disparate impact claim. It should be noted, however, that if the service provider intentionally discriminates against a protected class, then a claim of intentional discrimination (rather than a disparate impact claim) could be filed against the housing provider and the legitimate business purpose defense would not be available.

When combining MHSA funds with other sources of local, state or federal funds, even where there is no violation of fair housing or civil rights laws, funding program and policy requirements may prevent a provider from relying exclusively or primarily on referrals from the county or particular social service organizations. For example, many funding programs have affirmative fair housing marketing requirements. 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 prohibit a housing provider from giving advantages to county-referred clients. HUD programs generally prohibit participating providers from granting special preference to clients of the provider. Social service organizations providing housing to the MHSA-eligible population should carefully review their target population to ensure that there is not an unintentional discriminatory impact of a preference in any housing provided. Housing providers should also consider whether relying upon referrals from a single service provider or

even multiple service providers for their MHPA units violates the MHPA prohibition on mandatory services. Although in this situation the housing provider is not mandating the services, an MHPA tenant may argue that the requirement for a service agency referral is a backdoor method for mandating services. Some practitioners believe relying on referrals from a single service provider violates the MHPA prohibition on mandatory services.

10. Should A Housing Provider Designate Specific MHPA Units?

To avoid discrimination claims that may arise from segregating MHPA-eligible households, housing providers must make efforts to disperse and integrate MHPA units throughout a development. Efforts must also be made to ensure that MHPA-funded units are of comparable size and quality to other units in the development.

Housing providers should also avoid designating specific units as MHPA-eligible units. For example, if an MHPA-eligible household no longer qualifies as MHPA-eligible due to death of the eligible person or due to the eligible person's vacation of the unit, a provider may want the flexibility to permit the remaining members of the household to continue to occupy a unit and to classify another unit as an MHPA-eligible unit. As another example, if a housing provider designates certain units as MHPA units, but an MHPA-eligible household desires to reside in another unit, the housing provider will violate fair housing laws if the MHPA-eligible tenant meets the qualifications to rent that other unit and the housing provider tries to limit the household's occupancy to designated MHPA units.

11. May A Housing Provider Maintain Separate Waiting Lists For Different Populations, Including MHPA-Eligible Populations?

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 are financed with MHPA funds. The housing provider may seek to maintain two waiting lists, one for MHPA-eligible households and one for other households. This approach facilitates the housing provider's leasing process: when an MHPA-eligible unit is vacant, the applicant at the top of the MHPA waiting list is offered the unit, and when a non-MHPA unit is vacant, the applicant at the top of the general waiting list is offered the unit.

The problem with this approach is that it could have the effect of penalizing persons on the MHPA waiting list (who are a protected class under the fair housing laws) because they are not being offered the non-MHPA units. Such an approach may result in discrimination against MHPA-eligible households. A more defensible approach would be to maintain a single waiting list in which an applicant's MHPA-eligibility is noted: when an MHPA-assisted unit is vacant, the highest MHPA-eligible applicant on the waiting list is offered the unit, and when a non-MHPA unit is vacant, the applicant at the top of the waiting list (whether or not MHPA-eligible) is offered the unit. Another defensible approach would be to maintain a separate MHPA waiting list, but also to permit MHPA-eligible applicants to apply for the general waiting list as well as the MHPA waiting list.

12. Are There Special Legal Issues Associated With Marketing Units Financed With MHPA Funds?

Both the federal Fair Housing Act and the state Fair Employment and Housing Act prohibit discriminatory advertising and make 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, and source of income (42 U.S.C. 3604(c); California Government Code § 12955(c)). 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 making the advertisement. 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. Fair housing advertising guidelines used to be included in HUD regulations located at 24 CFR Part 109, but were repealed with the intent that they be republished in a HUD handbook. This has not yet occurred.

While the Fair Housing Act regulations authorize housing for seniors to advertise as such, there is no similar authorization to advertise housing for people with disabilities. Logically, if a project's admission requirements do not violate fair housing laws, those requirements should be permitted to be included 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 (i.e., "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.

Providers combining MHSA funds with federal funds should also be aware of any affirmative fair marketing requirements that may be imposed by the particular funding program. Affirmative marketing is project advertising which is designed to reach underserved classes of people. HUD's Affirmative Fair Housing Marketing regulations were published in 1972 and 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. 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: (i) a project to be publicized to minority persons using minority media and other minority outlets; (ii) the use of the HUD equal opportunity logo or slogan in all advertising and literature and posting in conspicuous locations; (iii) maintenance of nondiscriminatory hiring policy so that staff will include people of majority and minority groups and both genders; (iv) oral and written instruction to employees and marketing agents on non-discrimination and fair housing; (v) and solicitation of eligible applicants for housing reported to HUD offices.

In addition to the general HUD Affirmative Marketing Regulations, some HUD financed programs, such as HOME, HOPWA and various McKinney Act programs have their own specific affirmative fair marketing requirements. HUD's Limited English Proficiency Guidance may also require that providers translate marketing materials in order to ensure that the housing is accessible to populations with limited English.

It should be possible to comply with affirmative marketing requirements in a project designated for MHSA-eligible persons if the project is structured in a manner that does not violate fair housing law. If units in a project are lawfully restricted to MHSA-eligible households, including compliance with the fair housing laws and Section 504, as discussed above in Chapter 2, Questions 1 and 2, the affirmative marketing plan may provide for affirmative marketing within the targeted disability group.

13. May A Housing Provider Disclose To Other Tenants That A Tenant Is MHSA- Eligible Or Resides In An MHSA Unit? May A Housing Provider Disclose That Certain Units Are Financed With MHSA Funds?

A housing provider should never reveal to other tenants that a particular tenant has a particular disability, unless such disclosure is specifically authorized by the tenant with the disability. However, this prohibition does not mean that the provider may not reveal in marketing materials that the project or some number of units in the

project are targeted to specific populations or limited by funding sources to tenancy by a particular group of disabled persons. Moreover, if one application is used, applicants are likely to notice questions that pertain to MHSAs eligibility.

Under federal and state privacy laws, you are required to keep confidential any personal information about a person that you obtained in a confidential manner or from a confidential source. If the tenant with the disability gives the housing provider permission to reveal the information either to other tenants or to service providers, the housing provider should ensure it is in writing. Then the housing provider can inform other tenants, but caution should be exercised that any information is disclosed only to people authorized to receive the information by the tenant. Additionally, the information disclosed 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, which are required as part of the MHSAs Housing Program. Peer counseling and other tenant-to-tenant programs may inadvertently result in disclosure of private information.

In addition to general privacy concerns that would compel a housing provider to keep confidential information about a tenant's disability, MHSAs housing providers should be concerned about the requirements of the Health Insurance Portability and Accountability Act (HIPAA) which may regulate the disclosure of information regarding a tenant's condition. HIPAA regulates the transmittal of information regarding health care via electronic means. The entities covered by HIPAA include any entity that provides health care, including counseling services related to physical or mental conditions. Although HIPAA was primarily intended to apply to health insurers and medical providers, the broad definitions in the statute could be interpreted to apply to supportive housing providers engaging in counseling and other supportive service activities with 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, it might be wise for supportive services providers to have residents using services complete HIPAA type release forms.

CHAPTER 3: SELECTION OF INDIVIDUAL TENANTS

1. What Questions May A Housing Provider Ask of Applicants For MHSA Units?

The Fair Housing Act Regulations set forth questions that may be asked of applicants for housing (See 24 CFR 100.202). These questions are limited to the following categories:

- Inquiries into an applicant's ability to meet the requirements of ownership or tenancy. (Presumably this would include inquiries into such things as income if the housing is income restricted and age if the housing is limited to seniors.)
- Inquiries to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap. (Presumably this would include inquiries as to whether or not someone is MHSA-eligible.)
- Inquiries to determine whether an applicant is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap.
- 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.

If these questions are asked of any applicant for an MHSA unit, then they should be asked of each applicant for a housing unit in the development, regardless of whether the housing provider believes the applicant qualifies for an MHSA unit. The broad areas of permissible inquiry obviously leave many unanswered questions regarding screening of applicants and do not provide any guidance on verifying any information provided by the applicant.

The first step in establishing a tenant screening process is to review procedures to determine whether the information being requested 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.

If a person is applying for an MHSA housing unit, the housing provider may ask the applicant to document or provide a certification of MHSA eligibility. If the applicant provides the requested certification of MHSA eligibility, the housing provider should not further inquire into the severity of the disability or the applicant's medical status. Since fair housing laws prohibit a housing provider from asking for medical records, asking questions about an applicants' medical condition or requiring any verification other than a doctor's or medical professional's letter stating that the applicant is disabled, housing providers should not attempt to determine if someone is MHSA-eligible on their own. They should rely on a certification from a county or from a medical professional.

2. Can A Housing Provider Use A Different Application For An MHSA Unit?

Housing providers offering MHSA-financed units will need to determine if an applicant for such unit is MHSA-eligible. Despite the fact that MHSA-eligible households must provide a certification of their MHSA eligibility, housing providers should use one application for all units in the development. This application could list the qualifications for all housing in the development, including the qualifications for the MHSA units. A single application is preferable to a separate application for MHSA-eligible households since determining which application to provide to an applicant would require the provider to make an assessment of whether the applicant is qualified for an MHSA unit before the application is complete. Such a determination in itself can lead to

discrimination claims. (See Chapter 3, Question 2 below for more information regarding applications.)

3. What Is “One Strike” And How Does It Apply To MHSA Units During The Application Process?

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.¹² 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 which 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. If MHSA funds are combined with any of these HUD-administered funds, One Strike policies will apply. One Strike policies do not currently apply to HOME, CDBG funds, 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 Section 8, 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 requires housing providers to create admission standards, but the rules grant housing providers discretion in their admission decisions. In fact, One Strike does not require blanket exclusions for all individuals with histories of criminal and/or drug activities. Under One Strike:

- Housing providers must prohibit admission to 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

¹² 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.

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, and for Tenant-Based Section 8 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 the Section 514 and 515 to determine how One Strike arises in 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 of 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 households 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. (24 CFR 5.852.)

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 period¹³ before the admission decision during which the applicant must not have engaged in the prohibited criminal activity.

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.

It is important to note that One Strike regulations do not require a criminal conviction in order 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 be certain to 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. As such, providers should have at least "reasonable cause" to believe that an applicant is actually engaging in illegal drug use or has a history of drug or alcohol abuse that will threaten the health, safety and right to peaceful enjoyment of the premises by other residents, prior to denying admission to an applicant. Providers are cautioned against relying exclusively on arrest records to make a determination concerning previous criminal activity by an applicant, given the racial and ethnic bias that is often reflected in arrest patterns.

Denial of admission decisions may be appealed by program applicants, and PHAs and housing providers are also granted discretion to reconsider an applicant who has previously been denied admission. Housing providers should review HUD Handbook 4350.3 Chapter 4, Section 2 for requirements concerning reconsideration. Housing providers combining MHSA funds with any of the programs to which One Strike regulations apply will want to tailor their One Strike policies to allow latitude for the MHSA-eligible population.

One Strike issues often arise in mixed-financed projects where some units are federally funded and subject to One Strike while other units do not receive federal funds and thus are not subject to One Strike. In such a

¹³ 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".

situation, rather than have multiple admission policies, all applicants should be provided with the same application which may include questions related to One Strike 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.

Information regarding how One Strike is applied during tenancy is discussed in greater detail in Chapter 5, Question 4.

4. May A Housing Provider Prohibit Admission To An MHSA-Eligible Household If A Member Of The Household Is A Registered Sex Offender?

Admission of sex offenders to MHSA units may be prohibited if the One Strike rules described in answer to Chapter 3, Question 3 above apply. Even if the One Strike rules do not apply, housing providers may still prohibit admission of sex offenders if necessary to protect a person at risk.

California's Megan's Law requires certain sex offenders to register with the law enforcement agency of the city in which they reside (California Penal Code §§ 290 and 290.4). The California Department of Justice is required to compile this information and make it available through a "900" telephone number, CD-ROMs at local police stations, and the Internet (collectively, the "Megan's Law Database"). Members of the public may access the Megan's Law Database to determine if a particular individual is a registered offender. Pursuant to Megan's Law, police officers are permitted to disclose certain information regarding registered sex offenders to the community if the police determine that the registered sex offender is a risk to a child or person (California Penal Code §§ 290 and 290.45). The law, however, prohibits the use of information from the Megan's Law Database for purposes relating to housing, except to protect a person at risk. The federal One Strike rules preempt this prohibition on the use of the Megan's Law Database for housing purposes for those units subject to One Strike.

If One Strike is not applicable, then California law will control. Housing providers seeking to prohibit admission of sex offenders face a few hurdles. First, housing providers may only use information regarding sex offenders obtained from Megan's List to protect a person at risk. Housing providers desiring to exclude sex offenders should obtain the information regarding the individual status as a sex offender from sources other than Megan's List, such as criminal records. Second, it is uncertain how the courts will view a landlord's prohibition of sex offenders. The California Attorney General has issued an opinion stating that the provision which prohibits the use of Megan's List for housing decisions, except when necessary to protect a person at risk, does not make sex-offenders a protected class (see California Attorney General Opinion No. 5-301). The courts have not yet weighed in on this issue. Moreover, the California Attorney General did not opine as to whether prohibiting admission of sex offenders would be deemed arbitrary and therefore impermissible under California's Unruh Act. Given the lack of legal clarity as to treatment of sex offenders with regards to housing decisions, housing providers should be careful to craft tenant selection policies that factor in both the risks the particular applicant may pose, as well the obligation a housing provider may have to protect other tenants in the development.

Housing providers should also be aware that California's "Jessica's Law" (also known as Proposition 83), which was enacted by the voters of California in November of 2006, bars any person required to register as a sex offender from living within 2,000 feet of any school or park where children regularly gather (Cal. Penal Code 3003.5). Certain high-risk sex offenders are subject to an even greater distance requirement of 2,640 feet from a school or park. One federal district court ruled that Jessica's law could not be implemented against sex offenders who were convicted, paroled, given probation or released from incarceration prior to the law's effective date.¹⁴

¹⁴ Doe v. Schwarzenegger 476 F. Supp. 2d 1178 (2007).

5. May A Housing Provider Prohibit Admission To An MHSA-Eligible Household If A Member Of The Household Has A Criminal Record?

A housing provider may deny housing to a person with a record of criminal convictions, as opposed to arrests, if the convictions 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 or otherwise relates to an applicant's ability to meet tenancy obligations. 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 others in the development. 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. If the housing is subject to One Strike, applicants with certain criminal convictions must be excluded, as discussed in response to Chapter 3, Question 3 above.

6. May A Housing Provider Rent An MHSA Unit To A Parolee?

No. Welfare and Institutions Code Section 5813.5(f) prohibits the use of MHSA funds for parolees from state prisons. The DMH Regulations prohibit the use of MHSA funds for parolees from state and federal prisons (9 California Code of Regulations 3610). People who are on probation after serving terms in county jails, and who are not on parole are eligible for MHSA funds.

7. Should Existing Tenants Assist In Selecting Future Tenants?

A housing provider is responsible for tenant selection decisions regardless of who conducts the screening process. So, if there is a tenant selection committee, the housing provider will be liable for any unlawful discrimination by the committee. This liability cautions against using tenant selection committees for pre-screening since the housing provider loses control in the initial selection process and the process may be affected by the tenants' individual prejudices, while the housing provider will still face all of the risk of decisions that go awry. Additionally, in the context of MHSA-funded housing, where applicants must be MHSA-eligible, the information on the tenant's qualifying status may be confidential and under general privacy laws as well as HIPPA should not be disclosed to other tenants.

In certain housing, housing providers may want to include tenants as part of the screening process, with the ultimate decision resting with the professional housing 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, the tenant screeners should only be provided information about the applicant that is not confidential, so information regarding the applicant's mental health history should not be disclosed to the tenant screeners. When tenants are involved, they should receive training on antidiscrimination laws and the tenant selection procedures should clearly indicate that the screening committee is only advisory.

Housing providers of unlicensed shared housing may be required to permit tenants to advertise for and select co-tenants. As discussed in Chapter 5, Question 1, supportive housing as defined by Health and Safety Code Section 1504.5 provides an exception to the community care licensing requirements. In order to qualify as supportive housing under Section 1504.5, a tenant must have his or her own room or apartment and be individually responsible for arranging any shared tenancy, which mandates some degree of tenant participation in an approval of the selection of roommates. Since the MHSA Housing Program will only fund unlicensed facilities, housing providers will need to craft tenant screening programs for shared housing, carefully taking into account privacy and liability issues.

8. What Happens If A Housing Provider Cannot Find a Qualified MHSA-Eligible Tenant To Reside In An MHSA Unit?

Owners will need to avoid renting MHSA units to households who are not MHSA-eligible. Housing financed with MHSA funds is intended to be occupied by MHSA-eligible households. Permitting a non-MHSA-eligible household to reside in an MHSA unit is likely to lead to default under MHSA financing documents, legal claims, and requests for the return of MHSA funds. Owners with MHSA units will need to engage in diligent marketing efforts and work with social service providers to ensure MHSA units are filled in a timely manner. As described in greater detail in Chapter 5, Question 8, the MHSA Housing Program will reduce its subsidy if an MHSA unit is left vacant or if the MHSA-eligible household member vacates the unit. Counties financing MHSA units on their own will have to develop their own procedures regarding vacancies, but they are likely to mirror the MHSA Housing Program requirements.

9. May A Housing Provider Restrict Occupancy To MHSA Units On The Basis Of Age?

Yes, a housing provider may restrict occupancy based on age in limited circumstances. MHSA housing providers may want to develop housing restricted to certain age groups such as seniors or youth. Age restrictions generally violate Fair Housing laws and HUD regulations. However, there are specific exceptions under both federal and state fair housing laws that allow for senior housing and additional exceptions under state law that allow for youth housing. MHSA housing providers will need to comply with these specific fair housing requirements to age-restrict housing.

The definition for "Older Adult" used for MHSA purposes differs from the definition of "senior households" in the fair housing laws. The MHSA Act references the state definition of "Older Adults," which defines older adults as at 60 years old or older. Conflicting fair housing laws require that persons residing in a senior housing development of fewer than 35 units be 62 or older. If a development has 35 or more units, at least one person in each unit must be 55 or older.¹⁵ California Civil Code, Section 51.3 characterizes this type of larger development as "Senior Citizen Housing Developments." The MHSA definition of "Older Adult" (which sets the age limit at 60 years of age or older) for determining qualifications for housing would not comply with the fair housing law exceptions that allow for senior housing. Housing providers desiring to provide senior housing for MHSA-eligible persons should, therefore, age-restrict housing in accordance with the fair housing laws, rather than the MHSA definitions for Older Adults.

Housing providers may also want to provide housing targeted to transition age youth, which is one of the underserved populations targeted by DMH in its draft regulations. As defined in the MHSA Housing Program and the DMH MHSA regulations, transition age youth are youth aged 16 to 25 (Welfare and Institutions Code § 5847(c)). The age limits established by the Housing Program and DMH are slightly inconsistent with California Government Code Section 11139.3, which permits housing to be limited to certain transition age youth and was enacted so that housing for transitioning youth could be provided in compliance with fair housing laws. Government Code 11139.3 defines "Homeless Youth" as persons not older than 24 year of age who are (i) homeless or at risk of homelessness (ii) no longer eligible for foster care on the basis of age or (iii) have run away from home. Where a youth under 18 years of age has been emancipated and is homeless or at risk of homelessness, he or she is also defined as a "Homeless Youth" under Section 11139.3. Without Section 11139.3, housing providers would not be able to limit their housing to young adults without violating the Unruh Act and the Federal Age Discrimination Act.

¹⁵ Developments with over 35 units may be occupied by persons 62 years of age or older, but such developments must be exclusively occupied by persons 62 years of age or older.

Therefore, in developing housing programs for transition age youth, housing providers must comply with requirements of Government Code Section 11139.3, even though its definition of transition age youth is different from the MHSA Housing Program and DMH definition. In particular, in establishing tenant selection criteria, housing providers should ensure that at the time of application each tenant is (i) homeless or at risk of homelessness (ii) no longer eligible for foster care on the basis of age or (iii) have run away from home. In addition, even though DMH defines transition age youth as youth between 16 and 25 years old, housing providers should ensure that their tenant selection criteria is limited to persons between the ages of 18 and 24 (with the exception that youth between the ages of 16 and 18 may be admitted if they are emancipated).

MHSA housing providers may target their housing to transition age youth as long as the population targeted meets the criteria set forth in Section 11139.3. The age restrictions set forth in Government Code Section 11139.3 were intended to apply to initial occupancy of the youth. Government Code 11139.3 does not require that housing operated for homeless youth remove residents at the age of 25. Housing providers targeting transition age youth should be cautious about designing a program that requires the eviction of a resident upon reaching the age of 25. Such a requirement may result in age discrimination claims since the sole basis for the eviction would be the age of the resident.

10. May A Housing Provider Provide A Preference To Or Refuse To Rent To MHSA-Eligible Tenants With A Particular Diagnosis?

No, a housing provider may not distinguish between persons with different diagnoses who are MHSA-eligible without violating fair housing laws.

As discussed under Chapter 2, Question 1 above, providers may legally restrict housing units under the Fair Housing Act, the Fair Employment and Housing Act, and the Unruh Act to persons who are MHSA-eligible because state law has created a funding stream dedicated to serving people with serious mental illness and this population is recognized under state law as a discrete population of persons with disabilities who will benefit from a discrete set of services. Housing providers have no legal authority to make distinctions among different diagnoses of MHSA-eligible persons. In addition, housing providers may not refuse housing to MHSA-eligible persons who may have been diagnosed with other conditions (e.g., people with co-occurring, developmental, or physical disabilities).

11. Are “Clean And Sober” Requirements Enforceable in MHSA Units?

Although some “clean and sober” policies may be legal, enforcement can present problems for housing providers and courts may reject evictions based upon violations of such policies. Persons currently using illegal drugs may be excluded from a project, but a housing provider generally cannot require an applicant to be sober. Further, clean and sober requirements are not compatible with Project-Based Section 8 assistance and HUD has suspended Project-Based Section 8 contracts for projects with clean and sober requirements, even though such requirements were imposed through other HUD-funded programs that required operation of a “clean and sober” facility.

Though housing providers can prohibit use of illegal drugs on the premises, alcohol is a legal substance, and alcoholics who are still drinking are persons with a disability. Enforcement of a no alcohol policy may be problematic because housing providers must make reasonable accommodations in the application of rules, policies, and procedures for people with disabilities, “when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.” (Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act. July 2008. http://www.usdoj.gov/crt/housing/final8_1.php.) If a provider tried to evict a tenant for

use of alcohol 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 remain is a reasonable accommodation. However, a housing provider could reasonably argue that, in a clean and sober facility, any waiver of a sobriety rule would be a fundamental alteration of policy and therefore is not a reasonable accommodation.

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 the provider believes is indicative of illegal drug use without having actual proof of the use of drugs on the premises may not be successful.

Additionally, though providers may exclude from a project people currently using illegal drugs, “currently using illegal drugs” is not well defined. The Americans with Disabilities Act provides that “current use” means the use 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.” (28 CFR 36.104.) Courts and housing providers interpret this standard differently.

A carefully crafted policy that sets forth a standard based on evidence and allows potential tenants to rebut these presumptions may prevent some challenges. To maximize the enforceability of a clean and sober requirement, the requirement should be adequately disclosed and explained to potential tenants prior to occupancy, and the policy should be consistently enforced. However, consistent 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 flexible application of clean and sober rules.

Although a court may find waiver of a sobriety rule a reasonable accommodation, repeated requests for waiver of the rule by a tenant may, over the course of time, cease to be seen as reasonable. In addition, a landlord may impose requirements on a tenant as part of a reasonable accommodation, such as attending recovery support meetings or other treatment. Finally, a housing provider can evict for behaviors that interfere with tenancy that may be caused by the use of alcohol, such as excessive noise. But 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.

CHAPTER 4: REASONABLE ACCOMMODATIONS

1. How Do Reasonable Accommodation and Reasonable Modification Rules Apply To MHPA Units And MHPA-Eligible Households?

- (a) What are reasonable accommodation and a reasonable modification? The federal Fair Housing Act and the state Fair Employment and Housing Act prohibit discrimination against persons with disabilities in the provision of housing, but they also go further and create an affirmative duty for housing providers to accommodate persons with disabilities. “Failure to accommodate” is a separate and distinct charge under both laws. In other words, housing providers must make reasonable changes to their rules, policies, and procedures and are also obligated to make or permit reasonable structural changes to housing in order to allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. A “reasonable accommodation” is a change to a rule, policy or procedure made to permit a person to enjoy the benefits of housing on an equal basis. A “reasonable modification” is a structural change to the premises which allows the tenant to enjoy the benefits of the housing on an equal basis.

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.¹⁶ Housing providers must determine what constitutes an undue financial or administrative hardship or a fundamental alteration in the nature of a housing providers program on a case-by-case basis. The HUD Multifamily Housing Handbook provides numerous examples of when a requested accommodation may be unreasonable and suggests that an accommodation may constitute an undue financial burden if it costs so much that project's reserves would be depleted and a rent increase would be required to replenish the reserves within one year. Recent Department of Justice and HUD Joint Statements also provide guidance and examples.¹⁷ Clearly, the provider must make some special provisions for persons with disabilities. Whether or not the provisions are unreasonable will be determined by the particular nature of the request and the particular circumstances of the housing development. Some accommodations or modifications may also place a burden on the tenant to participate or to pay for the modifications.

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 which generally has a broader scope than the Fair Housing Act and Fair Employment and Housing Act provisions, requiring a housing provider in certain instances to pay for necessary physical modifications to a disabled tenant's unit. If non-federal public funds are received, the assisting public agency's obligations under Title II of the ADA

¹⁶ See Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397, 410-12 (1979).

¹⁷ Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications Under the Fair Housing Act, March 5, 2008, at http://www.usdoj.gov/crt/housing/fairhousing/reasonable_modifications_mar08.pdf; Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act, May 14, 2004 at http://www.usdoj.gov/crt/housing/jointstatement_ra.php.

impose a similar reasonable modification requirement on the provider.

In determining what is a reasonable accommodation or modification, courts will balance the financial and administrative burden on housing providers against the benefit to a person with a disability. It is critical that housing providers attempt to understand what accommodations a tenant needs and attempt to provide those accommodations or modifications, if feasible, in order to enable the tenant to enjoy the use and benefits of the housing.

- (b) Reasonable Accommodations During Tenant Screening – MHSA Issues. In the applicant screening process housing providers have two levels of requirements for accommodation. 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 in order to ensure that the applicant has an opportunity to participate in the application process.

The housing provider's second responsibility in applicant screening is to determine if there is a reasonable accommodation or modification available that would allow the applicant to occupy the dwelling, either by physically modifying the housing unit or changing the rules of the program. It should be noted that housing providers do not have an affirmative obligation to ask applicants if they need a reasonable accommodation or modification, but housing providers also should not ignore obvious disabilities. Nor do housing providers have to try to determine what the reasonable accommodation or modification should be. If an applicant requests a reasonable accommodation or modification as part of the screening process, the housing provider is required to consider the request and implement the accommodation or modification if it does not fundamentally alter the nature of the housing program and does not cause an undue financial burden on the housing provider. Additionally, the reasonable accommodation or modification must relate to the applicant's residency in the housing and is designed to enable the applicant to reside in and have full enjoyment of the housing. 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 of the disability and the link between the disability and the requested accommodation/modification. 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, proof that an individual receives SSI, 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 for only a particular disabled population, or unless the specific information relates to the provision of an accommodation.¹⁸

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 to experience disabilities—information

¹⁸ See Robards v. Cotton Mill Associates, 1998 WL 321714 (Me.), June 18, 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).

about the housing provider's duty to make reasonable accommodations and modifications. Additionally, in informing an applicant that the housing provider has rejected the application, a general information statement regarding the availability of reasonable accommodations should be included.

Various reasonable accommodation/modification issues may arise in the screening of MHSA-eligible applicants. Many MHSA-eligible applicants may have a bad tenancy record as a result of their mental disability. Although a negative reference from a previous landlord would typically result in rejection of a housing application, if an MHSA-eligible tenant demonstrates that the previous bad behavior was a result of the mental disability and also provides evidence that the applicant now has programs or services in place that will allow the applicant to reside in the MHSA unit without violating lease provisions, the housing provider may need to waive rules regarding rejection for negative landlord references in order to allow the MHSA-eligible applicant to reside in the unit. Other applicants may have substance abuse issues that result in a poor tenancy record. Rather than reject the applicant, the housing provider may need to focus on the tenant's current behavior and the support programs in place that would allow the tenant to reside in the unit without a repeat of the previous behaviors.

MHSA housing providers may also need to consider applicants who need a greater level of care and supervision than the housing program provides. Providers may ask questions to determine whether the tenant can comply with a lease, and may need to allow accommodations that allow compliance with lease provisions. A provider may exclude someone who cannot comply with these provisions, subject to reasonable accommodation requirements. An applicant requiring care and supervision would have to be allowed to have a care attendant live with them even if such an accommodation required the provider to waive occupancy rules or requirements for occupancy such as age restrictions or requirements that all occupants be MHSA-eligible. Other reasonable accommodations that may be required in a situation where an applicant needs a care attendant may include providing extra keys for the care attendant, providing a parking space for the care attendant and waiving guest and visitor rules in order to allow the care attendant access to the tenant.

- (c) Reasonable Accommodation During Occupancy – MHSA Issues. The obligation to provide a reasonable accommodation to a tenant arises even if the tenant did not disclose the disability during the screening process or the tenant becomes disabled after occupying the housing and requests the accommodation after taking up residency. If a tenant requests a reasonable accommodation, the housing provider may request documentation verifying the disability, but medical records cannot be required. A medical practitioner's or social worker's letter confirming the disability without disclosing the nature or severity of the disability is sufficient. The housing provider may also request that the medical provider indicate whether the reasonable accommodation requested is necessary to allow the resident to enjoy the benefits of the housing. Such an inquiry, though, does not allow the housing provider to request any additional information regarding the disability.

In analyzing a reasonable accommodation request, a housing provider should attempt to determine if the accommodation is necessary to the tenant's equal enjoyment of the housing and whether the accommodation requested is reasonable. Accommodations that infringe on other tenants rights may not be reasonable. Examples of accommodations that may be necessary would include providing additional soundproofing so that a tenant's pacing does not disturb other residents.

Providers should also keep in mind that MHSA-eligible tenants may have multiple disabilities in addition to the mental illness that makes them MHSA-eligible, and that reasonable accommodation may be necessary for an MHSA-eligible tenant for a disability-related reason that is unconnected with his or her mental illness. For example, an accommodation giving a tenant a parking space close to the elevator

may not be necessary for a tenant with mental illness to enjoy full access to a housing unit, but it may be necessary because a tenant with mental illness also suffers from an orthopedic disability.

If a tenant has a substance use problem 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. However, it would not be a reasonable accommodation to allow a tenant to continue the illegal use of drugs on the premises. Current use of illegal drugs is specifically exempted from the definitions of disability, so a current user would not be entitled to a reasonable accommodation solely by virtue of drug addiction. Current use of alcohol, though, is more complicated. Alcoholism is considered a disability under the definitions of disability of the Fair Housing Act. A housing provider may have to accommodate some behaviors that often accompany drinking under the reasonable accommodation requirements, as long as the tenant complies with lease provisions, unless the entire project is operated as a "clean and sober" project (see Chapter 3, Question 11 above). It would not be a reasonable accommodation, however, if a recovering alcoholic requested that the housing provider prohibit all other tenants from using alcohol on the premises, as this would infringe on other tenants' rights and constitute a "fundamental alteration" of the housing program in a building that is not officially "clean and sober."

2. What Procedures Should A Housing Provider Follow If An Applicant For A MHSA Unit Asks For A Reasonable Accommodation?

If a tenant requests a reasonable accommodation, either during the application process or after the tenant occupies the unit, the housing provider may first require that the tenant provide evidence of a disability by verification from a medical profession. For MHSA-funded units, the tenant will already have documentation of mental illness (via the certification process described in Chapter 2, Question 4 above), so the provider need not require the resident to provide additional verification, if the accommodation requested is related to the mental illness. If the accommodation is related to another disability, the provider may ask for documentation from a health care provider that the tenant is disabled in the manner asserted.

Assuming the tenant is disabled, the housing provider will want to inquire about the nature of the reasonable accommodation being requested. As discussed above, the accommodation requested must relate to the tenant's occupancy and use of the housing unit; that is, the requested accommodation must be something that allows this tenant with his or her particular disability to enjoy equal access to the housing unit. Accommodations that are unrelated to the particular tenant's ability to use the unit do not have to be granted. Assuming that the accommodation will assist the tenant in using the housing, the housing provider then needs to examine whether the accommodation will place an undue financial or administrative burden on the housing provider or cause the provider to fundamentally alter the nature of their program. If the housing is not federally funded and thus does not fall under Section 504, the housing provider is not obligated to incur any costs associated with physical modifications to a unit. If the housing is federally funded, the housing provider may have to incur costs associated with a physical modification, such as the cost of installing additional soundproofing in the example above. (Federal funds include, but are limited to, HUD-funded housing programs such as HOME, CDBG, HOPWA, Section 8, Shelter Plus Care and Section 811 programs. Tax credit and bond financing are not considered "federal financial assistance" under Section 504.) In all reasonable accommodation situations, the housing provider must weigh the needs of the individual tenant with the impact of the request on the overall housing program. Thus, if the request will impose an undue administrative and financial burden, or require the provider to change the nature of the housing or service in a fundamental way, the request will be deemed to be unreasonable.

CHAPTER 5: OPERATION AND MANAGEMENT

1. What Kind Of Licensing Requirements Apply To MHSA Units?

The MHSA Housing Program prohibits funding for any developments that require a license. Because of the prohibition in the MHSA Housing Program, providers should be careful in designing their program to ensure that it does not require a license. Housing financed with other, non-MHSA Housing Program funds, may be licensed housing.

Whether or not an MHSA-funded housing development will require a license depends on the type of care and services that are provided to residents of the program and whether or not the supportive housing exception to state licensing laws is applicable. Generally, facilities that provide care and supervision are considered community care facilities and require a license to operate. However, legislation passed in 2002 provides an exception to this licensing requirement for supportive housing if certain conditions are met. In order to determine whether MHSA housing meets the requirements for supportive housing and thus is exempt from the community care licensing requirements, it is important to first understand what a community care facility is.

The term "community care facility" is defined by law as a facility where "care and supervision" are provided. In addition, the term "unlicensed community care facility" is defined by law to include both of the following types of facilities: (i) an unlicensed facility where care and supervision are provided;¹⁹ and (ii) an unlicensed facility that accepts and retains residents who demonstrate the need for care and supervision, even if care and supervision are not provided. "Care and supervision" means any of the following activities provided by a facility to meet the needs of its clients/residents: (1) assistance in dressing, grooming, bathing, and other personal hygiene; (2) assistance with taking medication; (3) central storage and/or distribution of medications; (4) arrangement of and assistance with medical and dental care; (5) maintenance of house rules for the protection of clients (as opposed to for the benefit of the housing provider); (6) supervision of schedules and activities; (7) maintenance and/or supervision of cash resources or property; (8) monitoring food intake or special diets; or (9) providing the basic services required to be provided in a community care facility (22 Cal. Code Regulations 80001).

Health and Safety Code Section 1504.5 provides an exception to the community care licensing requirements for supportive and independent living facilities. In order to qualify for the exception supportive housing must meet the following requirements:

- It is rental housing that is affordable to persons with disabilities;
- Each of the tenants holds a lease or rental agreement in his or her own name and is responsible for paying his or her own rent;
- Each tenant has his or her own room or apartment and is individually responsible for arranging any shared tenancy;
- The housing is permanent, in that the tenant can stay as long as he or she complies with the terms of the lease and pays the rent;
- The housing is subject to state and federal landlord tenant laws; and

¹⁹ In *Grimes v. State Department of Social Services*, 70 Cal. App. 4th 1065, 1071-72 (1999), the court discussed this trigger for licensing. The court ruled that DSS abused its discretion by refusing to exempt from licensing a housing situation in which a person with special needs (who was mentally competent) lived as a tenant in the home of two close friends who provided care and supervision in addition to housing.

- Participation in services is not required as a term of tenancy.

Supportive housing meeting the terms outlined above may provide "community living support services" without requiring a license. Community living support services must be voluntary and chosen by the tenant. Services may include

- Support services designed to develop and improve independent living and problem solving skills;
- Education and training in meal planning and shopping, budgeting and managing finances, medication self-management, transportation, vocational and educational development, and the appropriate use of community resources and leisure activities;
- Assistance with the tenant's individual basic needs such as financial benefits, food, clothing, household goods and housing and locating and scheduling appropriate medical, dental and vision benefits and care.

Section 1504.5 was designed to exclude supportive housing from licensing laws and has resulted in providers achieving a level of confidence that their housing program will not be subject to licensing actions. However, it is important for providers to carefully examine their housing program to make sure that it meets the requirements of Section 1504.5. Some program components could result in providers falling outside the safe harbor of Section 1504.5. Program alterations may be necessary in order to fall within the parameters of the Health and Safety Code Section 1504.5 exemption.

2. May A Housing Provider Require That An MHSA-Eligible Tenant Participate In A Particular Social Service Program?

The Act and DMH Regulations promote voluntary services and a mandatory service requirement would violate the regulations. A provider may not mandate services in supportive housing projects financed under the Program, unless mandatory services are required by another funding agency.

3. May A Housing Provider Require That An MHSA-Eligible Tenant Be Enrolled In A Full Service Partnership?

A Full Service Partnership ("FSP") is a social service program that creates a "collaborative relationship" between a county and an MHSA-eligible person or household where the county plans for and provides mental health and non-mental health services and supports that will help the client achieve certain goals of recovery, wellness and resilience.

The MHSA Housing Program does not require a tenant to be participating in FSP services to be eligible for MHSA Housing Program housing. On the contrary, DMH Regulations promote voluntary services and prohibit a housing provider from mandating participation in services to obtain or maintain eligibility for housing. Therefore, a provider should not require a tenant to participate in a Full Service Partnership. Additionally, counties should consider the voluntary service provision of the Act along with other fair housing issues when developing a tenant referral or selection policy that relies on referrals from Full Service Partnerships.

Participation in an FSP may be required by a tenant's circumstances, even if none of the housing program lenders or the housing provider require participation. For example, if a housing provider rents to an FSP tenant who can only afford the unit because of the rental assistance that may be available as part of the FSP package of benefits, the tenant will lose the rental assistance and may not be able to pay the rent if the tenant chooses not to participate in the FSP. In such a situation where a housing provider would likely evict the tenant for breaching the covenant to pay rent, the tenant may experience this requirement as a mandate to participate in an FSP program; however, this would not violate the DMH Regulations or the MHSA Housing Program Requirements.

4. How Does “One Strike” Apply To MHSA Units During Tenancy?

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 (described in Chapter 3, Question 3 above), 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.

It is important to be aware that under the One Strike regulations: 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. However, housing providers should apply these factors consistently.

5. How Much Information May A Service Provider Share With A Housing Provider About An MHSA-Eligible Tenant During Tenancy?

What information a case manager or service provider releases to a housing manager is not a fair housing question, but rather goes to the professional standards and duties of the case manager. Case managers, be they social workers, nurses, or some other professional designation, all have duties of confidentiality which should not be breached 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 HIPPA which requires the patient to agree to release of information prior to any such release.

Generally, it would be best if the case manager did not disclose information to the housing manager during the tenant screening process. Tenant screening should be based primarily on information that is relevant to the landlord-tenant relationship regarding whether the tenant is capable of meeting the terms and conditions of residency. Without an appropriately obtained waiver of confidentiality, it is also best if the case manager does not disclose information to the housing manager during tenancy. The type of information disclosed would most likely relate to the severity and nature of a client's disability, which is information a housing manager is generally not entitled to request of a tenant either as part of an application process or once a tenancy is established. The fact

that a housing manager possesses such information may open the door for the tenant to allege that the housing 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 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 mental illness, information from a case manager may be useful to the housing manager in his or her day-to-day dealings with the tenant. If the housing manager believes such information would be useful and in the best interest of the tenant, the best course of action would be to request that the tenant waive in writing confidentiality requirements that the case manager may have so that the case manager may provide the housing manager with the necessary information.

6. May A Housing Provider Evict An MHSA-Eligible Tenant For Violations Of The Lease That Result From His Or Her Disability?

MHSA-eligible tenants are entitled to reasonable accommodations both in the tenant selection process and during their occupancy of a residential unit. Reasonable accommodations may require a housing provider to waive rules and conditions of occupancy in order to accommodate the tenant and ensure that the tenant is able to enjoy the full benefits of the housing. Situations may arise where a MHSA-eligible tenant has violated the terms of the rental agreement resulting in the housing provider evicting the tenant. Such an eviction may be prohibited if the violation of the lease is the result of the tenant's disability and waiver of the violation would not fundamentally alter the nature of the housing provider's program. For example, assume an MHSA-eligible tenant violated a term of the lease that calls for the tenant to maintain the apartment to a certain maintenance standard and the tenant's failure to maintain the unit in accordance with the requirements of the lease was a result of the MHSA-eligible tenant's disability. In such an instance, rather than evicting the MHSA-eligible resident for failure to maintain, the housing provider should work with the resident to determine if there is a cleaning service that could be used by the tenant on a regular basis to ensure that the apartment is well maintained. The housing provider is not required to pay for such a service, unless the housing is funded with federal funds, in which case Section 504 may require the provider to incur some costs in order to ensure that the tenant can continue to reside in the apartment. Each situation with regards to lease violations must be considered individually on its merits to determine whether the lease violation was a result of the resident's disability. If the violation was a result of the disability, the housing provider must then consider whether there is a reasonable accommodation that will allow the resident to enjoy the benefits of the housing without causing an undue administrative or financial burden on the housing. Some lease violations may not be overcome by a reasonable accommodation. For example, if the resident is engaging in behavior that is harmful or potentially harmful to other residents, a reasonable accommodation may not be in order.

7. May A Housing Provider Establish Housing Rules Regarding Guests And Curfews?

Reasonable rules and regulations for conduct imposed by landlords for legitimate business purposes are generally legal, unless they violate fair housing laws. Such rules should pertain to the core obligations of tenancy, which include payment of rent, upkeep of the premises, respecting the quiet enjoyment of others, and following basic health and safety rules. Restrictive guest and overnight policies are usually legal and would be allowed under MHSA. However, curfews would not be allowed under MHSA and are questionable under California landlord tenant law.

- (a) Guest Policies. Some supportive housing providers, either at their own behest or at the request of tenant groups, seek to restrict visitors, such as by limiting the number of visitors at one time, denying the right to receive visitors with a reputation for illegal or disruptive activity, charging for guest visits, requiring visitors

to register with a desk clerk, limiting the hours during which visits may occur, or limiting the frequency of overnight guests. These policies are generally legal under state law, but providers should check whether local laws may restrict landlord-imposed guest policies. For example, a local San Francisco ordinance imposes specific standards on landlord-imposed policies restricting guests and overnight visitors; if a housing provider wants to adopt a guest policy that differs from the "model policy" adopted by the city, it must apply for special approval of the policy.

Nothing in California landlord-tenant law prevents a landlord from inserting into a lease agreement a provision to restrict visitors in any of the ways described above. However, it is possible that a judge or jury would not permit an eviction where the tenant's sole lease violation was related to restrictive guest policies, because the judge or jury would 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 tenant is on a month-to-month tenancy with no local rent control or eviction protections, and the landlord can therefore change the terms of tenancy with a thirty (30) day notice. To maximize the possibility of 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 guest policies are stated clearly.

Even when guest policies are permitted under landlord-tenant law, they may violate fair housing or civil rights laws. For example, a housing provider wishing to deny 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, and such discretion can sometimes lead to unlawful discrimination. Similarly, a guest policy that explicitly disfavors members of a protected class of people would probably be illegal (such as a prohibition against visits by children, which would likely be classified as discrimination based on family status, or a prohibition against visits by people of one gender).

Some guest policies may also violate other funder or program requirements. For example, a fee charged 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 care giver 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 in California on specific factors, including (most importantly) whether the guest has remained in residence for more than thirty (30) consecutive days. A housing provider can decrease the likelihood of a guest becoming a tenant by requiring the presence of guests to be disclosed in writing or by strictly prohibiting guest stays of more than a few weeks.

- (b) Curfews. If a curfew means that all residents must be in their apartments by a certain time, it is probably not allowed under California landlord tenant law. Such a restriction on the use of a leased apartment would likely not be deemed reasonable, and is rare in non-service related residential complexes. An individual leases an apartment for residential use with the expectation that he/she can come and go freely, and a landlord has no reasonably legitimate purpose for requiring that all the residents be in their units at a certain time. Curfews are typically imposed as part of a requirement for services, when such services are provided in a residential setting. If a lender (like CalHFA and DMH under the MHSA Housing Program) 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 MHSA-eligible residents, and not on non-MHSA residents, would

be deemed discriminatory.

In contrast, restricting the use of common areas by all residents 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.

8. What Should A Housing Provider Do If An MHSA-Eligible Tenant Leaves A Unit Financed With MHSA Funds And The Remaining Household Stays Or If The MHSA-Eligible Tenant Is No Longer MHSA-Eligible?

Neither the Act nor the current DMH Regulations describe what steps a housing provider must take if an MHSA-eligible household member leaves an MHSA unit. Therefore, landlords and tenants should come up with reasonable policies to address this issue should it arise. Any policy should be grounded in the purposes of the Act and balance the requirement that the housing unit should be made available to an MHSA-eligible household against the disruption to the previously eligible tenant or household.

The MHSA Housing Program sets forth specific procedures that will apply if an MHSA-eligible person no longer occupies the MHSA Unit. If the development includes some non-MHSA units, the housing provider should allow the tenants to continue to occupy the unit, provided a non-MHSA unit is available for an MHSA-eligible tenant and the tenants agree to the terms of the non-MHSA unit lease. (Remaining household members may experience a rent increase, however, because any MHSA operating subsidy for the unit will terminate after a 90-day grace period.) If the development consists of only MHSA units, or if the development is mixed, but the provider does not have any other units it can make available to the remaining household members, then the remaining household members may continue to occupy the MHSA unit for a grace period of 90 days, presumably beginning the month following the month the MHSA-eligible tenant vacated the unit. During this grace period the housing provider is required to work with the remaining household members to find alternate housing accommodations. The MHSA Housing Program requires housing providers to begin eviction proceedings if, after the 90 day grace period, the remaining household members do not find alternate accommodations.

In addition, the MHSA Housing Program will continue to pay operating subsidies for a unit for up to three months if an MHSA eligible tenant is temporarily institutionalized but has not permanently vacated the unit.

The MHSA Housing Program policy is similar to HOPWA requirements. HOPWA is HUD's "Housing Opportunities for Persons with AIDS" program. The HOPWA regulations require housing providers to establish a reasonable grace period following the death of the household member with AIDS. During the grace period, the surviving household members may continue to reside in the HOPWA unit and participate in available social services. The HOPWA regulations also contemplate that the housing provider will assist the surviving household members in locating new housing. Providers of MHSA units that are not assisted with MHSA Housing Program funds are not tied to the MHSA Housing Program requirements. Therefore, such providers may extend the grace period.

CHAPTER 6: ZONING AND LAND USE

1. What Land Use Restrictions Might A Developer Encounter In Trying To Create Housing For MHSA-Eligible Households?

In California, the restrictions applied to development vary greatly from community to community. For instance, some cities welcome dense, high-rise multifamily projects, while other communities are almost entirely reserved for single-family homes on large lots. Consequently, a developer might encounter a wide variety of land use restrictions. While this section attempts to explain the most common restrictions, in every case developers must review the local land use regulations to determine the particular restrictions that apply to a site that they are considering for MHSA housing.

- (a) Local Land Use Restrictions. Local land use restrictions may be included in a variety of plans and local ordinances that are adopted by cities and counties in California. The State requires every community to adopt a General Plan and a Zoning Ordinance. The General Plan is the community's overall plan for development. It discusses the community's goals, shows the general location of different kinds of land uses, includes a plan for streets and roads, preserves open space, and may discuss a wide variety of topics, such as economic development and agricultural land preservation.

The most important part of the General Plan for a developer of MHSA housing is the *Housing Element*. State law requires that the Housing Element analyze the need for housing for the disabled, identify sites for supportive housing, and remove constraints on the development of supportive housing (Government Code § 65583). The Housing Element often contains local policies that may be helpful in obtaining local approval for MHSA housing.

The local *Zoning Ordinance* divides the city or county into zoning districts where different uses are permitted. In a typical zoning ordinance, some zoning districts are reserved primarily for single-family homes; some for apartments, townhouses, and other multifamily housing; others for stores and other retail commercial uses; and still others for offices, industry, and the like. The local Zoning Ordinance will also usually regulate building height, floor area, housing density, parking and loading, setbacks from property lines, landscaping, and other factors affecting building construction.

Within a zoning district, some uses are "permitted" uses, while others are "conditional" uses. A permitted use does not require any discretionary local government approval. An example would be a single-family home in a residential area. A conditional use requires a public hearing and review, usually by the community's Planning Commission. An example might be schools and churches in residential areas.

Communities may also have adopted other plans and ordinances. Applicable polices may be included in community and specific plans (which apply to a particular area of the city); design guidelines; and special purpose ordinances.

Any project that needs a discretionary approval from local government must also be evaluated under the *California Environmental Quality Act*, which requires that the government examine the environmental impacts of the project. Typical issues considered would be traffic, parking, noise, exposure to flooding, earthquakes, and hazardous wastes, and similar effects.

Each community has a unique and distinctive General Plan, Zoning Ordinance, and other land use regulations. The only way to determine the regulations applicable to a proposed MHSA development is to read carefully the applicable provisions of the local General Plan, Zoning Ordinance, and other

documents. The staff of the local planning department should also be consulted regarding provisions that are applicable to the MHSA development.

- (b) Land Use Restrictions Typically Applied to MHSA Housing. This section describes the most common land use restrictions that a developer of MHSA housing might encounter, recognizing that local restrictions vary widely.

There are two kinds of housing under the MHSA Housing Program: Rental Housing Developments and Shared Housing Developments. MHSA projects funded directly by counties may vary from the exact requirements in the MHSA Housing Program, but most will generally fall under the rental housing or shared housing models. The typical land use restrictions vary somewhat for the two types of housing.

1. Rental Housing Developments are multifamily apartment buildings. In most cases at least five of the dwelling units in Rental Housing Developments must be occupied by MHSA-eligible residents. Each MHSA-eligible resident must have a separate apartment that includes a bathroom and kitchen.

The land use restrictions for new Rental Housing Developments are those applicable to any other multifamily housing development. Typically, cities and counties allow multifamily development only in zoning districts designated for multifamily uses and in some cases in mixed-use zones that also permit commercial development. There are usually limits on the height, floor area, density, and other aspects of the project, and the community may require design review or other discretionary approval.

Cities and counties have at times claimed that the provision of services for the mentally ill means that the Rental Housing Development is something other than a multifamily residence—a treatment facility, for instance—and have insisted on a conditional use permit or other discretionary permit. However, amendments to Housing Element law (Government Code § 65583(a)(5)) effective January 1, 2008 require cities and counties that prepare housing elements to remove constraints so that supportive housing, as defined in the bill, is treated like other residences of the same type. This means that communities must revise their zoning so that the only restrictions that may be applied to Rental Housing Developments are those that apply to other multifamily housing in the same zoning district.

To qualify for this protection, the supportive housing must meet the definition of "supportive housing" contained in Health & Safety Code Section 50675.14. This requires that the supportive housing:

- Have no limit on the length of stay;
- Be linked to onsite or offsite services that assist residents in improving their health status, retaining the housing, and living and working in the community; and
- Be occupied by the "target population." In this instance, the target population includes adults with low incomes having one or more disabilities, including mental illness, HIV or AIDS, substance abuse, or other chronic health problems. The target population also includes persons eligible for services under the Lanterman Development Disabilities Act (the "Lanterman Act"). The Lanterman Act provides services to persons, including children, with developmental disabilities that originated before the person turned 18; it does not provide services to persons with solely physical disabilities. The target population may include, among other populations, families with children, elderly persons, young adults aging out of the foster care system, individuals exiting from institutional settings, veterans, and homeless people.

Since the MHSA Housing Program requires that all households include at least one household member with serious mental illness, that there be no limit on the length of stay, and that

supportive services be available, and since it is likely that MHSA eligible households will be low income, Rental Housing Developments funded under the MHSA Housing Program will fall under the definition of "supportive housing" and so, as communities revise their housing elements and zoning ordinances, must be treated like other multifamily residences in the same zoning district.

2. Shared Housing Developments include structures with one to four dwelling units that house two or more MHSA-eligible adults. All of the residents in a Shared Housing Development must be MHSA-eligible. Each resident must have a separate lockable bedroom, but the kitchen and bath facilities may be shared.

The land use restrictions for new Shared Housing Developments are those applicable to either single-family homes, duplexes (with two units), or three- to four-unit buildings (triplexes and fourplexes). Typically, cities and counties allow single-family homes and duplexes in more zoning districts than triplexes and fourplexes, which are often considered to be multifamily housing. In each zoning district, there are again limits on the height, floor area, density, and other aspects of the project, and the community may require design review or other discretionary approval. Height, setback, and other regulations are often the strictest in single-family zones. On the other hand, design review is less likely to be required for single-family homes and duplexes.

Providers seeking to offer shared housing units are cautioned that some cities and counties may consider Shared Housing Developments to be "group homes" or "residential service facilities." These cities and counties may attempt to impose further regulations, such as requiring the provider to obtain a conditional use permit. However, amendments to Housing Element Law effective on January 1, 2008 (Government Code § 65583(a)(5)) require cities and counties that prepare housing elements to remove constraints so that Shared housing developments that meet the definition of "supportive housing" contained in Health & Safety Code Section 50675.14 (discussed above) are treated like other residences of the same type. This means that communities must revise their zoning so that the only restrictions that may be applied to Shared housing developments are those that apply to other residences of the same type (single-family homes, duplexes, triplexes, or fourplexes) in the same zoning district.

- (c) Limitations on Denial of MHSA Housing. Since MHSA Housing should be defined as "supportive housing," recent amendments to the Housing Accountability Act (Government Code § 65589.5) effective January 1, 2008 do not permit local governments to deny MHSA Housing, or to add conditions that make the housing infeasible, unless they can make one of the following five findings:
 1. The jurisdiction has met its low income housing needs.
 2. The housing would have a specific, adverse impact on public health or safety, and there is no feasible way to mitigate the impact.
 3. Denial is required to comply with state or federal law, and there is no way to comply without making the housing unaffordable.
 4. The housing is proposed on land zoned for agriculture and is surrounded on two sides by land being used for agriculture, or there is inadequate water or sewer service.
 5. The housing is inconsistent with both the zoning and the land use designation of the site and is not shown in the housing element as an affordable housing site.

2. Are Shared Housing Units Occupied By MHSA-Eligible Households "Group Homes" That Can Be Prohibited or Restricted By Local Zoning Laws?

Local zoning ordinances often restrict the location of "group homes," which are often called "lodging houses," "boarding houses," or "group residential facilities." For instance, if a single-family home housing a "family" would ordinarily be a permitted use in a zoning district, a single-family home that is defined as a "group home" might require a conditional use permit or not be permitted at all. Because MHSA-eligible residents in Shared Housing Developments have separate rental agreements with the manager, and do not always live as a "family," some communities may consider a Shared Housing Development to be a "group home" for zoning purposes.

However, as discussed in the previous section, recent amendments to Housing Element law will require communities to revise their zoning so that supportive housing is not treated differently from other housing of the same type, and MHSA-funded housing in most cases will be protected from being defined as a "group home."

If residents living in each dwelling in a Shared Housing Development meet the local zoning definition of a "family," then they will be treated like any other occupants of a home. While the definition of "family" varies from city to city, a typical ordinance would define a "family" as related persons or a group of unrelated people, of any size, who jointly occupy a single dwelling unit, share common areas such as the kitchen and living room, jointly participate in ordinary household activities such as meals, chores, and expenses, and have a limited number of rental agreements.²⁰

Also, most Shared Housing Developments under the MHSA Housing Program will be defined as "supportive housing" under Housing Element law (Government Code § 65583(a)(5)) effective January 1, 2008 and so, as communities amend their housing elements, they must amend their zoning ordinances so that Shared Housing Developments are treated like other residences of the same physical type (single-family homes, duplexes, triplexes, or fourplexes). (See detailed discussion in Chapter 6, Question 1 above.) Once the rezonings are complete, the only restrictions that may be applied to these Shared Housing Developments are those that apply to the same type of housing in the same zoning district.

While licensed facilities are not eligible for funding under the MHSA Housing Program, counties may fund such facilities directly with MHSA Community Services and Support funds. If a facility is state-licensed, located in a residence, and serves six or fewer persons, it must be treated like a single-family home for zoning purposes.²¹ The statutes specifically state that it cannot be considered to be a boarding house or rest home or regulated as such (for example, *see* Health & Safety Code 1566.3 & 11834.23). Staff members and operators may live in the home in addition to a maximum of six clients.

Providers should note that restrictions on "group homes" and "residential service facilities" may or may not comply with the Fair Housing Act and comparable California laws depending on how the local restrictions are designed and applied. Restrictions that apply *only* to housing for the disabled are justified only if they benefit disabled persons or respond to legitimate safety concerns.²² Restrictions that are *applied* in a discriminatory fashion also

²⁰ California case law requires that related and unrelated persons who live as a single housekeeping unit must be treated the same (*see City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980)). Put another way, local governments cannot limit the number of unrelated persons who can live together, so long as they are living as a single housekeeping unit (usually defined as a "family").

²¹ This rule appears to apply to virtually all licensed group homes. Included are facilities for persons with disabilities and other facilities (Welfare & Inst. Code 5116), residential health care facilities (Health & Safety Code 1267.8, 1267.9, & 1267.16), residential care facilities for the elderly (Health & Safety Code 1568.083 - 1568.0831, 1569.82 - 1569.87), community care facilities (Health & Safety Code 1518, 1520.5, 1566 - 1566.8, 1567.1, pediatric day health facilities (Health & Safety Code 1267.9; 1760 - 1761.8), and facilities for alcohol and drug treatment (Health & Safety Code 11834.23).

²² *See Community House v. City of Boise*, 468 F.3d 1118 (9th Cir. Nov. 2006; amended June 2007).

violate the Fair Housing Act.²³ For instance, if a community approves triplexes serving non-disabled people, but does not approve similar buildings serving disabled persons, that may be evidence of intentional discrimination. Restrictions that adversely affect disabled persons more than non-disabled persons (e.g. create a discriminatory *impact*) may violate the Fair Housing Act unless they are justified by a strong public interest.²⁴ Finally, communities must grant a "reasonable accommodation" under certain circumstances when needed by a facility that serves the disabled. This is considered in detail in the next question.

3. Can A Housing Provider Obtain Land Use Approval Of An MHSA-Funded Project As A Reasonable Accommodation Under Fair Housing Laws?

If an application for a Rental Housing Development or a Shared Housing Development does not meet the usual standards for a land use approval, the developer may apply for a "reasonable accommodation" – an exception to the usual zoning standards. For instance, the developer could ask that a Shared Housing Development be permitted in a zone where a group home would usually not be allowed. In the zoning context, the city or county must grant the accommodation under the following circumstances:

- The housing will be used by individuals with a disability protected by the Fair Housing Act.
- The accommodation is *necessary* to give the disabled individuals an equal opportunity to use and enjoy a residence.
- The accommodation will not impose an undue administrative or financial burden; and will not require a fundamental or substantial alteration in the City's land use program.²⁵

Many cities and counties in California have set up a process for requesting a reasonable accommodation. The local Housing Element, in particular, must explain how the community will grant reasonable accommodations.²⁶

There are a fair number of published federal court decisions regarding reasonable accommodation in the zoning context. In general, requests for a reasonable accommodation appear to be more successful in the context of permitting group homes in residential neighborhoods, where the courts view the accommodation as the only way that disabled persons can live in the community. They have been less successful where the accommodation appears to be a request for a special privilege, such as building an apartment house in a single-family neighborhood, or having sewer line extension fees waived. A provider who desires to request a reasonable accommodation should contact an attorney experienced in fair housing laws.

4. What Steps Can A Housing Provider Take If A Local Government Denies A Permit For MHSA-Funded Housing Units?

If a local government denies a permit for MHSA-funded units, the provider should initially appeal the decision if an administrative appeal is available (for instance, from the Planning Commission to the City Council). An appeal may provide an opportunity to demonstrate to the community that the denial is contrary to the Fair Housing Act, comparable California laws such as FEHA, the Housing Accountability Act, and other state laws. The provider may also be able to modify the project to respond to community objections, or generate community support for the project, or the provider may request a reasonable accommodation as part of the appeal. In any case, a lawsuit often cannot be brought unless the provider has used ("exhausted") all available administrative remedies.

²³ See *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997).

²⁴ See *id.* See also Government Code Section 12955.8(b) (Fair Employment and Housing Act).

²⁵ See, e.g., *McGary v. City of Portland*, 386 F. 3d 1259 (2004).

²⁶ See Government Code Section 65583(c)(3).

If the project is denied, the provider in most cases must request a reasonable accommodation from the city or county before bringing a lawsuit.²⁷

Once a local government's decision to deny MHSA-funded units is final, the housing provider's only real option is to file a lawsuit against the local government. The provider may have a variety of valid claims based on the Fair Housing Act, FEHA, the Housing Accountability Act, and other statutes, such as a California statute barring discrimination based on the affordability of residence. (*See* Government Code § 65008.) However, litigation is time-consuming and costly, and the result cannot be guaranteed even in the strongest cases. In getting MHSA-funded units built, the provider's efforts are probably better spent in finding sites where the local land use restrictions allow the project to be built with the fewest discretionary approvals and in educating local officials about the requirements of California and federal law, which may require the community to approve the MHSA-funded housing.

²⁷ However, in the case of facial discrimination—an ordinance that on its face treats the disabled differently from the non-disabled (such as a 1,000-foot separation requirement for uses serving the disabled)—it may be possible to file a lawsuit without first applying for a reasonable accommodation. *See Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1500 (D. Wash. 1997).

Summary of Planning and Zoning, Landlord-Tenant, Physical Accessibility, and Other Supportive Housing Laws

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Section A. California Planning and Zoning Laws Affecting the Siting of Supportive Housing Projects

The United States and California Constitutions give local governments broad "police power" to regulate land use in their local jurisdictions in order to protect the health, safety, and welfare of residents. California Planning and Zoning Laws encompass the state statutes that set minimum standards for land use planning and zoning and land use approvals by cities and counties.

Cities and counties in California largely regulate land use by adopting *general plans* and by adopting *zoning ordinances*. The general plan is the "land use constitution" of the jurisdiction: in most cases, all development decisions must be consistent with the general plan. General plans are required to have seven different subject matter chapters or "elements," the most relevant of which for supportive housing providers are the *land use element*¹ and the *housing element*.² The land use element sets forth the general land uses permitted in different parts of the city or county, such as high density residential, low density residential, commercial, industrial, open space, and others. However, the most important provisions are contained in the jurisdiction's housing element, which governs the development of housing.

Housing Element Requirements. Under state law, each local jurisdiction's housing element must identify sites for all types of housing, including emergency shelters, transitional housing, and supportive housing. Several provisions of housing element law have specific requirements related to housing for persons with disabilities and persons in need of emergency shelters, transitional housing, and supportive housing. These requirements include:

- The housing element must analyze the housing needs of persons with disabilities and persons in need of emergency shelter.³ It must also analyze governmental constraints on housing for persons with disabilities and must demonstrate efforts to remove constraints that prevent the city or county from meeting the housing needs of persons with disabilities, supportive and transitional housing,

¹ California Government Code Section 65302(a). All further references are to the Government Code unless otherwise stated.

² Sections 65580 – 65589.3.

³ Section 65583(a)(7).

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and emergency shelters.⁴ Finally, it must contain programs to remove those constraints and provide reasonable accommodation for housing occupied by persons with disabilities.⁵

Communities with draft housing elements submitted to the State Department of Housing and Community Development for review after March 31, 2008 must also comply with the following provisions:

- Transitional and supportive housing must be considered a residential use of property, subject only to restrictions that apply to other residential dwellings of the same type in the same zone.⁶
- At least one zoning district must be designated where emergency shelters may be permitted without a use permit, subject only to specified development and management standards. If, however, the community has met its entire need for emergency shelters, it may require a use permit for additional emergency shelters.⁷

Emergency shelters, transitional housing, and supportive housing are defined in Government Code Section 65582 for purposes of housing element law. This Section refers to definitions contained in the California Health and Safety Code.⁸

Zoning Ordinance. The local zoning ordinance divides the city or county into zoning districts where different uses are permitted. In a typical zoning ordinance, some zoning districts are reserved primarily for single-family homes; some for apartments, townhouses, and other multifamily housing; others for stores and other retail commercial uses; and still others for offices, industry, and the like. The local zoning ordinance will also regulate building features such as height, floor area, housing density, parking and loading, setbacks from property lines, landscaping, and other factors affecting building construction.

Within a zoning district, some uses are "permitted" uses, while others are "conditional" uses. A permitted use does not require any discretionary local government approval. An example would be a single-family home in a residential area. A conditional use requires a public hearing and review, usually by the community's Planning Commission. An example might be schools and churches in residential areas. Many communities have designated emergency shelters, transitional housing, and supportive uses as "conditional" uses that require a use permit. However, given the requirements of housing element law, in many cases communities may no longer be able to require a use permit. For instance, supportive housing contained in a single-family home must be treated like any other single-family home, which is normally a permitted use and requires no use permit.⁹

Other Provisions of Planning and Zoning Law. California's Planning and Zoning Law contains two provisions which address housing discrimination and limit the disapproval of supportive housing developments.

⁴ Section 65583(a)(5).

⁵ Section 65583(c)(3).

⁶ Section 65583(a)(5).

⁷ Sections 65583(a)(4) and 65583(d).

⁸ Section 65582(d) gives "emergency shelter" the same meaning as defined in Health and Safety Code § 50801. Section 65582(f) defines "supportive housing" as it is defined in § 50675.14 of the Health and Safety Code, while 65582(g) defines "transitional housing" as it is defined in § 50675.2 of the Health and Safety Code. The definition of supportive housing differs from the definition provided in the State's exemption from community care licensing facilities, found in the California Health and Safety Code § 1504.5.

⁹ Section 65583(a)(5).

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Government Code Section 65008 prohibits denying any residence opportunity or land use approval, or discriminating against any development project, based on race, sex, color, religion, sex, sexual orientation, marital or familial status, national origin, source of income, disability, lawful occupation, age, method of financing the housing, or income level of the occupants.

Government Code Section 65589.5(d) (the "Housing Accountability Act") requires approval of transitional and supportive housing, emergency shelters, and housing developments intended for at least 20 percent low-income households or 100 percent moderate-income households, and prohibits the imposition of approval conditions that make such projects infeasible, unless the disapproving local government can make one of the following five specific findings:

(1) the local government has a legally adequate and up-to-date housing element and has met its need for housing in the proposed income category;

(2) the project would have a specific, measurable adverse impact upon public health or safety, under objective written standards, that cannot be mitigated without rendering the project unaffordable;

(3) the denial of the project or the imposition of conditions is required in order to comply with state or federal law, and there is no feasible way to comply without rendering the project unaffordable;

(4) the project land is zoned for agriculture or does not have adequate water or wastewater facilities to serve the project; or

(5) the local government has a legally adequate and up-to-date housing element, the site is not designated for affordable housing in the housing element, the community has adequate housing sites with appropriate zoning, and the project is inconsistent with both the jurisdiction's zoning ordinance and the land use designation in the jurisdiction's general plan as it existed when the application for the development was filed.

As discussed in other sections, the federal Fair Housing Act also prohibits discriminatory zoning and land use actions by local governments and imposes an affirmative duty on local governments to adjust land use requirements as necessary to reasonably accommodate housing for people with disabilities.

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Section B. Other California Laws that Affect Local Government Decisions Related to Siting of Supportive Housing Projects

California statutes provide special protections for *licensed* residential care facilities (including community care facilities, residential health facilities, and alcoholism and drug treatment facilities) that serve six or fewer people. The California Constitution's *right to privacy* restricts a community's ability to limit the *occupancy* of residences.

Protections for Licensed Facilities. While many supportive housing facilities are unlicensed, some do obtain licenses to provide a greater level of care for their residents.

Licensed group homes serving six or fewer residents must be treated like single-family homes for zoning purposes.¹⁰ A licensed group home serving six or fewer residents must be a permitted use in all residential zones in which a single-family home is permitted, with the same parking requirements, setbacks, design standards, and the like. Local government cannot require any conditional use permit, variance, or special permit for these small group homes unless the same permit is required for single-family homes. Nor can local governments impose higher parking requirements or special design standards. The statutes specifically state that local government cannot regulate these facilities as boarding houses or rest homes.¹¹ Staff members and operators of the facility may reside in the home, in addition to those served.

Restrictive covenants such as homeowners' association covenants, conditions, and restrictions (CC&Rs) limiting uses of homes to "private residences" cannot be enforced to exclude licensed homes for people with disabilities that serve six or fewer persons.¹²

Local governments must also allow health facilities for both inpatient and outpatient psychiatric care and treatment in any area zoned for hospitals or nursing homes, or in which hospitals and nursing homes are permitted with a conditional use permit.¹³ "Health facilities" include residential care facilities for mentally ill persons, so, if a zoning ordinance permits hospitals or nursing homes in an area, it must also permit all types of mental health facilities, regardless of the number of patients or residents.

However, the State of California must deny an application for certain licensed facilities if the new facility would result in "overconcentration." For community care facilities,¹⁴ intermediate care facilities, and pediatric day health and respite care facilities,¹⁵ "overconcentration" is defined as a separation of less than 300 feet from another licensed "residential care facility," measured from the outside walls of the structure housing the facility. These separation requirements do *not* apply to residential care facilities for the elderly,

¹⁰ This rule appears to apply to virtually all licensed group homes. Included are facilities for persons with disabilities and other facilities (Welfare & Inst. Code 5116), residential health care facilities (Health & Safety Code 1267.8, 1267.9, & 1267.16), residential care facilities for the elderly (Health & Safety Code 1568.083 - 1568.0831, 1569.82 - 1569.87), community care facilities (Health & Safety Code 1518, 1520.5, 1566 - 1566.8, 1567.1, pediatric day health facilities (Health & Safety Code 1267.9; 1760 - 1761.8), and facilities for alcohol and drug treatment (Health & Safety Code 11834.23).

¹¹ For example, *see* Health & Safety Code 1566.3 & 11834.23.

¹² Government Code 12955; *Hall v. Butte Home Health Inc.*, 60 Cal. App. 4th 308 (1997); *Broadmoor San Clemente Homeowners Assoc. v. Nelson*, 25 Cal. App. 4th 1 (1994).

¹³ Cal. Wel. & Inst. Code 5120.

¹⁴ Cal. Health & Safety Code 1520.5.

¹⁵ Cal. Health & Safety Code 1267.9.

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drug and alcohol treatment facilities, foster family homes, or "transitional shelter care facilities," which provide immediate shelter for children removed from their homes.

Separation requirements apply only to facilities with the same type of license. For instance, a community care facility would not violate the separation requirements even if located next to a drug and alcohol treatment facility.

California Right to Privacy. Unlike the federal Constitution, California's Constitution contains an *express* right to privacy, adopted by the voters in 1972. The California Supreme Court has found that this right includes "the right to be left alone in our own homes" and has explained that "the right to choose with whom to live is fundamental."¹⁶ California case law requires cities to treat groups of related and unrelated people identically when they function as one household.¹⁷ Local ordinances that define a "family" in terms of blood, marriage, or adoption, and that treat unrelated groups differently from "families," violate California law. California cities cannot limit the number of unrelated people who live together while allowing an unlimited number of family members to live in a dwelling. Note, however, that the courts will support ordinances that regulate the *use* of a residence for commercial purposes (such as for a home occupation or as a vacation rental).

Occupancy Limits. The Uniform Housing Code (the "UHC") establishes occupancy limits (the number of people who may live in a house of a certain size) and in almost all circumstances municipalities may not adopt more restrictive limits. The UHC provides that at least one room in a dwelling unit must have 120 square feet. Other rooms must have at least 70 square feet (except kitchens). If more than two persons are using a room for sleeping purposes, there must be an additional 50 square feet for each additional person.¹⁸ Using this standard, the occupancy limit would be seven persons for a 400-sq. ft. studio apartment (the size of a standard two-car garage). Locally adopted occupancy limits cannot be more restrictive than the UHC unless justified based on local climatic, geological, or topographical conditions.¹⁹ Efforts by cities to adopt more restrictive standards based on other impacts (such as parking and noise) have been overturned in California.²⁰

Similarly, the Ninth Circuit found that a local ordinance that limited the number of persons in a homeless shelter to 15, when the building code would allow 25 persons, was unreasonable, and found that allowing 25 persons in the shelter would constitute a reasonable accommodation.²¹

Based on these federal and state precedents, localities may not limit the number of people living in a dwelling below that permitted by the UHC.

¹⁶ Coalition Advocating Legal Housing Options v. City of Santa Monica, 88 Cal. App. 4th 451, 459-60 (2001).

¹⁷ City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134 (1980).

¹⁸ Cal. Health and Safety Code 17922(a)(1). See Briseno v. City of Santa Ana, 6 Cal. App. 4th 1378, 1381-82 (1992) (holding that the state Uniform Housing Code preempts local regulation of occupancy limits).

¹⁹ The UHC notes the Briseno case at § 17922.

²⁰ Briseno, 6 Cal. App. 4th at 1383.

²¹ Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996).

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Section C. California Landlord-Tenant Law, Transitional Housing Misconduct Law, and the Local Rent Control and Eviction Ordinances

State landlord-tenant law applies whenever a tenant occupies property as a renter for more than thirty continuous days.²² An unlicensed supportive housing facility that charges its residents rent (which includes program fees) is covered by state landlord-tenant law. California Civil Code Sections 1940, et seq., govern the basics of the landlord-tenant relationship, including leases and rental agreements, security deposits, the landlord's right to enter the tenant's unit, and notices to change the terms of tenancy or to terminate tenancy. California Code of Civil Procedure Sections 1161, et seq., governs termination of tenancy and evictions. *The Landlord's Law Book: Rights and Responsibilities*, published by Nolo Press, is an excellent self-help resource book on landlord-tenant law.

The Transitional Housing Misconduct Law²³ authorizes operators of transitional housing programs (defined in the law as housing for homeless persons which includes a comprehensive social service program and a tenancy term of at least thirty days but no more than twenty-four months) to remove program participants from housing by applying to a court for a temporary restraining order and injunction, where certain kinds of misconduct have occurred and the participant has not resided on the premises for more than six (6) months. However, if the participant violates the court order, eviction proceedings under Code of Civil Procedure Section 1161 may still be required.

Some cities and counties have adopted local rent control and just cause eviction ordinances which also affect the landlord-tenant relationship. Many local rent control and eviction control ordinances do not cover tenancies where the rent is controlled by another branch of government. Consequently, a supportive housing provider that has signed a regulatory agreement with a department of the federal, state, or local government that regulates rents in the facility will often, although not always, be exempt from local rent and eviction controls. The local rent control board that administers the rent or eviction control ordinance should be contacted for guidance on the kind of projects that are covered by, or exempt from, the local ordinance. Rent and eviction control laws vary greatly from community to community, making it important to carefully review the ordinance and regulations that apply in your own city or county, and to contact rent board staff for assistance in interpretation.

²² California Civil Code § 1940; California Revenue and Taxation Code § 7280.

²³ California Health and Safety Code §§ 50580, et seq.

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Section D. Design and Construction Accessibility Requirements

The Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), and state and local statutes, ordinances and building codes all include design and construction accessibility requirements. Affordable housing projects with multiple layers of financing and social service components have to harmonize this matrix of federal and State accessibility requirements. Which laws apply depends on the type of project, whether it involves new construction or rehabilitation, and the funding the project receives. Accessible design requirements for new construction and rehabilitation are described below. Accessibility requirements for project operations are discussed as part of the "reasonable accommodations" addressed in Chapter Five, Section B, Question Two.

Federal Accessibility-Related Laws that Apply to New Construction or Rehabilitation.

The Fair Housing Act imposes design and construction accessibility requirements if (a) the building was first occupied after March 13, 1991, and (b) the construction activity is for a "covered multifamily dwelling" unit. A covered multifamily dwelling is every unit in an elevator building with at least four units, and every ground floor unit in a non-elevator building with at least four units. Covered multifamily dwelling units can be either rental or ownership units, but do not include detached single family homes. The law also provides an exception for some two story units. The Fair Housing Act accessibility requirements apply to both the design of the units and the project site. The requirements are intended to be modest requirements, with the focus on visitability²³ rather than full accessibility²⁴. Rehabilitation activities generally will not trigger the Fair Housing Act design and accessibility requirements, but this does not mean that housing providers should perform rehabilitation on covered multi-family dwelling units which conflict with the Fair Housing Act design and accessibility requirements.

Title III of the ADA imposes design and construction accessibility requirements if a building or space is a "place of public accommodation" or a commercial facility. Housing is considered neither a place of public accommodation nor a commercial facility under the ADA, but certain components of a residential building such as a rental office, social service center, or a day care center, may be subject to Title III requirements depending on whether members of the general public are expected to visit and use those facilities. Homeless shelters and substance abuse treatment centers are considered to be social service facilities that are places of public accommodation, and therefore subject to Title III. Title III imposes requirements on existing buildings, new construction, and alterations.²⁵

Federal Accessibility-Related Laws that Apply to New Construction or Rehabilitation When Government Funding is Provided.

All of the requirements described under question 1 above continue to apply when the government is funding the project. In addition, Section 504 of the Rehabilitation Act imposes accessible design and

²³ Various HUD Notices describe 'visitability' as a basic level of accessibility that enables persons with a variety of abilities to visit friends and neighbors in their community. HUD Notices indicate visitability may be achieved through providing a 32" clear opening in all bathrooms and interior doorways and providing at least one accessible means of egress/ingress to each unit.

²⁴ House Report No. 711, 100th Congress 2nd Session at pages 25 and 18.

²⁵ 28 CFR § 36.101 et seq.

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construction requirements if the federal government is providing any funding (including state or local "pass-through" funding under federal programs such as HOME or CDBG, though excluding federal tax-related funding such as low-income housing tax credits or tax-exempt bonds). Each federal agency has developed regulations implementing Section 504. The housing provider must consult the regulations of the particular federal agency providing financing to a particular project to determine the scope of accessibility required under Section 504. The HUD Section 504 requirements, for example, apply to existing, newly constructed and rehabilitated housing - ownership and rental - as well as non-housing facilities, like community rooms and laundry facilities located on the project site.

Title II of the ADA, which applies to public entities (e.g., state and local governments) may also apply to private entities to the extent that government involvement transforms a particular privately owned facility into part of a public program. The Title II requirements apply to existing buildings, new construction, and alterations. Some state statutes require Title II compliance for state funded programs, so a review of applicable state laws is a necessary part of the Title II accessibility analysis. In California, for example, Government Code Section 11135 requires Title II compliance for any program or activity that receives financial assistance from the State.

Requirements of Each Accessibility-Related Law Applicable to New Construction or Rehabilitation.

In implementing accessibility requirements in the design and construction of a project, a housing provider should consult an architect to provide a thorough analysis of all applicable laws. Below is a general summary of some of the accessibility requirements imposed by the laws discussed above.

Fair Housing Act

The Fair Housing Act has the following requirements:

- a. A building must have an entrance on an accessible route, except where compliance is impractical due to terrain or unusual characteristics of the site.
- b. A building's public and common use areas must be readily accessible to and usable by people with disabilities.
- c. Doors in accessible units must be usable by mobility-impaired persons.
- d. There must be an accessible route into and through an accessible unit.
- e. Light switches, electrical outlets, thermostats, and other environmental controls must be placed in accessible locations.
- f. Bathroom walls in accessible units must be reinforced to allow installation of grab bars.
- g. Kitchens and bathrooms in accessible units must have sufficient space to allow people in wheelchairs to maneuver about.

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To comply with the Fair Housing Act construction and design requirements, providers should review 24 CFR 100.205, which sets forth the HUD-recognized safe harbors for compliance. Using these standards does not preclude using other designs that would similarly achieve compliance with the requirements. For details, ask your architect, local planning and building officials, the applicable local government's ADA office, and/or the Pacific Disability and Technical Assistance Center (a nonprofit provider of technical assistance that can be reached at (800) 949-4232).

Section 504

If a housing project is receiving any federal funding, the provider must comply with Section 504. To implement Section 504's design and construction requirements, a housing provider must comply with the Uniform Federal Accessibility Standards (UFAS). The Uniform Federal Accessibility Standards are available at <http://www.access-board.gov/ufas/ufas-html/ufas.htm>. Under UFAS, five percent of the units in a newly constructed multifamily housing project of fifteen (15) or more units (or at least one unit if between 15 and 20 units) must be accessible for people with physical disabilities. No specific UFAS percentage requirements exist for rehabilitation of housing, but in the absence of guidance from a particular funding source, complying with the five percent new construction requirement should suffice.

In addition to the UFAS requirements, housing providers must also consult the Section 504 regulations applicable to its funding for additional Section 504 requirements. The HUD regulations implementing Section 504, for example, have the following requirements for new construction projects with more than five (5) units and substantial rehabilitation projects with more than fifteen (15) units: five percent of the units (or at least one unit) must be accessible for people with mobility impairment, and an additional two percent (or at least one unit) must be accessible for people with visual or hearing impairment.²⁶ The requirements are less expansive for rehabilitation that is not substantial. Housing providers may depart from UFAS where the provider is affording substantially equivalent or greater access. For details, ask your architect and/or your local planning and building officials.

ADA

The ADA's accessibility requirements depend on whether the project is subject to Title II or Title III of the ADA. Under Title II, a public entity may currently choose (with limited exceptions) from two design standards, either UFAS or the ADA Standards for Accessible Design ("ADA Standards") when designing or constructing new buildings or performing alterations. Under Title III, housing providers must follow the ADA Standards. The ADA Standards set out general accessibility guidelines and specific design and construction requirements for certain types of facilities but currently do not contain specific requirements for housing. To the extent that the guidance does not specifically address a particular type or element of a facility, the architect should design the type or element in accordance with the general directive that the facility be "accessible to and usable by" individuals with disabilities. The Standards include exceptions to the ADA requirements where compliance would be infeasible or structurally impractical. For details, ask your architect and/or local planning and building officials.

²⁶ 24 CFR § 8.22; 24 CFR § 8.23(a).

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California Building Code Accessibility Requirements.

State and local statutes, ordinances and building codes also impose certain accessibility-related design and construction requirements. In California, Title 24 of the California Code of Regulations sets forth accessibility requirements the Division of State Architect ("DSA") and the Department of Housing and Community Development ("HCD") promulgates. These requirements are found in Part 2 of Title 24 which is the California Building Code. Statutory authority for these accessibility requirements arises from California's Government Code. The DSA Regulations are patterned on the ADA requirements and the HCD regulations are patterned on the Federal Fair Housing Act, but, in certain instances, require greater accessibility than the federal laws on which they are based. Those state requirements that are stricter than the federal requirements will take precedence over the federal ones. For a discussion of the relationship between federal law, state law, and local law, see Chapter Two, Section A, Question Two. For a discussion of what must be done when different laws have mutually inconsistent requirements, see Chapter Two, Section A, Question Three.

Although patterned on the ADA and the Fair Housing Act, providers must follow key additional accessibility requirements in California. For example, the California HCD requirements define Covered Multifamily Dwellings as all dwelling units in buildings of three or more dwelling units or four or more condominium units if the building has an elevator, and the ground floor dwelling units in buildings of three or more dwelling units or four or more condominium units if the building does not have an elevator. The federal Fair Housing Act trigger is four units for both rental and ownership units. Also under the HCD requirements, 10% of multistory dwelling units on the ground floor of non-elevator buildings of three or more units or condominiums with four or more units, and all multistory dwelling units on the ground floor in elevator buildings must comply with certain accessibility requirements affecting access and spaces on the primary entrance level of the unit. In contrast, the federal Fair Housing Act does not apply to most multistory dwelling units.

APPENDIX 3: Fair Housing Laws Summary

Law	Law Applies to Whom?	Who Is Protected by the Law?	Provisions
Equal Protection Clause of the 14th Amendment to the U.S. Constitution (1868)	All state action, including actions by private parties who receive governmental assistance, including owners of housing receiving government assistance.	<p>Everyone is protected. Distinctions between people based on:</p> <p>"Suspect" laws/policies that categorizes or treats people differently based on certain classes of individuals, or that violate "fundamental rights." Violations determined by "strict scrutiny" test; withstands test if "compelling state interest" and if there is no less restrictive alternative means for the state to achieve its objectives.</p> <p>"Semi-suspect" classifications in laws/policies can be justified by "important governmental interest."</p> <p>All other distinctions can be justified by a "rational basis."</p>	<p>Prohibits government from denying any person "equal protection of the laws." Prohibits irrational, arbitrary or unreasonable discrimination.</p> <p>Discriminatory motivation is required to show a violation of the Equal Protection Clause.</p> <p>Section 5 grants power to Congress to legislate against discriminatory conduct; pursuant to this, Congress has adopted civil rights laws, including Fair Housing Laws.</p>
Fair Housing Act (1968) and Fair Housing Act Amendments (1988)	<p>Applies to all housing— those receiving public funds and the private housing market (with several very narrow exceptions).</p> <p>Applies in sale, rental, financing and advertising of housing as well as to zoning and land use decisions by local government.</p>	<p>Enumerated bases: race, color, religion, national origin, gender, familial status and handicap.</p> <p>Definition of handicap:</p> <p>Physical or mental impairment which substantially limits one or more major life activities (or a record of such an impairment or being regarded as having one).</p> <p>Physical or mental impairment:</p> <ul style="list-style-type: none"> - physiological disorders - mental or psychological disorders. Includes HIV infection, emotional or mental illness, specific learning disabilities, alcoholism, drug addiction (but not current, illegal use of or addiction to a controlled substance). <p>Major life activities includes functions such as caring for one self, performing manual tasks, walking, seeing, hearing, breathing, learning and working.</p>	<p>Prohibits discrimination in housing. (Housing for seniors that meets certain criteria is exempt from the Act's prohibition of discrimination against families with children.)</p> <p>Discriminatory effect without discriminatory intent is generally sufficient to prevail in court. Standard of proof to justify discriminatory effect when there's no discriminatory intent is "business necessity."</p> <p>Includes specific accessibility requirements for newly constructed-housing.</p> <p>Imposes affirmative duty on housing providers to provide reasonable accommodation and reasonable modifications to persons with disabilities to allow them equal access to the housing</p> <p>Reasonable accommodations or reasonable modifications: physical modification of the housing site/unit (at the tenant's expense) and/or a change (accommodation) in the provider's rules, policies and procedures, with the limitation that a provider is not required to undergo undue financial and administrative hardship or make a fundamental alteration to the nature of its program.</p>

Law	Law Applies to Whom?	Who Is Protected by the Law?	Provisions
<p>Section 504 of the Rehabilitation Act of 1973</p>	<p>Applies to all housing and non-housing programs receiving federal funding, including CDBG, HOME, HOPWA, Sections 202 and 811, McKinney Act. Does not include low income housing tax credits or tax-exempt bond financing. Applies to public and private owners receiving federal funding.</p>	<p>Individual with handicaps: any person who has a physical or mental impairment that substantially limits one or more major life activities (or a record of having such an impairment or being regarded as having one). Uses similar definitions as Fair Housing Act above.</p> <p>For purposes of employment, handicap does not include:</p> <p>An individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents him/her from performing the duties of the job in question, or whose employment would constitute a direct threat to property or safety of others.</p> <p>Any individual who has a currently contagious disease or infection and who would constitute a direct threat to the health or safety of other individuals or who is unable to perform the duties of the job.</p> <p>For purposes of other programs and activities (including housing), handicap does not include:</p> <p>Any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from participating in the program or activity in question, or whose participation would constitute a direct threat to property or the safety of others.</p>	<p>Prohibits discrimination on basis of disability. Requires access for people with disabilities to housing and non-housing programs operated with federal funds.</p> <p>Requires a specific percentage of accessible units and specific accessibility requirements for newly constructed or substantially rehabilitated housing.</p> <p>Requires integration of people with disabilities. Prohibits projects 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, e.g., Section 811, HOPWA, Shelter Plus Care, etc., or in limited circumstances if the distinction based on disability is necessary to provide persons with disabilities with equal access to housing, and housing further intent of Section 504.</p> <p>Non-housing and housing programs or activities must be operated so when viewed in entirety they are readily accessible by people with disabilities. Non-substantial alterations are required to the maximum extent feasible. Existing facilities/programs are to be made accessible to extent it doesn't pose undue financial/administrative burden or fundamentally alter the nature of its program.</p> <p>Requires the owner to pay for physical modifications as part of duty of reasonable accommodation.</p>

Law	Law Applies to Whom?	Who Is Protected by the Law?	Provisions
<p>Americans with Disabilities Act (ADA) (1990)</p>	<p>Title II: state and local public entities, also may apply to publicly funded programs and facilities.</p> <p>Title III: commercial establishments and privately owned places of "public accommodation."</p>	<p>Individual with disabilities: any person who has a physical or mental impairment that substantially limits one or more major life activities (or a record of having such an impairment or being regarded as having one).</p> <p>Uses similar definitions as Fair Housing Act above. However, Title III defines symptomatic and asymptomatic HIV as protected.</p>	<p>Broad civil rights protection to people with disabilities, extending beyond activities of the federal government or programs receiving federal funds. Five parts or titles, two are relevant to supportive housing providers:</p> <p>Title II: prohibits discrimination by state and local government in all government programs and services (whether or not federal funding is utilized). Requires all government funded or operated services and activities so that, when viewed in entirety, they are readily accessible. Has its own accessibility standards. Imposes reasonable accommodation duty. Allows state and local government to establish programs to target people with disabilities or a subgroup to provide equal access to housing, so long as overall programs are accessible.</p> <p>Unclear if Title II applies directly to nonprofit housing providers receiving state/local funds under contract. Clear that Title II requires public entities to ensure facilities receiving their funds are operated in a manner that enables the public entity to meet its Title II obligations.</p> <p>Title III: prohibits disability-based discrimination in commercial facilities and places of "public accommodation." Requires facilities to be constructed or altered in compliance with certain accessibility standards. Requires duty of reasonable accommodation for public accommodations.</p> <p>Places of public accommodation include privately-run facilities whose operation affects commerce: hotels and other places of lodging except owner-occupied establishments renting fewer than six rooms, auditoriums and other places of public gatherings, day care centers, homeless shelters, and other social service centers.</p> <p>Places of public accommodation do not include portions of privately owned rental housing used exclusively as residences, but do include areas within those facilities available to the general public, such as rental offices and community rooms available for rent or use by non-residents. (Social services programs operated by housing providers available to non-residents would be public accommodations as well.)</p> <p>If social services are provided only to residents and level of services is significant, services portion of premises may also be considered a public accommodation, subject to Title III.</p>

Law	Law Applies to Whom?	Who Is Protected by the Law?	Provisions
California Fair Employment and Housing Act (FEHA) (1980)	All housing, except owner-occupied single-family homes, or single-family homes with only one roomer or boarder. Applies to land use practices within California.	Enumerated bases of housing provisions receiving protection under FEHA: race, color, religion, sex, national origin, familial status, disability, marital status, ancestry, and as of January 1, 2000, sexual orientation and source of income. Pre-empts local jurisdictions from protecting additional groups not named in FEHA or the Unruh Act.	Substantially same requirements as Fair Housing Act, including non-discrimination provisions and duty to provide reasonable accommodations. However, FEHA prohibits both intentional discrimination and facially neutral policies that have disparate adverse impact on protected groups. (FEHA is stricter standard than the Fair Housing Act, where statute is silent on discriminatory impact.)
Unruh Civil Rights Act (1905)	All business establishments, including housing.	Enumerated bases receiving protection under Unruh Act: sex, race, color, religion, ancestry, national origin and disability. Courts have extended law's protection under "arbitrary discrimination" clause to include: sexual orientation, familial status and age.	Based on 14th Amendment, California statute prohibiting discrimination. California courts have interpreted the law broadly to prohibit all arbitrary discrimination, regardless of whether it's based on one of the specifically enumerated bases.
California Government Code Section 11135	Housing receiving State funding.	Prohibits discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability in "any program or activity that is conducted by the state or a state agency or financed by the state."	Regulations implementing 11135 are found at 22 CCR § 981020, et. seq. Regulations require reasonable accommodations as well as translation or interpretive services in certain instances. Section 11135 also requires that any activity or program the State (or State agency) runs or finances complies with Section 202 of the Americans with Disabilities Act. Section 202 applies to public entities and generally prohibits discrimination on the basis of disability. It also incorporates the ADA's Title II accessibility provisions. As such, State-financed housing programs should comply with Title II of the ADA (in addition to meeting other accessibility requirements).
Local Housing Discrimination Ordinances	Some cities and counties have adopted local ordinances prohibiting discrimination in housing for groups not specifically protected by state or federal housing law. These are probably not enforceable against private owners of housing because of the pre-emption discussed under FEHA. However, if a local government is providing financial assistance to a project, it will have additional authority to regulate the operation of the project and may be able to impose non-discrimination requirements that protect additional classes not specifically protected under state law.		

“How the Law Thinks” – Outline of Relevant Laws

Section A.	Landlord/Tenant Law.....	A4-1
Section B.	Fair Housing Laws.....	A4-2
Section C.	Relocation Law.....	A4-4
Section D.	Zoning and Planning Law.....	A4-5

Section A. Landlord/Tenant Law

(1) CONCEPTUAL FRAMEWORK. Landlord/tenant law is a specialized version of basic contract law. Landlord and tenant enter into a contract which is enforceable in court. Regulation of this contractual relationship by state and local government has emerged over time in response to perceived abuse, landlord discrimination, and increasing legislative recognition of the importance of safe and decent housing.

(a) Landlords must comply with the rental agreement and habitable premises, notice before entry, security deposits, nondiscrimination, and local rent control laws. Tenants must comply with the rental agreement.

(b) Landlords have the right to force compliance with the rental agreement and to terminate the tenancy if the tenant does not comply. Tenants have the right to enforce the rental agreement, as well as the rights to habitable premises, freedom from landlord entry without notice, and notice and established practices for termination of tenancy. Where there is local rent control, tenants have protection from arbitrary rent increases and from eviction without just cause.

(c) Both parties can enforce the lease by going to court and can enforce local rent control by going to the local rent board and/or to court. The landlord's ultimate remedy is termination of lease for tenant violation and eviction of tenant by court judgment and sheriff enforcement.

(2) APPLICABLE LAW.

(a) Federal. No federal law governs this relationship directly. Federal fair housing laws affect the relationship because they prohibit discrimination and require reasonable accommodation in certain circumstances. Funding programs (like HOME) may also impose lease and eviction requirements.

(b) California State Law.

(i) Civil Code Section 1940, et seq. Governs the basics of the landlord-tenant relationship: entering into leases and rental agreements, notices to change terms of tenancy, security deposits (how much landlord can collect, circumstances when landlord can keep the deposit, when and how the deposit must be returned). Also establishes parameters for local rent and eviction control ordinances.

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(ii) Code of Civil Procedure Section 1161, et seq. Governs the details of termination of tenancies (unlawful detainer), including types and forms of eviction notices and procedure for eviction actions.

(iii) Fair Employment and Housing Act and Unruh Act. Prohibits certain types of discrimination - see Part 2 of Outline below.

(c) City and County Ordinances.

(i) Rent Control, Rent Stabilization, and Eviction Control Ordinances. Localities have broad power to adopt ordinances and charter provisions regulating rents and evictions.

(1) Limitations. Local laws are limited by state and federal constitutional protections against the taking of private property without just compensation (must permit reasonable rate of return) and state statutory requirements (no more rent control on vacant units; no rent control on newly constructed housing).

(2) Exemptions. Housing receiving public money that includes rent regulation is often exempt from local rent control.

(ii) Interest on Security Deposits. Local ordinances can require landlords to pay interest.

Section B. Fair Housing Laws

(1) **CONCEPTUAL FRAMEWORK**. Emphasis is on the right of the individual to be free from unlawful discrimination. Unlawful discrimination is the act of treating people differently on account of specifically forbidden considerations, such as race, sex, religion, or disability. Over time, more categories have been added to the laws creating more specifically forbidden considerations (and more protected classes of people). At first, laws prohibited discrimination for housing receiving federal funding. Over time, this prohibition was extended to cover all public programs (programs receiving local, state, or federal funding) and, finally, actions of private parties as well. Discrimination includes intentional discrimination and seemingly neutral acts that have a discriminatory impact.

(a) **Duties**. Owners, managers, sellers, landlords, and brokers have a duty not to discriminate against protected classes of people. This duty includes making reasonable accommodations or modifications for people with disabilities.

(b) **Rights**. Individuals have the right to obtain housing without discrimination based on certain characteristics. People with disabilities have the right to reasonable accommodations or modifications. Owners have the right to protect other tenants from harm and to protect their property.

(c) **Remedies**. Aggrieved individuals can file administrative complaints with HUD or the California Department of Fair Employment and Housing and receive damages, injunctive relief, and civil penalties. They can also file a lawsuit in federal or state court and receive damages, injunctive relief and attorney fees.

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(2) APPLICABLE LAW.

(a) Federal.

(i) Title VI of the Civil Rights Act of 1964 (42 USC 2000(a)). Made it illegal to discriminate based on race and other categories in programs receiving federal funding.

(ii) Fair Housing Act of 1968 (42 USC 3601). Civil rights law applying to private parties and public agencies, making discrimination illegal on the basis of race, color, sex, religion, and nationality, and covering many housing practices, including advertising, renting, terms and conditions, and eviction. HUD has issued implementing regulations at 24 CFR Part 100. Owner-occupied dwellings of no more than four units are exempt.

(iii) Fair Housing Amendments Act of 1988. Amended Fair Housing Act to add disability and family status as protected classes and to add enforcement measures. Imposes accessibility requirements on new multifamily housing. Also prohibits discriminatory land use and zoning practices.

(1) Disability is defined as a physical or mental impairment which substantially limits one or more major life activity. Includes alcoholism and treatment for or recovery from former illegal drug use. Excludes current use of illegal drugs.

(2) Requires "reasonable accommodation" or "reasonable modifications" for persons with disabilities, meaning a landlord is obligated to make reasonable adjustments to rules, policies, practices and procedures and to make structural modifications that do not result in an undue financial and administrative hardship. Requires owners to permit tenants to make reasonable modifications to premises at their own expense.

(iv) Section 504 of the Rehabilitation Act of 1973 (29 USC 794). Made it illegal to discriminate on the basis of disability in programs receiving federal funding. HUD has issued implementing regulations found at 24 CFR Part 8. Regulations require integration of people with disabilities, mandate provision of auxiliary aids and services necessary for communication with people with disabilities, and establish accessibility requirements for newly constructed or substantially rehabilitated housing, and program access.

(v) The Americans with Disabilities Act (ADA) (42 USC 12101 et seq., adopted in 1990). Title II of the ADA extended the coverage of Section 504 to all public entities regardless of federal funding. The requirements are similar to the requirements of the Fair Housing Amendments Act. Title III of the ADA prohibits disability-based discrimination and requires accessibility in places of public accommodation.

(b) California State Law.

(i) Fair Employment and Housing Act (Government Code Sections 12955 et seq.). Prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status, disability (same as federal) and marital status, ancestry, sexual orientation, and source of income. Excepts owner-occupied single family house with only one renter.

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(ii) Unruh Civil Right Act (Civil Code Section 51 et seq.). Protects similar classes of people as the Fair Employment and Housing Act, but also prohibits age discrimination. It also prohibits arbitrary discrimination, interpreted to include discrimination based on sexual orientation and other personal characteristics, but does not include discrimination based on economic status.

(c) Local Ordinances. Local laws may include additional protected classes (like sexual orientation) and may establish local commissions to process complaints.

Section C. Relocation Law

(1) CONCEPTUAL FRAMEWORK. Federal and state statutes and regulations give people who are displaced by public action the right to receive certain benefits to mitigate their displacement. These laws were adopted at the federal and state level in response to the massive displacement that occurred due to freeway building and urban renewal movements of the 1950s and 1960s.

(a) Duties. The government has a duty to adopt relocation plans and to provide certain assistance to people who are displaced by public action, including action by private parties who have public agency funding.

(b) Rights. Displaced people and businesses have the right to receive special advanced notice of pending displacement, counseling, moving allowances, and payments to offset increased costs resulting from displacement.

(c) Remedies. Displacees can appeal to a local relocation appeals board and can sue in court to enforce their right to benefits. They can also prevent/delay their eviction if the public action resulted in non-compliance with requirements.

(2) APPLICABLE LAW.

(a) Federal.

(i) Uniform Relocation Act (URA) (42 USC 4601, et seq.) and its Regulations (49 CFR Part 24). This statute applies to all displacement as a result of action by the federal government or action by private parties that the federal government funds. The U.S. Department of Transportation and HUD adopted regulations that provide more specificity. The URA and regulations apply to housing developers who receive financing from CDBG, HOME, HOPWA, McKinney Act, and other federal programs.

(ii) HUD Handbook 1378. The HUD handbook is not itself a regulation, but it sets forth HUD's interpretation of the requirements of the statute and regulations, and provides sample forms of required notices. Since HUD implements most of the federal housing programs, HUD's view of the implementation of the law and regulations is persuasive authority. HUD is currently in the process of updating Handbook 1378. Only certain chapters are currently updated.

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(iii) Statutes and Regulations for Various HUD Programs. The individual laws and regulations for many programs like HOME and HOPWA have additional relocation obligations.

(b) California State Law.

(i) Relocation Assistance Act (Government Code Sections 7260, et seq.). Adopted by the state legislature to cover displacement by public agencies or private parties acting under contract with public agencies.

(ii) Real Property Acquisition and Relocation Assistance Guidelines.¹ Adopted by the State Department of Housing and Community Development (HCD) to implement and interpret the Relocation Assistance Act.

(iii) HCD Programs. Individual HCD programs require compliance with the Guidelines. HCD interpretation of the Guidelines often varies from local interpretation.

(c) Local Governments (Cities, Counties, Redevelopment Agencies).

(i) Local Relocation Guidelines. Local agencies are required to adopt local relocation guidelines that conform with the state guidelines.

(ii) Relocation Appeals Board. Local governments usually have a relocation appeals board, where appeals of local agency relocation decisions are heard.

(iii) Housing and Redevelopment Staff. People who implement the state and federal requirements at the local level, often in consultation with HUD about the required scope. Although the public agency providing the funding is the entity that is obligated to provide relocation benefits, this responsibility is usually passed on to the housing developer who receives the local, state or federal funding.

Section D. Zoning and Planning Law

(1) CONCEPTUAL FRAMEWORK. The U.S. and California Constitutions give local governments broad "police power" to regulate land use to protect the health, safety, and welfare of residents. A land use restriction is valid if it bears a reasonable relationship to the general welfare of the community. However, state statutes set minimum standards for exercise of local police power, and state and federal fair housing laws prohibit local land use practices that have a discriminatory impact on protected groups. Federal and State Constitutions also impose restrictions on the government taking private property without just compensation.

(a) Duties. State law requires local governments to adopt general plans (including housing elements) that must comply with state law requirements. In adopting plans and zoning ordinances and in approving individual projects, the local government must at least arguably be furthering legitimate goals of public welfare without discriminating against protected classes, deny affordable housing

¹ Title 25 CCR Section 6006 et seq.

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projects without making special findings, or treat licensed facilities occupied by unrelated groups of six or fewer people differently from single family homes.

(b) Rights. The local community has the collective right to establish land use plans and standards. Individual property owners (including housing developers) have the right to develop their property in a manner consistent with local zoning laws. Protected classes of people have the right to nondiscriminatory adoption and application of local zoning laws.

(c) Remedies. Affected parties can appeal land use decisions to the City Council, Board of Supervisors, or Permit Appeals Board, as applicable. Thereafter, they can sue in court to enforce their rights and force or invalidate project approval.

(2) APPLICABLE LAW.

(a) Federal. No federal law governs planning and zoning directly. The U.S. Constitution and federal fair housing laws prohibit zoning laws that have discriminatory impact, and require zoning laws to accommodate persons with disabilities. The U.S. Constitution also prohibits government taking of private property without just compensation.

(b) California State Law.

(i) General Plan and Housing Element Law. Government Code Section 65300, et seq., requires the local government to adopt a general plan, including seven elements, one of which is the housing element. The general plan is the land use constitution for the jurisdiction, and all other land use decisions must be consistent with the general plan. The housing element must describe the housing needs of all economic segments of the community and address those needs through policies and programs.

(ii) State Zoning Law. (Government Code Section 65800, et seq.) establishes minimum standards and procedures for adopting and implementing local zoning ordinances, including the granting of variances and conditional use permits.

(iii) California Environmental Quality Act. (CEQA) (Public Resources Code Section 21000, et seq.) requires a review of the environmental impacts of most projects, resulting in either a finding that the project is exempt, a negative declaration (no significant impacts), a mitigated negative declaration (impacts mitigated below the level of significance), or an environmental impact report (EIR) that identifies impacts and proposes mitigations. Certain affordable housing projects are now exempt from CEQA.

(iv) Density Bonus Law (Government Code Section 65915, et seq.). Requires local government to grant developers increased density plus additional incentives if developer agrees to restrict a certain percentage of units for lower or moderate income households.

(v) Housing Accountability Act (Government Code Section 65589.5). Prohibits a local agency from disapproving an affordable housing development or imposing conditions on the development that make it infeasible unless special findings are made based on substantial evidence.

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(vi) Affordable Housing Discrimination Law (Government Code Section 65008). Prohibits discriminatory land use actions by local government agencies against affordable housing and shelters and against any residential development, if the discrimination is based on race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, source of income, familial status, disability, age, method of financing, or occupancy by low or moderate income persons.

(vii) Group Home Law (Health and Safety Code Sections 1267.8, 1566.3, 1568.083, and 11834.23). Requires local governments to treat licensed group homes of six or fewer residents no differently from single family homes. Local agencies must allow these homes in any area zoned for residential use.

(viii) Fair Employment and Housing Act (Government Code Section 12900, et seq.). Prohibits housing discrimination in land use actions by local governments. The Act also requires local government to make reasonable accommodations in rules, policies, practices, or services in order to afford disabled persons equal opportunity to use and enjoy a dwelling. Applies to disparate impacts, as well as intentional discrimination.

(ix) Community Redevelopment Law. (Health and Safety Code Section 33000, et seq.) Establishes procedures for local jurisdictions to adopt redevelopment plans and sets forth powers of local redevelopment agencies. Imposes significant affordable housing requirements on redevelopment agencies.

(c) City and County Ordinances and Plans.

(i) Housing Element of General Plan. Must comply with state law requirements. Significant interplay between the state and local government is common in this process.

(ii) Planning Code/Zoning Law. Establishes districts that regulate height, bulk, and uses of buildings.

(iii) Building and Housing Code. Establishes minimum building, construction and housing requirements, including occupancy standards that limit the number of people in a dwelling.

(iv) Redevelopment Plans. Create special redevelopment areas where redevelopment agency has power to condemn and redevelop property. Create tax increment flow to redevelopment agency. Includes low and moderate income housing requirements.



U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
March 5, 2008

**JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE**

***REASONABLE MODIFICATIONS UNDER THE
FAIR HOUSING ACT***

Introduction

The Department of Justice (“DOJ”) and the Department of Housing and Urban Development (“HUD”) are jointly responsible for enforcing the federal Fair Housing Act¹ (the “Act”), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.² One type of disability discrimination prohibited by the Act is a refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.³ HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable modifications to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to reasonable modifications.⁴

¹ The Fair Housing Act is codified at 42 U.S.C. §§ 3601-3619.

² The Act uses the term “handicap” instead of “disability.” Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of “disability” in the Americans with Disabilities Act is drawn almost verbatim “from the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”). This document uses the term “disability,” which is more generally accepted.

³ 42 U.S.C. § 3604(f)(3)(A).

⁴ This Statement does not address the principles relating to reasonable accommodations. For further information see the Joint Statement of the Department of Housing and Urban

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This Statement is not intended to provide specific guidance regarding the Act's design and construction requirements for multifamily dwellings built for first occupancy after March 13, 1991. Some of the reasonable modifications discussed in this Statement are features of accessible design that are required for covered multifamily dwellings pursuant to the Act's design and construction requirements. As a result, people involved in the design and construction of multifamily dwellings are advised to consult the Act at 42 U.S.C. § 3604(f)(3)(c), the implementing regulations at 24 C.F.R. § 100.205, the Fair Housing Accessibility Guidelines, and the Fair Housing Act Design Manual. All of these are available on HUD's website at www.hud.gov/offices/fheo/disabilities/index.cfm. Additional technical guidance on the design and construction requirements can also be found on HUD's website and the Fair Housing Accessibility FIRST website at: <http://www.fairhousingfirst.org>.

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against housing applicants or residents because of their disability or the disability of anyone associated with them and from treating persons with disabilities less favorably than others because of their disability. The Act makes it unlawful for any person to refuse "to permit, at the expense of the [disabled] person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted."⁵ The Act also makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling." The Act also prohibits housing providers from refusing residency to persons with disabilities, or, with some narrow exceptions⁶,

Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act, dated May 17, 2004. This Joint Statement is available at www.hud.gov/offices/fheo/disabilities/index.cfm and http://www.usdoj.gov/crt/housing/jointstatement_ra.htm. See also 42 U.S.C. § 3604(f)(3)(B).

This Statement also does not discuss in depth the obligations of housing providers who are recipients of federal financial assistance to make and pay for structural changes to units and common and public areas that are needed as a reasonable accommodation for a person's disability. See Question 31.

⁵ 42 U.S.C. § 3604(f)(3)(A). HUD regulations pertaining to reasonable modifications may be found at 24 C.F.R. § 100.203.

⁶ The Act contemplates certain limits to the receipt of reasonable accommodations or reasonable modifications. For example, a tenant may be required to deposit money into an interest bearing

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placing conditions on their residency, because those persons may require reasonable modifications or reasonable accommodations.

2. What is a reasonable modification under the Fair Housing Act?

A reasonable modification is a structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises. Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas. A request for a reasonable modification may be made at any time during the tenancy. The Act makes it unlawful for a housing provider or homeowners' association to refuse to allow a reasonable modification to the premises when such a modification may be necessary to afford persons with disabilities full enjoyment of the premises.

To show that a requested modification may be necessary, there must be an identifiable relationship, or nexus, between the requested modification and the individual's disability. Further, the modification must be "reasonable." Examples of modifications that typically are reasonable include widening doorways to make rooms more accessible for persons in wheelchairs; installing grab bars in bathrooms; lowering kitchen cabinets to a height suitable for persons in wheelchairs; adding a ramp to make a primary entrance accessible for persons in wheelchairs; or altering a walkway to provide access to a public or common use area. These examples of reasonable modifications are not exhaustive.

3. Who is responsible for the expense of making a reasonable modification?

The Fair Housing Act provides that while the housing provider must permit the modification, the tenant is responsible for paying the cost of the modification.

4. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other

account to ensure that funds are available to restore the interior of a dwelling to its previous state. See, e.g., Question 21 below. A reasonable accommodation can be conditioned on meeting reasonable safety requirements, such as requiring persons who use motorized wheelchairs to operate them in a manner that does not pose a risk to the safety of others or cause damage to other persons' property. See Joint Statement on Reasonable Accommodations, Question 11.

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than addiction caused by current, illegal use of a controlled substance) and alcoholism.

The term “substantially limits” suggests that the limitation is “significant” or “to a large degree.”

The term “major life activity” means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, and speaking. This list of major life activities is not exhaustive.

5. Who is entitled to a reasonable modification under the Fair Housing Act?

Persons who meet the Fair Housing Act’s definition of “person with a disability” may be entitled to a reasonable modification under the Act. However, there must be an identifiable relationship, or nexus, between the requested modification and the individual’s disability. If no such nexus exists, then the housing provider may refuse to allow the requested modification.

Example 1: A tenant, whose arthritis impairs the use of her hands and causes her substantial difficulty in using the doorknobs in her apartment, wishes to replace the doorknobs with levers. Since there is a relationship between the tenant’s disability and the requested modification and the modification is reasonable, the housing provider must allow her to make the modification at the tenant’s expense.

Example 2: A homeowner with a mobility disability asks the condo association to permit him to change his roofing from shaker shingles to clay tiles and fiberglass shingles because he alleges that the shingles are less fireproof and put him at greater risk during a fire. There is no evidence that the shingles permitted by the homeowner’s association provide inadequate fire protection and the person with the disability has not identified a nexus between his disability and the need for clay tiles and fiberglass shingles. The homeowner’s association is not required to permit the homeowner’s modification because the homeowner’s request is not reasonable and there is no nexus between the request and the disability.

6. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested reasonable modification?

A housing provider may not ordinarily inquire as to the nature and severity of an individual’s disability. However, in response to a request for a reasonable modification, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act’s definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed modification, and (3) shows the relationship between the person’s disability and the need for the requested modification. Depending on the individual’s circumstances, information verifying that the person meets the Act’s definition of disability can usually be provided by the individual herself (e.g., proof that an individual under 65 years of age receives Supplemental Security

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Income or Social Security Disability Insurance benefits⁸ or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable modification is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable modification request or unless disclosure is required by law (e.g., a court-issued subpoena requiring disclosure).

7. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable modification?

A housing provider is entitled to obtain information that is necessary to evaluate whether a requested reasonable modification may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the housing provider, and if the need for the requested modification is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the modification.

If the requester's disability is known or readily apparent to the provider, but the need for the modification is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the modification.

Example 1: An applicant with an obvious mobility impairment who uses a motorized scooter to move around asks the housing provider to permit her to install a ramp at the entrance of the apartment building. Since the physical disability (i.e., difficulty walking) and the disability-related need for the requested modification are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested modification.

⁸ Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Income ("SSDI") benefits in most cases meet the definition of a disability under the Fair Housing Act, although the converse may not be true. See, e.g., *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999) (noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).

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Example 2: A deaf tenant asks his housing provider to allow him to install extra electrical lines and a cable line so the tenant can use computer equipment that helps him communicate with others. If the tenant's disability is known, the housing provider may not require him to document his disability; however, since the need for the electrical and cable lines may not be apparent, the housing provider may request information that is necessary to support the disability-related need for the requested modification.

8. Who must comply with the Fair Housing Act's reasonable modification requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to allow an individual to make reasonable modifications when such modifications may be necessary to afford a person with a disability full enjoyment of the premises – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. See, e.g., City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 2d 703, 710 (D. Md. 2001), *aff'd*, 2002 WL 2012545 (4th Cir. 2002).

9. What is the difference between a *reasonable accommodation* and a *reasonable modification* under the Fair Housing Act?⁹

Under the Fair Housing Act, a *reasonable modification* is a structural change made to the premises whereas a *reasonable accommodation* is a change, exception, or adjustment to a rule, policy, practice, or service. A person with a disability may need either a reasonable accommodation or a reasonable modification, or both, in order to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Generally, under the Fair Housing Act, the housing provider is responsible for the costs associated with a reasonable accommodation unless it is an undue financial and administrative burden, while the tenant or someone acting on the tenant's behalf, is responsible for costs associated with a reasonable modification. See Reasonable Accommodation Statement, Questions 7 and 8.

Example 1: Because of a mobility disability, a tenant wants to install grab bars in the bathroom. This is a reasonable modification and must be permitted at the tenant's expense.

⁹ Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability, and obligate housing providers to make and pay for structural changes to facilities, if needed as a reasonable accommodation for applicants and tenants with disabilities, unless doing so poses an undue financial and administrative burden. See Question 31.

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Example 2: Because of a hearing disability, a tenant wishes to install a peephole in her door so she can see who is at the door before she opens it. This is a reasonable modification and must be permitted at the tenant's expense.

Example 3: Because of a mobility disability, a tenant wants to install a ramp outside the building in a common area. This is a reasonable modification and must be permitted at the tenant's expense. See also Questions 19, 20 and 21.

Example 4: Because of a vision disability, a tenant requests permission to have a guide dog reside with her in her apartment. The housing provider has a "no-pets" policy. This is a request for a reasonable accommodation, and the housing provider must grant the accommodation.

10. Are reasonable modifications restricted to the interior of a dwelling?

No. Reasonable modifications are not limited to the interior of a dwelling. Reasonable modifications may also be made to public and common use areas such as widening entrances to fitness centers or laundry rooms, or for changes to exteriors of dwelling units such as installing a ramp at the entrance to a dwelling.

11. Is a request for a parking space because of a physical disability a *reasonable accommodation* or a *reasonable modification*?

Courts have treated requests for parking spaces as requests for a reasonable accommodation and have placed the responsibility for providing the parking space on the housing provider, even if provision of an accessible or assigned parking space results in some cost to the provider. For example, courts have required a housing provider to provide an assigned space even though the housing provider had a policy of not assigning parking spaces or had a waiting list for available parking. However, housing providers may not require persons with disabilities to pay extra fees as a condition of receiving accessible parking spaces.

Providing a parking accommodation could include creating signage, repainting markings, redistributing spaces, or creating curb cuts. This list is not exhaustive.

12. What if the structural changes being requested by the tenant or applicant are in a building that is subject to the design and construction requirements of the Fair Housing Act and the requested structural changes are a feature of accessible design that should have already existed in the unit or common area, e.g., doorways wide enough to accommodate a wheelchair, or an accessible entryway to a unit.

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The Fair Housing Act provides that covered multifamily dwellings built for first occupancy after March 13, 1991, shall be designed and constructed to meet certain minimum accessibility and adaptability standards. If any of the structural changes needed by the tenant are ones that should have been included in the unit or public and common use area when constructed then the housing provider may be responsible for providing and paying for those requested structural changes. However, if the requested structural changes are not a feature of accessible design that should have already existed in the building pursuant to the design and construction requirements under the Act, then the tenant is responsible for paying for the cost of the structural changes as a reasonable modification.

Although the design and construction provisions only apply to certain multifamily dwellings built for first occupancy since 1991, a tenant may request reasonable modifications to housing built prior to that date. In such cases, the housing provider must allow the modifications, and the tenant is responsible for paying for the costs under the Fair Housing Act.

For a discussion of the design and construction requirements of the Act, and their applicability, see HUD's website at: www.hud.gov/offices/fheo/disabilities/index.cfm and the Fair Housing Accessibility FIRST website at: <http://www.fairhousingfirst.org>.

Example 1: A tenant with a disability who uses a wheelchair resides in a ground floor apartment in a non-elevator building that was built in 1995. Buildings built for first occupancy after March 13, 1991 are covered by the design and construction requirements of the Fair Housing Act. Because the building is a non-elevator building, all ground floor units must meet the minimum accessibility requirements of the Act. The doors in the apartment are not wide enough for passage using a wheelchair in violation of the design and construction requirements but can be made so through retrofitting. Under these circumstances, one federal court has held that the tenant may have a potential claim against the housing provider.

Example 2: A tenant with a disability resides in an apartment in a building that was built in 1987. The doors in the unit are not wide enough for passage using a wheelchair but can be made so through retrofitting. If the tenant meets the other requirements for obtaining a modification, the tenant may widen the doorways, at her own expense.

Example 3: A tenant with a disability resides in an apartment in a building that was built in 1993 in compliance with the design and construction requirements of the Fair Housing Act. The tenant wants to install grab bars in the bathroom because of her disability. Provided that the tenant meets the other requirements for obtaining a modification, the tenant may install the grab bars at her own expense.

13. Who is responsible for expenses associated with a reasonable modification, e.g., for upkeep or maintenance?

The tenant is responsible for upkeep and maintenance of a modification that is used exclusively by her. If a modification is made to a common area that is normally maintained by the housing provider, then the housing provider is responsible for the upkeep and maintenance of the modification. If a modification is made to a common area that is not normally maintained by

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the housing provider, then the housing provider has no responsibility under the Fair Housing Act to maintain the modification.

Example 1: Because of a mobility disability, a tenant, at her own expense, installs a lift inside her unit to allow her access to a second story. She is required to maintain the lift at her expense because it is not in a common area.

Example 2: Because of a mobility disability, a tenant installs a ramp in the lobby of a multifamily building at her own expense. The ramp is used by other tenants and the public as well as the tenant with the disability. The housing provider is responsible for maintaining the ramp.

Example 3: A tenant leases a detached, single-family home. Because of a mobility disability, the tenant installs a ramp at the outside entrance to the home. The housing provider provides no snow removal services, and the lease agreement specifically states that snow removal is the responsibility of the individual tenant. Under these circumstances, the housing provider has no responsibility under the Fair Housing Act to remove snow on the tenant's ramp. However, if the housing provider normally provides snow removal for the outside of the building and the common areas, the housing provider is responsible for removing the snow from the ramp as well.

14. In addition to current residents, are prospective tenants and buyers of housing protected by the reasonable modification provisions of the Fair Housing Act?

Yes. A person may make a request for a reasonable modification at any time. An individual may request a reasonable modification of the dwelling at the time that the potential tenancy or purchase is discussed. Under the Act, a housing provider cannot deny or restrict access to housing because a request for a reasonable modification is made. Such conduct would constitute discrimination. The modification does not have to be made, however, unless it is reasonable. See Questions 2, 16, 21 and 23.

15. When and how should an individual request permission to make a modification?

Under the Act, a resident or an applicant for housing makes a reasonable modification request whenever she makes clear to the housing provider that she is requesting permission to make a structural change to the premises because of her disability. She should explain that she has a disability, if not readily apparent or not known to the housing provider, the type of modification she is requesting, and the relationship between the requested modification and her disability.

An applicant or resident is not entitled to receive a reasonable modification unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable modification request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable modification request does

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not need to mention the Act or use the words “reasonable modification.” However, the requester must make the request in a manner that a reasonable person would understand to be a request for permission to make a structural change because of a disability.

Although a reasonable modification request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable modification requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

16. Does a person with a disability have to have the housing provider’s approval before making a reasonable modification to the dwelling?

Yes. A person with a disability must have the housing provider’s approval before making the modification. However, if the person with a disability meets the requirements under the Act for a reasonable modification and provides the relevant documents and assurances, the housing provider cannot deny the request.

17. What if the housing provider fails to act promptly on a reasonable modification request?

A provider has an obligation to provide prompt responses to a reasonable modification request. An undue delay in responding to a reasonable modification request may be deemed a failure to permit a reasonable modification.

18. What if the housing provider proposes that the tenant move to a different unit in lieu of making a proposed modification?

The housing provider cannot insist that a tenant move to a different unit in lieu of allowing the tenant to make a modification that complies with the requirements for reasonable modifications. See Questions 2, 21 and 23. Housing providers should be aware that persons with disabilities typically have the most accurate knowledge regarding the functional limitations posed by their disability.

Example: As a result of a mobility disability, a tenant requests that he be permitted, at his expense, to install a ramp so that he can access his apartment using his motorized wheelchair. The existing entrance to his dwelling is not wheelchair accessible because the route to the front door requires going up a step. The housing provider proposes that in lieu of installing the ramp, the tenant move to a different unit in the building. The tenant is not obligated to accept the alternative proposed by the housing provider, as his request to modify his unit is reasonable and must be approved.

19. What if the housing provider wants an alternative modification or alternative design for the proposed modification that does not cost more but that the housing provider considers more aesthetically pleasing?

In general, the housing provider cannot insist on an alternative modification or an alternative design if the tenant complies with the requirements for reasonable modifications. See Questions 2, 21 and 23. If the modification is to the interior of the unit and must be restored to its original condition when the tenant moves out, then the housing provider cannot require that its design be used instead of the tenant's design. However, if the modification is to a common area or an aspect of the interior of the unit that would not have to be restored because it would not be reasonable to do so, and if the housing provider's proposed design imposes no additional costs and still meets the tenant's needs, then the modification should be done in accordance with the housing provider's design. See Question 24 for a discussion of the restoration requirements.

Example 1: As a result of a mobility disability, a tenant requests that he be permitted, at his expense, to install a ramp so that he can access his apartment using his motorized wheelchair. The existing entrance to his dwelling is not wheelchair accessible because the route to the front door requires going up a step. The housing provider proposes an alternative design for a ramp but the alternative design costs more and does not meet the tenant's needs. The tenant is not obligated to accept the alternative modification, as his request to modify his unit is reasonable and must be approved.

Example 2: As a result of a mobility disability, a tenant requests permission to widen a doorway to allow passage with her wheelchair. All of the doorways in the unit are trimmed with a decorative trim molding that does not cost any more than the standard trim molding. Because in usual circumstances it would not be reasonable to require that the doorway be restored at the end of the tenancy, the tenant should use the decorative trim when he widens the doorway.

20. What if the housing provider wants a more costly design for the requested modification?

If the housing provider wishes a modification to be made with more costly materials, in order to satisfy the landlord's aesthetic standards, the tenant must agree only if the housing provider pays those additional costs. Further, as discussed in Questions 21 and 23 below, housing providers may require that the tenant obtain all necessary building permits and may require that the work be performed in a workmanlike manner. If the housing provider requires more costly materials be used to satisfy her workmanship preferences beyond the requirements of the applicable local codes, the tenant must agree only if the housing provider pays for those additional costs as well. In such a case, however, the housing provider's design must still meet the tenant's needs.

21. What types of documents and assurances may a housing provider require regarding the modification before granting the reasonable modification?

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A housing provider may require that a request for a reasonable modification include a description of the proposed modification both before changes are made to the dwelling and before granting the modification. A description of the modification to be made may be provided to a housing provider either orally or in writing depending on the extent and nature of the proposed modification. A housing provider may also require that the tenant obtain any building permits needed to make the modifications, and that the work be performed in a workmanlike manner.

The regulations implementing the Fair Housing Act state that housing providers generally cannot impose conditions on a proposed reasonable modification. For example, a housing provider cannot require that the tenant obtain additional insurance or increase the security deposit as a condition that must be met before the modification will be allowed. However, the Preamble to the Final Regulations also indicates that there are some conditions that can be placed on a tenant requesting a reasonable modification. For example, in certain limited and narrow circumstances, a housing provider may require that the tenant deposit money into an interest bearing account to ensure that funds are available to restore the interior of a dwelling to its previous state, ordinary wear and tear excepted. Imposing conditions not contemplated by the Fair Housing Act and its implementing regulations may be the same as an illegal refusal to permit the modification.

22. May a housing provider or homeowner's association condition approval of the requested modification on the requester obtaining special liability insurance?

No. Imposition of such a requirement would constitute a violation of the Fair Housing Act.

Example: Because of a mobility disability, a tenant wants to install a ramp outside his unit. The housing provider informs the tenant that the ramp may be installed, but only after the tenant obtains separate liability insurance for the ramp out of concern for the housing provider's potential liability. The housing provider may not impose a requirement of liability insurance as a condition of approval of the ramp.

23. Once the housing provider has agreed to a reasonable modification, may she insist that a particular contractor be used to perform the work?

No. The housing provider cannot insist that a particular contractor do the work. The housing provider may only require that whoever does the work is reasonably able to complete the work in a workmanlike manner and obtain all necessary building permits.

24. If a person with a disability has made reasonable modifications to the interior of the dwelling, must she restore *all* of them when she moves out?

The tenant is obligated to restore those portions of the interior of the dwelling to their previous condition only where "it is reasonable to do so" and where the housing provider has requested the restoration. The tenant is not responsible for expenses associated with reasonable

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wear and tear. In general, if the modifications do not affect the housing provider's or subsequent tenant's use or enjoyment of the premises, the tenant cannot be required to restore the modifications to their prior state. A housing provider may choose to keep the modifications in place at the end of the tenancy. See also Question 28.

Example 1: Because the tenant uses a wheelchair, she obtained permission from her housing provider to remove the base cabinets and lower the kitchen sink to provide for greater accessibility. It is reasonable for the housing provider to ask the tenant to replace the cabinets and raise the sink back to its original height.

Example 2: Because of a mobility disability, a tenant obtained approval from the housing provider to install grab bars in the bathroom. As part of the installation, the contractor had to construct reinforcements on the underside of the wall. These reinforcements are not visible and do not detract from the use of the apartment. It is reasonable for the housing provider to require the tenant to remove the grab bars, but it is not reasonable for the housing provider to require the tenant to remove the reinforcements.

Example 3: Because of a mobility disability, a tenant obtained approval from the housing provider to widen doorways to allow him to maneuver in his wheelchair. In usual circumstances, it is not reasonable for the housing provider to require him to restore the doorways to their prior width.

25. Of the reasonable modifications made to the interior of a dwelling that must be restored, must the person with a disability pay to make those restorations when she moves out?

Yes. Reasonable restorations of the dwelling required as a result of modifications made to the interior of the dwelling must be paid for by the tenant unless the next occupant of the dwelling wants to retain the reasonable modifications and where it is reasonable to do so, the next occupant is willing to establish a new interest bearing escrow account. The subsequent tenant would have to restore the modifications to the prior condition at the end of his tenancy if it is reasonable to do so and if requested by the housing provider. See also Question 24.

26. If a person with a disability has made a reasonable modification to the exterior of the dwelling, or a common area, must she restore it to its original condition when she moves out?

No. The Fair Housing Act expressly provides that housing providers may only require restoration of modifications made to interiors of the dwelling at the end of the tenancy. Reasonable modifications such as ramps to the front door of the dwelling or modifications made to laundry rooms or building entrances are not required to be restored.

27. May a housing provider increase or require a person with a disability to pay a security deposit if she requests a reasonable modification?

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No. The housing provider may not require an increased security deposit as the result of a request for a reasonable modification, nor may a housing provider require a tenant to pay a security deposit when one is not customarily required. However, a housing provider may be able to take other steps to ensure that money will be available to pay for restoration of the interior of the premises at the end of the tenancy. See Questions 21 and 28.

28. May a housing provider take other steps to ensure that money will be available to pay for restoration of the interior of the premises at the end of the tenancy?

Where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the housing provider may negotiate with the tenant as part of a restoration agreement a provision that requires the tenant to make payments into an interest-bearing escrow account. A housing provider may not routinely require that tenants place money in escrow accounts when a modification is sought. Both the amount and the terms of the escrow payment are subject to negotiation between the housing provider and the tenant.

Simply because an individual has a disability does not mean that she is less creditworthy than an individual without a disability. The decision to require that money be placed in an escrow account should be based on the following factors: 1) the extent and nature of the proposed modifications; 2) the expected duration of the lease; 3) the credit and tenancy history of the individual tenant; and 4) other information that may bear on the risk to the housing provider that the premises will not be restored.

If the housing provider decides to require payment into an escrow account, the amount of money to be placed in the account cannot exceed the cost of restoring the modifications, and the period of time during which the tenant makes payment into the escrow account must be reasonable. Although a housing provider may require that funds be placed in escrow, it does not automatically mean that the full amount of money needed to make the future restorations can be required to be paid at the time that the modifications are sought. In addition, it is important to note that interest from the account accrues to the benefit of the tenant. If an escrow account is established, and the housing provider later decides not to have the unit restored, then all funds in the account, including the interest, must be promptly returned to the tenant.

Example 1: Because of a mobility disability, a tenant requests a reasonable modification. The modification includes installation of grab bars in the bathroom. The tenant has an excellent credit history and has lived in the apartment for five years before becoming disabled. Under these circumstances, it may not be reasonable to require payment into an escrow account.

Example 2: Because of a mobility disability, a new tenant with a poor credit history wants to lower the kitchen cabinets to a more accessible height. It may be reasonable for the housing provider to require payment into an interest bearing escrow account to ensure that funds are available for restoration.

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Example 3: A housing provider requires all tenants with disabilities to pay a set sum into an interest bearing escrow account before approving any request for a reasonable modification. The amount required by the housing provider has no relationship to the actual cost of the restoration. This type of requirement violates the Fair Housing Act.

29. What if a person with a disability moves into a rental unit and wants the carpet taken up because her wheelchair does not move easily across carpeting? Is that a reasonable accommodation or modification?

Depending on the circumstances, removal of carpeting may be either a reasonable accommodation or a reasonable modification.

Example 1: If the housing provider has a practice of not permitting a tenant to change flooring in a unit and there is a smooth, finished floor underneath the carpeting, generally, allowing the tenant to remove the carpet would be a reasonable accommodation.

Example 2: If there is no finished flooring underneath the carpeting, generally, removing the carpeting and installing a finished floor would be a reasonable modification that would have to be done at the tenant's expense. If the finished floor installed by the tenant does not affect the housing provider's or subsequent tenant's use or enjoyment of the premises, the tenant would not have to restore the carpeting at the conclusion of the tenancy. See Questions 24 and 25.

Example 3: If the housing provider has a practice of replacing the carpeting before a new tenant moves in, and there is an existing smooth, finished floor underneath, then it would be a reasonable accommodation of his normal practice of installing new carpeting for the housing provider to just take up the old carpeting and wait until the tenant with a mobility disability moves out to put new carpeting down.

30. Who is responsible for paying for the costs of structural changes to a dwelling unit that has not yet been constructed if a purchaser with a disability needs different or additional features to make the unit meet her disability-related needs?

If the dwelling unit is not subject to the design and construction requirements (i.e., a detached single family home or a multi-story townhouse without an elevator), then the purchaser is responsible for the additional costs associated with the structural changes. The purchaser is responsible for any additional cost that the structural changes might create over and above what the original design would have cost.

If the unit being purchased is subject to the design and construction requirements of the Fair Housing Act, then all costs associated with incorporating the features required by the Act are borne by the builder. If a purchaser with a disability needs different or additional features added to a unit under construction or about to be constructed beyond those already required by the Act, and it would cost the builder more to provide the requested features, the structural changes would be considered a reasonable modification and the additional costs would have to

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be borne by the purchaser. The purchaser is responsible for any additional cost that the structural changes might create over and above what the original design would have cost.

Example 1: A buyer with a mobility disability is purchasing a single family dwelling under construction and asks for a bathroom sink with a floorless base cabinet with retractable doors that allows the buyer to position his wheelchair under the sink. If the cabinet costs more than the standard vanity cabinet provided by the builder, the buyer is responsible for the additional cost, not the full cost of the requested cabinet. If, however, the alternative cabinet requested by the buyer costs less than or the same as the one normally provided by the builder, and the installation costs are also the same or less, then the builder should install the requested cabinet without any additional cost to the buyer.

Example 2: A buyer with a mobility disability is purchasing a ground floor unit in a detached townhouse that is designed with a concrete step at the front door. The buyer requests that the builder grade the entrance to eliminate the need for the step. If the cost of providing the at-grade entrance is no greater than the cost of building the concrete step, then the builder would have to provide the at-grade entrance without additional charge to the purchaser.

Example 3: A buyer with a mobility disability is purchasing a unit that is subject to the design and construction requirements of the Fair Housing Act. The buyer wishes to have grab bars installed in the unit as a reasonable modification to the bathroom. The builder is responsible for installing and paying for the wall reinforcements for the grab bars because these reinforcements are required under the design and construction provisions of the Act. The buyer is responsible for the costs of installing and paying for the grab bars.

31. Are the rules the same if a person with a disability lives in housing that receives federal financial assistance and the needed structural changes to the unit or common area are the result of the tenant having a disability?

Housing that receives federal financial assistance is covered by both the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973. Under regulations implementing Section 504, structural changes needed by an applicant or resident with a disability in housing receiving federal financial assistance are considered reasonable accommodations. They must be paid for by the housing provider unless providing them would be an undue financial and administrative burden or a fundamental alteration of the program or unless the housing provider can accommodate the individual's needs through other means. Housing that receives federal financial assistance and that is provided by state or local entities may also be covered by Title II of the Americans with Disabilities Act.

Example 1: A tenant who uses a wheelchair and who lives in privately owned housing needs a roll-in shower in order to bathe independently. Under the Fair Housing Act the tenant would be responsible for the costs of installing the roll-in shower as a reasonable modification to his unit.

Example 2: A tenant who uses a wheelchair and who lives in housing that receives federal financial assistance needs a roll-in shower in order to bathe independently. Under Section 504 of the Rehabilitation Act of 1973, the housing provider would be obligated to pay for and install the roll-in shower as a reasonable accommodation to the tenant unless doing so was an undue financial and administrative burden or unless the housing provider could meet the tenant's disability-related needs by transferring the tenant to another appropriate unit that contains a roll-in shower.

HUD has provided more detailed information about Section 504's requirements. See www.hud.gov/offices/fheo/disabilities/sect504.cfm.

32. If a person believes that she has been unlawfully denied a reasonable modification, what should that person do if she wants to challenge that denial under the Act?

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for a reasonable modification, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;
- By completing the "on-line" complaint form available on the HUD internet site: <http://www.hud.gov>; or
- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity
Department of Housing & Urban Development
451 Seventh Street, S.W., Room 5204
Washington, DC 20410-2000

Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application

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and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section – G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at <http://www.usdoj.gov/crt/housing/hcehome.html>.

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.



U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
May 17, 2004

JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE

*REASONABLE ACCOMMODATIONS UNDER THE
FAIR HOUSING ACT*

Introduction

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act¹ (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.² One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.³ HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

¹ The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

² The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

³ 42 U.S.C. § 3604(f)(3)(B).

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reasonable accommodations.⁴

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them⁵ and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.”⁶ The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

⁴ Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (*e.g.*, providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. *See* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) (www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf) and “Section 504: Frequently Asked Questions,” (www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118).

⁵ The Fair Housing Act’s protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). *See also* H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) (“The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.”). *Accord:* Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

⁶ 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

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make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.⁷ With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 703, 710 (D. Md. 2001), aff'd 2002 WL 2012545 (4th Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

3. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

⁷ This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.

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The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.⁸ This list of major life activities is not exhaustive. *See e.g., Bragdon v. Abbott*, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.⁹ Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

5. How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

⁸ The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See Sutton v. United Airlines, Inc.*, 527 U.S. 470, 492 (1999).

⁹ *See, e.g., United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

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how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

Example 1: A housing provider requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. On her application to rent an apartment, a woman notes that she currently resides in Cambridge House. The manager of the apartment complex knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and his personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant. The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. The housing provider may not treat this applicant differently than other applicants based on his subjective perceptions of the potential problems posed by her alcoholism by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. However, the manager could have checked this applicant's references to the same extent and in the same manner as he would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the manager could then have rejected the applicant based on direct threat.

Example 2: James X, a tenant at the Shady Oaks apartment complex, is arrested for threatening his neighbor while brandishing a baseball bat. The Shady Oaks' lease agreement contains a term prohibiting tenants from threatening violence against other residents. Shady Oaks' rental manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Shady Oaks' standard practice of strictly enforcing its "no threats" policy, the Shady Oaks rental manager issues James X a 30-day notice to quit, which is the first step in the eviction process. James X's attorney contacts Shady Oaks' rental manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability. The Shady Oaks rental manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and

periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James X, the attorney responds that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding, since James X continues to pose a direct threat to the health or safety of other residents.

6. What is a "reasonable accommodation" for purposes of the Act?

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. The Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.

Example 1: A housing provider has a policy of providing unassigned parking spaces to residents. A resident with a mobility impairment, who is substantially limited in her ability to walk, requests an assigned accessible parking space close to the entrance to her unit as a reasonable accommodation. There are available parking spaces near the entrance to her unit that are accessible, but those spaces are available to all residents on a first come, first served basis. The provider must make an exception to its policy of not providing assigned parking spaces to accommodate this resident.

Example 2: A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.

Example 3: A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing

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provider must make an exception to its “no pets” policy to accommodate this tenant.

7. Are there any instances when a provider can deny a request for a reasonable accommodation without violating the Act?

Yes. A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

When a housing provider refuses a requested accommodation because it is not reasonable, the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.

Example: As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a

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fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

8. What is a “fundamental alteration”?

A "fundamental alteration" is a modification that alters the essential nature of a provider's operations.

Example: A tenant has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its tenants, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should discuss with the requester whether there is any alternative accommodation that would effectively meet the requester's disability-related needs without fundamentally altering the nature of its operations, such as reducing the tenant's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the tenant's unit so she can transport the tenant to the grocery store and assist him with his shopping.

9. What happens if providing a requested accommodation involves some costs on the part of the housing provider?

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative

burden.

10. What happens if no agreement can be reached through the interactive process?

A failure to reach an agreement on an accommodation request is in effect a decision by the provider not to grant the requested accommodation. If the individual who was denied an accommodation files a Fair Housing Act complaint to challenge that decision, then the agency or court receiving the complaint will review the evidence in light of applicable law and decide if the housing provider violated that law. For more information about the complaint process, see question 19 below.

11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?

No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

Example 1: A man who is substantially limited in his ability to walk uses a motorized scooter for mobility purposes. He applies to live in an assisted living facility that has a policy prohibiting the use of motorized vehicles in buildings and elsewhere on the premises. It would be a reasonable accommodation for the facility to make an exception to this policy to permit the man to use his motorized scooter on the premises for mobility purposes. Since allowing the man to use his scooter in the buildings and elsewhere on the premises is a reasonable accommodation, the facility may not condition his use of the scooter on payment of a fee or deposit or on a requirement that he obtain liability insurance relating to the use of the scooter. However, since the Fair Housing Act does not protect any person with a disability who poses a direct threat to the person or property of others, the man must operate his motorized scooter in a responsible manner that does not pose a significant risk to the safety of other persons and does not cause damage to other persons' property. If the individual's use of the scooter causes damage to his unit or the common areas, the housing provider may charge him for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

Example 2: Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for

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the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

12. When and how should an individual request an accommodation?

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability.

An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable accommodation request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation." However, the requester must make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.

Although a reasonable accommodation request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

Example: A tenant in a large apartment building makes an oral request that she be assigned a mailbox in a location that she can easily access because of a physical disability that limits her ability to reach and bend. The provider would prefer that the tenant make the accommodation request on a pre-printed form, but the tenant fails to complete the form. The provider must consider the reasonable accommodation request even though the tenant would not use the provider's designated form.

13. Must a housing provider adopt formal procedures for processing requests for a reasonable accommodation?

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No. The Act does not require that a housing provider adopt any formal procedures for reasonable accommodation requests. However, having formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted. If a provider adopts formal procedures for processing reasonable accommodation requests, the provider should ensure that the procedures, including any forms used, do not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford a person with a disability equal opportunity to use and enjoy a dwelling. See Questions 16 - 18, which discuss the disability-related information that a provider may and may not request for the purposes of evaluating a reasonable accommodation request.

14. Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?

No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for the accommodation has been made. A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words “reasonable accommodation” are not used as part of the request.

15. What if a housing provider fails to act promptly on a reasonable accommodation request?

A provider has an obligation to provide prompt responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

16. What inquiries, if any, may a housing provider make of current or potential residents regarding the existence of a disability when they have not asked for an accommodation?

Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability, or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries, provided these inquiries are made of all applicants, including those with and without disabilities:

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- An inquiry into an applicant's ability to meet the requirements of tenancy;
- An inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance;
- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or to persons with a particular type of disability; and
- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability.

Example 1: A housing provider offers accessible units to persons with disabilities needing the features of these units on a priority basis. The provider may ask applicants if they have a disability and if, in light of their disability, they will benefit from the features of the units. However, the provider may not ask applicants if they have other types of physical or mental impairments. If the applicant's disability and the need for the accessible features are not readily apparent, the provider may request reliable information/documentation of the disability-related need for an accessible unit.

Example 2: A housing provider operates housing that is legally limited to persons with chronic mental illness. The provider may ask applicants for information needed to determine if they have a mental disability that would qualify them for the housing. However, in this circumstance, the provider may not ask applicants if they have other types of physical or mental impairments. If it is not readily apparent that an applicant has a chronic mental disability, the provider may request reliable information/documentation of the mental disability needed to qualify for the housing.

In some instances, a provider may also request certain information about an applicant's or a resident's disability if the applicant or resident requests a reasonable accommodation. See Questions 17 and 18 below.

17. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation?

A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information

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about the requester's disability or the disability-related need for the accommodation.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation.

Example 1: An applicant with an obvious mobility impairment who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (*i.e.*, difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.

Example 2: A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.

Example 3: An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

18. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation?

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability (*see* Answer 16, above). However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits¹⁰ or a credible statement by the individual). A doctor or other

¹⁰ Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI") benefits in most cases meet the definition of disability under the Fair Housing Act, although the converse may not be true. *See e.g., Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999)

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medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (*e.g.*, a court-issued subpoena requiring disclosure).

19. If a person believes she has been unlawfully denied a reasonable accommodation, what should that person do if she wishes to challenge that denial under the Act?

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for reasonable accommodation, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;
- By completing the "on-line" complaint form available on the HUD internet site: <http://www.hud.gov>; or
- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity
Department of Housing & Urban Development
451 Seventh Street, S.W., Room 5204
Washington, DC 20410-2000

(noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).

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Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section – G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at <http://www.usdoj.gov/crt/housing/hcehome.html>.

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

Fair Housing Act and Regulations

Fair Housing Act and Regulations

Congress first passed the Fair Housing Act in 1968. It has amended the Act several times, the last in 1988. As discussed in Chapter 2, the three key concepts for analyzing the Fair Housing Act are the duties, rights, and remedies it created:

- When a law imposes a duty on a person (defined broadly to include a governmental actor, a private artificial person such as a corporation, or a natural, living, breathing 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.
- 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.

The Department of Housing and Urban Development (HUD), under Section 808 of the Act, is responsible for administering the Fair Housing Act. HUD has issued Regulations that interpret and provide guidelines for how HUD administers the Act. Regulations, like statutes, are considered laws.

This Appendix provides links to the Fair Housing Act and the implementing Regulations and offers a list of Act and Regulatory sections.

Fair Housing Act

The Act may be found on the Department of Justice's website at <http://www.justice.gov/crt/housing/title8.php>. The sections of the [Fair Housing Act](#) are:

- Sec. 800 (42 U.S.C. 3601): Short Title
- Sec. 801 (42 U.S.C. 3601): Declaration of Policy
- Sec. 802 (42 U.S.C. 3602): Definitions

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- (42 U.S.C. 3602 note: Neither the term "individual with handicaps" nor the term "handicap" shall apply to an individual solely because that individual is a transvestite)
- Sec. 803 (42 U.S.C. 3603): Effective dates of certain prohibitions
- Sec. 804 (42 U.S.C. 3604): Discrimination in sale or rental of housing and other prohibited practices
- Sec. 805 (42 U.S.C. 3605): Discrimination in Residential Real Estate-Related Transactions
- Sec. 806 (42 U.S.C. 3606): Discrimination in provision of brokerage services
- Sec. 807 (42 U.S.C. 3607): Religious organization or private club exemption
- Sec. 808 (42 U.S.C. 3608): Administration
- Sec. 808a (42 U.S.C. 3608a): Collection of certain data
- Sec. 809 (42 U.S.C. 3609): Education and conciliation; conferences and consultations; reports
- Sec. 810 (42 U.S.C. 3610): Administrative Enforcement; Preliminary Matters
- Sec. 811 (42 U.S.C. 3611): Subpoenas; Giving of Evidence
- Sec. 812 (42 U.S.C. 3612): Enforcement by Secretary
- Sec. 813 (42 U.S.C. 3613): Enforcement by Private Persons
- Sec. 814 (42 U.S.C. 3614): Enforcement by the Attorney General
- Sec. 814a: Incentives for Self-Testing and Self-Correction
- Sec. 815 (42 U.S.C. 3614a): Rules to Implement Title
- Sec. 816 (42 U.S.C. 3615): Effect on State laws
- Sec. 817. 42 U.S.C. 3616: Cooperation with State and local agencies administering fair housing laws; utilization of services and personnel; reimbursement; written agreements; publication in
- Sec. 818 (42 U.S.C. 3617): Interference, coercion, or intimidation; enforcement by civil action
- Sec. 819 (42 U.S.C. 3618): Authorization of appropriations
- Sec. 820 (42 U.S.C. 3619): Separability of provisions
- (Sec. 12 of 1988 Act) (42 U.S.C. 3601 note): Disclaimer of Preemptive Effect on Other Acts
- (Sec. 13 of 1988 Act) (42 U.S.C. 3601 note): Effective Date and Initial Rulemaking
- (Sec. 14 of 1988 Act) (42 U.S.C. 3601 note): Separability of Provisions
- Section 901 (Title IX As Amended) (42 U.S.C. 3631): Violations; bodily injury; death; penalties

Regulations

The Fair Housing Act Regulations may be found at the Government Printing Office website (<http://ecfr.gpoaccess.gov>). Links to each regulatory Part are included below:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

Subpart A—General

- § 100.1: Authority
- § 100.5: Scope
- § 100.10: Exemptions
- § 100.20: Definitions

Subpart B—Discriminatory Housing Practices

- § 100.50: Real estate practices prohibited
- § 100.60: Unlawful refusal to sell or rent or to negotiate for the sale or rental
- § 100.65: Discrimination in terms, conditions and privileges and in services and facilities
- § 100.70: Other prohibited sale and rental conduct
- § 100.75: Discriminatory advertisements, statements and notices
- § 100.80: Discriminatory representations on the availability of dwellings

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- § 100.85: Blockbusting
- § 100.90: Discrimination in the provision of brokerage services

Subpart C—Discrimination in Residential Real Estate-Related Transactions

- § 100.110: Discriminatory practices in residential real estate-related transactions
- § 100.115: Residential real estate-related transactions
- § 100.120: Discrimination in making of loans and in the provision of other financial assistance
- § 100.125: Discrimination in the purchasing of loans
- § 100.130: Discrimination in the terms and conditions for making available loans or other financial assistance
- § 100.135: Unlawful practices in the selling, brokering, or appraising of residential real property
- § 100.140: General rules
- § 100.141: Definitions
- § 100.142: Types of information
- § 100.143: Appropriate corrective action
- § 100.144: Scope of privilege
- § 100.145: Loss of privilege
- § 100.146: Limited use of privileged information
- § 100.147: Adjudication
- § 100.148: Effective date

Subpart D—Prohibition Against Discrimination Because of Handicap

- § 100.200: Purpose
- § 100.201: Definitions
- § 100.201a: Incorporation by reference
- § 100.202: General prohibitions against discrimination because of handicap
- § 100.203: Reasonable modifications of existing premises
- § 100.204: Reasonable accommodations
- § 100.205: Design and construction requirements

Subpart E—Housing for Older Persons

- § 100.300: Purpose
- § 100.301: Exemption
- § 100.302: State and Federal elderly housing programs
- § 100.303: 62 or over housing
- § 100.304: Housing for persons who are 55 years of age or older
- § 100.305: 80 percent occupancy
- § 100.306: Intent to operate as housing designed for persons who are 55 years of age or older
- § 100.307: Verification of occupancy
- § 100.308: Good faith defense against civil money damages

Subpart F—Interference, Coercion or Intimidation

- § 100.400: Prohibited interference, coercion or intimidation

PART 103—FAIR HOUSING—COMPLAINT PROCESSING

Subpart A—Purpose and Definitions

- § 103.1: Purpose and applicability

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- § 103.5: Other civil rights authorities
- § 103.9: Definitions

Subpart B—Complaints

- § 103.10: What can I do if I believe someone is discriminating against me in the sale, rental, finance, or advertisement of housing?
- § 103.15: Can I file a claim if the discrimination has not yet occurred?
- § 103.20: Can someone help me with filing a claim
- § 103.25: What information should I provide to HUD?
- § 103.30: How should I bring a claim that I am the victim of discrimination?
- § 103.35: Is there a time limit on when I can file?
- § 103.40: Can I change my complaint after it is filed?
- § 103.100: Notification and referral to substantially equivalent State or local agencies
- § 103.105: Cessation of action on referred complaints
- § 103.110: Reactivation of referred complaints
- § 103.115: Notification upon reactivation
- § 103.200: Investigations
- § 103.201: Service of notice on aggrieved person
- § 103.202: Notification of respondent; joinder of additional or substitute respondents
- § 103.203: Answer to complaint
- § 103.204: HUD complaints and compliance reviews
- § 103.205: Systemic processing
- § 103.215: Conduct of investigation
- § 103.220: Cooperation of Federal, State and local agencies
- § 103.225: Completion of investigation
- § 103.230: Final investigative report

Subpart E—Conciliation Procedures

- § 103.300: Conciliation
- § 103.310: Conciliation agreement
- § 103.315: Relief sought for aggrieved persons
- § 103.320: Provisions sought for the public interest
- § 103.325: Termination of conciliation efforts
- § 103.330: Prohibitions and requirements with respect to disclosure of information obtained during conciliation
- § 103.335: Review of compliance with conciliation agreements

Subpart F—Issuance of Charge

- § 103.400: Reasonable cause determination
- § 103.405: Issuance of charge
- § 104.410: Election of civil action or provision of administrative proceeding
- § 103.500: Prompt judicial action
- § 103.510: Other action by HUD
- § 103.515: Action by other agencies

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PART 107—NONDISCRIMINATION AND EQUAL OPPORTUNITY IN HOUSING UNDER EXECUTIVE ORDER 11063

- § 107.10: Purpose
- § 107.11: Relation to other authorities
- § 107.15: Definitions
- § 107.20: Prohibition against discriminatory practices
- § 107.21: Prevention of discriminatory practices
- § 107.25: Provisions in legal instruments
- § 107.30: Recordkeeping requirements
- § 107.35: Complaints
- § 107.40: Compliance meeting
- § 107.45: Resolution of matters
- § 107.50: Compliance reviews
- § 107.51: Findings of noncompliance
- § 107.55: Compliance report
- § 107.60: Sanctions and penalties
- § 107.65: Referral to the Attorney General

PART 108—COMPLIANCE PROCEDURES FOR AFFIRMATIVE FAIR HOUSING MARKETING

- § 108.1: Purpose and application
- § 108.5: Authority
- § 108.15: Pre-occupancy conference
- § 108.20: Monitoring office responsibility for monitoring plans and reports
- § 108.21: Civil rights/compliance reviewing office compliance responsibility
- § 108.25: Compliance meeting
- § 108.35: Complaints
- § 108.40: Compliance reviews
- § 108.45: Compliance report.
- § 108.50: Sanctions

PART 110—FAIR HOUSING POSTER

Subpart A—Purpose and Definitions

- § 110.1: Purpose
- § 110.5: Definitions

Subpart B—Requirements for Display of Posters

- § 110.10: Persons subject
- § 110.15: Location of posters
- § 110.20: Availability of posters
- § 110.25: Description of posters

Subpart C—Enforcement

- § 110.30: Effect of failure to display poster.

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PART 115—CERTIFICATION AND FUNDING OF STATE AND LOCAL FAIR HOUSING ENFORCEMENT AGENCIES

Subpart A—General

- § 115.100: Definitions.
- § 115.101: Program administration.
- § 115.102: Public notices

Subpart B—Certification of Substantially Equivalent Agencies

- § 115.200: Purpose
- § 115.201: The two phases of substantial equivalency certification
- § 115.202: Request for interim certification
- § 115.203: Interim certification procedures
- § 115.204: Criteria for adequacy of law
- § 115.205: Certification procedures
- § 115.206: Performance assessments; Performance standards
- § 115.207: Consequences of interim certification and certification
- § 115.208: Procedures for renewal of certification
- § 115.209: Technical assistance
- § 115.210: Performance deficiency procedures; Suspension; Withdrawal
- § 115.211: Changes limiting effectiveness of agency's law; Corrective actions; Suspension; Withdrawal; Consequences of repeal; Changes not limiting effectiveness
- § 115.212: Request after withdrawal

Subpart C—Fair Housing Assistance Program

- § 115.300: Purpose
- § 115.301: Agency eligibility criteria; Funding availability
- § 115.302: Capacity building funds
- § 115.303: Eligible activities for capacity building funds
- § 115.304: Agencies eligible for contributions funds
- § 115.305: Special enforcement effort (SEE) funds
- § 115.306: Training funds
- § 115.307: Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements
- § 115.308: Reporting and recordkeeping requirements
- § 115.309: Subcontracting under the FHAP
- § 115.310: FHAP and the First Amendment
- § 115.311: Testing

PART 121—COLLECTION OF DATA

- § 121.1: Purpose
- § 121.2: Furnishing of data by program participants

PART 125—FAIR HOUSING INITIATIVES PROGRAM

- § 125.103: Definitions

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- § 125.104: Program administration
- § 125.105: Application requirements
- § 125.106: Waivers
- § 125.107: Testers
- § 125.201: Administrative Enforcement Initiative
- § 125.301: Education and Outreach Initiative
- § 125.401: Private Enforcement Initiative
- § 125.501: Fair Housing Organizations Initiative

List of Citations for Definitions of "Disability" and Related Terms

The term "disability" and related terms such as "handicap" and "person with handicaps" are defined in several different laws. One law's definition may be the same as another law's definition, or may be unique.

This document lists citations and text for these definitions.

1. Fair Housing Act.

The statutory definition of "handicap" is at 42 USC § 3602(h).

- (h) "Handicap" means, with respect to a person--
- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
 - (2) a record of having such an impairment, or
 - (3) being regarded as having such an impairment,
- but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 USC 802)).

HUD's regulatory definitions of "handicap" and related terms (including "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") are at 24 CFR § 100.201:

Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

- (a) Physical or mental impairment includes:
- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
 - (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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- (b) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
- (c) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- (d) Is regarded as having an impairment means:
 - (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;
 - (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or
 - (3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

2. Section 504.

HUD's regulatory definitions of "handicap" and related terms (including "individual with handicaps," "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") are at 24 CFR § 8.3:

Handicap means any condition or characteristic that renders a person an individual with handicaps.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. For purposes of employment, this term does not include: Any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from performing the duties of the job in question, or whose employment, by reason of current alcohol or drug abuse, would constitute a direct threat to property or the safety of others; or any individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. For purposes of other programs and activities, the term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from participating in the program or activity in question, or whose participation, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. As used in this definition, the phrase:

- (a) Physical or mental impairment includes:
 - (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin;

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and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(b) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(c) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) Is regarded as having an impairment means:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by a recipient as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this section but is treated by a recipient as having such an impairment.

3. Americans with Disabilities Act.

The statutory definition of "disability" is at 42 USC § 12102:

As used in this Act:

(1) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities.

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

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- (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
- (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
 - (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
- (4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
- (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
 - (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
 - (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
 - (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
 - (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--
 - (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
 - (II) use of assistive technology;
 - (III) reasonable accommodations or auxiliary aids or services;or
 - (IV) learned behavioral or adaptive neurological modifications.
 - (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
 - (iii) As used in this subparagraph--
 - (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
 - (II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

With respect to Title I of the ADA, the Equal Employment Opportunity Office's regulatory definitions of "disability" and related terms (including "physical or mental impairment," "major life activities,"

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"substantially limits," "has a record of such an impairment," and "is regarded as having an impairment") are at 29 CFR § 1630.2 and 1630.3. Helpful interpretive guidance accompanies the regulations:

29 CFR § 1630.2:

- (g) Disability means, with respect to an individual --
 - (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (2) A record of such an impairment; or
 - (3) being regarded as having such an impairment.
(See § 1630.3 for exceptions to this definition).

- (h) Physical or mental impairment means:
 - (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
 - (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

- (i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- (j) Substantially limits -- (1) The term substantially limits means:
 - (i) Unable to perform a major life activity that the average person in the general population can perform; or
 - (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

- (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
 - (i) The nature and severity of the impairment;
 - (ii) The duration or expected duration of the impairment; and
 - (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

- (3) With respect to the major life activity of working --
 - (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

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(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 CFR § 1630.3:

(a) The terms disability and qualified individual with a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) Drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C 812)

(2) Illegal use of drugs means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms disability and qualified individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

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- (2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b) (1) or (2) of this section is no longer engaging in the illegal use of drugs. (See § 1630.16(c) Drug testing).

(d) Disability does not include:

- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) Compulsive gambling, kleptomania, or pyromania; or
- (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

With respect to Title II of the ADA, the Department of Justice has regulatory definitions of "disability" and related terms (including "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") at 28 CFR § 35.104, and with respect to Title III of the ADA, the Department of Justice has regulatory definitions at 28 CFR § 36.104. The Department of Justice's Title II and Title III regulatory definitions are identical to each other, and similar but not identical to the Equal Employment Opportunity Office's definitions (which for example define "substantially limits" while the Department of Justice definitions do not). Helpful interpretive guidance accompanies the regulations:

28 CFR § 35.104:

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1) (i) The phrase physical or mental impairment means --

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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- (ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
 - (iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.
- (2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- (3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- (4) The phrase is regarded as having an impairment means --
 - (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;
 - (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
 - (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.
- (5) The term disability does not include --
 - (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
 - (ii) Compulsive gambling, kleptomania, or pyromania; or
 - (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

28 CFR § 36.104:

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

- (1) The phrase physical or mental impairment means--
 - (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;
 - (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

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- (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;
- (iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means--

- (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;
- (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a private entity as having such an impairment.

(5) The term disability does not include--

- (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (ii) Compulsive gambling, kleptomania, or pyromania; or
- (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Regulations related to the ADA Amendments Act of 2008 have not yet been enacted, but the CFR sections referenced could be amended in 2010.

4. Social Security Act.

The statutory definition of "aged, blind, or disabled individual" is at 42 USC § 1382(a):

(a) Eligible individual" defined.

(1) Each aged, blind, or disabled individual who does not have an eligible spouse and--

(A) whose income, other than income excluded pursuant to section 1612(b) [42 USCS § 1382a(b)], is at a rate of not more than \$ 1,752 (or, if greater, the amount determined under section 1617 [42 USCS § 1382f]) for the calendar year 1974 or any calendar year thereafter, and

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- (B) whose resources, other than resources excluded pursuant to section 1613(a) [42 USCS § 1382b(a)], are not more than (i) in case such individual has a spouse with whom he is living, the applicable amount determined under paragraph (3)(A), or (ii) in case such individual has no spouse with whom he is living, the applicable amount determined under paragraph (3)(B), shall be an eligible individual for purposes of this title [42 USCS §§ 1381 et seq.].
- (2) Each aged, blind, or disabled individual who has an eligible spouse and--
- (A) whose income (together with the income of such spouse), other than income excluded pursuant to section 1612(b) [42 USCS § 1382a(b)], is at a rate of not more than \$ 2,628 (or, if greater, the amount determined under section 1617 [42 USCS § 1382f]) for the calendar year 1974, or any calendar year thereafter, and
- (B) whose resources (together with the resources of such spouse), other than resources excluded pursuant to section 1613(a) [42 USCS § 1382b(a)], are not more than the applicable amount determined under paragraph (3)(A), shall be an eligible individual for purposes of this title [42 USCS §§ 1381 et seq.].
- (3) (A) The dollar amount referred to in clause (i) of paragraph (1)(B), and in paragraph (2)(B), shall be \$ 2,250 prior to January 1, 1985, and shall be increased to \$ 2,400 on January 1, 1985, to \$ 2,550 on January 1, 1986, to \$ 2,700 on January 1, 1987, to \$ 2,850 on January 1, 1988, and to \$ 3,000 on January 1, 1989.
- (B) The dollar amount referred to in clause (ii) of paragraph (1)(B), shall be \$ 1,500 prior to January 1, 1985, and shall be increased to \$ 1,600 on January 1, 1985, to \$ 1,700 on January 1, 1986, to \$ 1,800 on January 1, 1987, to \$ 1,900 on January 1, 1988, and to \$ 2,000 on January 1, 1989.

The regulatory definition of "aged, blind, or disabled individual" is at 20 CFR § 416.120:

(13) Eligible individual means an aged, blind, or disabled individual who meets all the requirements for eligibility for benefits under the supplemental security income program.

(14) Eligible spouse means an aged, blind, or disabled individual who is the husband or wife of another aged, blind, or disabled individual and who is living with that individual (see § 416.1801(c)).

5. Section 811.

The statutory definition of "person with disabilities" is at 42 USC § 8013(k)(2):

(2) The term "person with disabilities" means a household composed of one or more persons at least one of whom is an adult who has a disability. A person shall be considered to have a disability if such person is determined, pursuant to regulations issued by the Secretary to have a physical, mental, or emotional impairment which (A) is expected

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to be of long-continued and indefinite duration, (B) substantially impedes his or her ability to live independently, and (C) is of such a nature that such ability could be improved by more suitable housing conditions. A person shall also be considered to have a disability if such person has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 USC § 15002]. The Secretary shall prescribe such regulations as may be necessary to prevent abuses in determining, under the definitions contained in this paragraph, the eligibility of families and persons for admission to and occupancy of housing assisted under this section. Notwithstanding the preceding provisions of this paragraph, the term "person with disabilities" includes two or more persons with disabilities living together, one or more such persons living with another person who is determined (under regulations prescribed by the Secretary) to be important to their care or well-being, and the surviving member or members of any household described in the first sentence of this paragraph who were living, in a unit assisted under this section, with the deceased member of the household at the time of his or her death.

HUD's regulatory definition of "person with disabilities" is at 24 CFR § 891.305:

Person with disabilities shall have the meaning provided in Section 811 (42 U.S.C. § 8013(k)(2)). The term "person with disabilities" shall also include the following:

- (1) A person who has a developmental disability, as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(5)), i.e., if he or she has a severe chronic disability which:
 - (i) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
 - (ii) Is manifested before the person attains age twenty-two;
 - (iii) Is likely to continue indefinitely;
 - (iv) Results in substantial functional limitation in three or more of the following areas of major life activity:
 - (A) Self-care;
 - (B) Receptive and expressive language;
 - (C) Learning;
 - (D) Mobility;
 - (E) Self-direction;
 - (F) Capacity for independent living;
 - (G) Economic self-sufficiency; and
 - (v) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.
- (2) A person with a chronic mental illness, i.e., a severe and persistent mental or emotional impairment that seriously limits his or her ability to live independently, and which impairment could be improved by more suitable housing conditions.
- (3) A person infected with the human acquired immunodeficiency virus (HIV) and a person who suffers from alcoholism or drug addiction, provided they meet the definition of "person with disabilities" in Section 811 (42 U.S.C. 8013(k)(2)). A person whose sole

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impairment is a diagnosis of HIV positive or alcoholism or drug addiction (i.e., does not meet the qualifying criteria in section 811 (42 U.S.C. 8013(k)(2)) will not be eligible for occupancy in a section 811 project.

HUD Handbook § 4350.3 (on multifamily occupancy) defines "disabled" in Figure 3.6 of Section 3.16:

Definition E – Person with Disabilities [24 CFR § 5.403]. A person with disabilities for purposes of program eligibility:

- (1) Means a person who:
 - (i) Has a disability, as defined in 42 U.S.C. 423;
 - (A) Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or
 - (B) In the case of an individual who has attained the age of 55 and is blind, inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he/she has previously engaged with some regularity and over a substantial period of time. For the purposes of this definition, the term blindness, as defined in section 416(i)(1) of this title, means central vision acuity of 20/200 or less in the better eye with use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for the purposes of this paragraph as having a central visual acuity of 20/200 or less.
 - (ii) Is determined, pursuant to HUD regulations, to have a physical, mental, or emotional impairment that:
 - (A) Is expected to be of long-continued and indefinite duration,
 - (B) Substantially impedes his or her ability to live independently, and
 - (C) Is of such a nature that the ability to live independently could be improved by more suitable housing conditions; or
 - (iii) Has a developmental disability, as defined in Section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(8)), i.e., a person with a severe chronic disability that
 - (A) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
 - (B) Is manifested before the person attains age 22;
 - (C) Is likely to continue indefinitely;
 - (D) Results in substantial functional limitation in three or more of the following areas of major life activity:
 - a. Self-care,
 - b. Receptive and expressive language,
 - c. Learning,

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- d. Mobility,
 - e. Self-direction,
 - f. Capacity for independent living, and
 - g. Economic self-sufficiency; and
- (E) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

- (2) Does not exclude persons who have the disease of acquired immunodeficiency syndrome or any conditions arising from the etiologic agent for acquired immunodeficiency syndrome;
- (3) For purposes of qualifying for low-income housing, does not include a person whose disability is based solely on any drug or alcohol dependence; and
- (4) Means person with disabilities (individual with handicaps), as defined in 24 CFR 8.3, for purposes of reasonable accommodation and program accessibility for persons with disabilities.

6. HEARTH Act.

The HEARTH Act (described in Chapter 3 Section C Question 3 above) adds a definition of "homeless individual with a disability:"

- (9) Homeless individual with a disability.--
- (A) In general.--The term 'homeless individual with a disability' means an individual who is homeless, as defined in section 103, and has a disability that—
- (i) (I) is expected to be long-continuing or of indefinite duration;
 - (II) substantially impedes the individual's ability to live independently;
 - (III) could be improved by the provision of more suitable housing conditions; and
 - (IV) is a physical, mental, or emotional impairment, including an impairment caused by alcohol or drug abuse, post traumatic stress disorder, or brain injury;
- (ii) is a developmental disability, as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15002); or
- (iii) is the disease of acquired immunodeficiency syndrome or any condition arising from the etiologic agency for acquired immunodeficiency syndrome.
- (B) Rule.--Nothing in clause (iii) of subparagraph (A) shall be construed to limit eligibility under clause (i) or (ii) of subparagraph (A).

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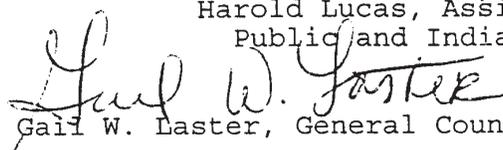
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

September 24, 1999

MEMORANDUM FOR: William C. Apgar, Assistant Secretary, Office of
Housing/Federal Housing Commissioner, H

Harold Lucas, Assistant Secretary, Office of
Public and Indian Housing, P

FROM:  Gail W. Laster, General Counsel, G

SUBJECT: Medical use of marijuana in public housing

The Office of Housing requested our opinion with respect to whether a section 8 tenant's use of medical marijuana¹ requires an owner to terminate the tenancy of the medical marijuana user. It further inquired whether the cost of medical marijuana is deductible for purposes of determining adjusted income under applicable section 8 regulations.² Several HUD Field Offices have also requested guidance on this matter. Because these issues are also relevant to the public housing program and the section 8 programs operated by the Office of Public and Indian Housing, this memorandum is also addressed to that office. As more fully articulated below, we conclude that State laws purporting to legalize medical marijuana directly conflict with the admission and occupancy requirements of the Quality Housing and Work Responsibility Act of 1998 ("Public Housing Reform Act") and are thus subject to preemption.³

¹ The term "medical marijuana" in this memorandum means marijuana which, when prescribed by a physician to treat a serious illness such as AIDS, cancer, or glaucoma, is legal under State law.

² These issues arose in the wake of Washington State's November 3, 1998 referendum in which voters approved the medical use of marijuana. According to the Office of National Drug Control Policy ("ONDCP"), the following States have enacted laws purporting to legalize medical marijuana to date: Alaska, Arizona, California, Connecticut, Massachusetts, New Hampshire, Nevada, Oregon, Vermont, Virginia, and Washington and, depending on the interpretation of the law in Louisiana, may also be legal there under certain circumstances. See ONDCP's web page, "Status of State Marijuana Initiatives" (copy attached).

³ The Public Housing Reform Act amended the United States Housing Act of 1937 ("Act"), 42 U.S.C. § 1437. As more fully discussed below, it also contains four freestanding sections, sections 576

I. Admissions Standards

Section 576(b)(1) of the Public Housing Reform Act requires public housing agencies ("PHAs") and owners to establish standards that:

prohibit admission to . . . federally assisted housing for any household with a member--
 (A) who the public housing agency or owner determines is illegally using a controlled substance; or
 (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such 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.

42 U.S.C. §13661(b)(1) (emphasis added). We interpret the word "prohibit" in this context to mean that the admission standards which the statute prescribes require that PHAs and owners **must** deny admission to the first class of households, i.e., those with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a controlled substance.⁴ See 64 Fed. Reg. 40262, 40270 (1999) (to be

through 579, which apply across the board to all federally assisted housing. Three of these four sections, section 576 ("Screening of Applicants for Federally Assisted Housing"), section 577 ("Termination of Tenancy and Assistance for Illegal Drug Users and Alcohol Abusers in Federally Assisted Housing"), and section 579 ("Definitions"), govern the questions articulated above. They are codified in Chapter 135 ("Residency and Service Requirements in Federally Assisted Housing") of Title 42 of the United States Code, 42 U.S.C. §§ 13661, 13662, & 13664, rather than with the Act itself.

⁴ None of the three applicable freestanding provisions identified in footnote 3 contains a definition of "controlled substance." Section 579(a)(1) of the Public Housing Reform Act, however, attributes the related phrase, "drug-related criminal activity," with the meaning specified in section 3(b) of the Act. 42 U.S.C. § 13664(a)(1). Section 3(b)(9) of the Act defines "drug-related criminal activity" as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as such term is identified in section 102 of the Controlled Substances Act.)" 42 U.S.C. § 1437b(9). The Controlled Substances Act in turn

codified at 24 C.F.R. §§ 5.853(a)(1)) (proposed July 23, 1999).
Id. at 40274 (to be codified at 24 C.F.R. § 882.518(a)(1)(i)).

With respect to the determination as to whether a person is illegally using a controlled substance, the Act does not indicate a minimum length of time that must have transpired since the last illegal use of a controlled substance for an applicant to be deemed eligible to receive Federal assistance. Legislative history to the Americans with Disabilities Act ("ADA"), which similarly excludes "current users of illegal drugs" from its protections, indicates that in excluding such persons from coverage, Congress intended to exclude persons "whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current." H.R. Conf. Rep. No. 101-596, at 64, reprinted in 1990 U.S.C.C.A.N. 267, 573. See also, D'Amico v. City of New York, 955 F. Supp. 294, 298 (S.D. N.Y. 1997) (Rehabilitation Act's prohibition against current illegal use of controlled substances encompasses illegal uses occurring recently enough to justify reasonable belief that illegal drug use is current), aff'd 132 F.3d 145 (2d Cir.), cert. denied, 118 S.Ct. 2075 (1998). We thus interpret the Public Housing Reform Act's prohibitions against "current" illegal use of a controlled substance as encompassing uses occurring recently enough to warrant a reasonable belief that the use is ongoing.

The courts of appeal which have addressed this issue in cases brought under Federal civil rights statutes have reached different conclusions regarding the length of time that must have passed since the last instance of illegal use for a person not to be considered a "current" illegal user. Most agree, however, that the issue of whether or not a person is a "current" illegal user under Federal civil rights laws requires a highly individualized, fact-specific examination of all relevant circumstances. See, e.g., Shafer v. Preston Memorial Hospital, 107 F.3d 274, 278 (4th Cir. 1997) (employee whose last illegal use of drugs occurred three weeks prior to termination held to be "currently engaging in the illegal use of drugs" under ADA); Collins v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) (passage of "months" between last illegal use of controlled

defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 42 U.S.C. § 802(6). Schedule I includes marijuana. 21 U.S.C. § 812(c) (Schedule I) (c)(10). We therefore attribute the latter definition of "controlled substance" to that phrase, as used in sections 576 and 577 of the Public Housing Reform Act. Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same Act are intended to have the same meaning") (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934)).

substance and termination held insufficient for employees to escape classification of current illegal users under ADA); United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992) (persons drug-free for one year held not "current" users under Fair Housing Act). In any event, it is likely that when issues arise with respect to medical marijuana, the person in question will be currently using the controlled substance.

With respect to the second class of households addressed in section 576(b)(1)(B), i.e., those including a member for whom the PHA or owner determines that reasonable cause exists to believe that the member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment⁵, section 576(b)(2) of the Public Housing Reform Act affords PHAs and owners limited discretion to admit such households. That section provides as follows:

Consideration of Rehabilitation.--In determining whether, pursuant to paragraph (1)(B), to deny admission to the program or federally assisted housing to any household based on a pattern of illegal use of a controlled substance or a pattern of abuse of alcohol by a household member, a public housing agency or an owner may consider whether such household member--

(A) has successfully completed a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable);

(B) has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable); or

(C) is participating in a supervised drug or

⁵ Section 576(b)(1)(B) of the Public Housing Reform Act does not expressly limit the reasonable cause determination to **past** illegal use or a **past and noncontinuing** pattern of illegal use, of a controlled substance. But given section 576(b)(1)(A)'s prohibition against admitting any household with a member who the PHA or owner determines is illegally using a controlled substance, i.e., at the time of consideration for admission or recently enough to warrant a reasonable belief that a household member's illegal use is ongoing, we interpret section 576(b)(1)(B) to require PHAs and owners to deny admission to households based on a reasonable cause determination that the household member's **past** illegal use or **past and noncontinuing** pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment of the premises. 42 U.S.C. § 13661(b)(1)(B).

alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable).

42 U.S.C. § 13661(b)(2). A PHA or owner may admit such a household under this provision after having determined that both conditions in one of the three considerations enumerated above have been met, i.e., some evidence of drug rehabilitation and no current illegal use. See 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(a)). As with households including a member who the PHA or owner determines is illegally using a controlled substance, a PHA or owner may admit a household under section 576(b)(1)(B) on the condition that the household member for whom reasonable cause exists to believe that such person's past and noncontinuing illegal use may interfere with other residents' health, safety, or right to peaceful enjoyment, may not reside with the household or on the premises. 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The law of preemption provides that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). Moreover, a State statute "is invalid to the extent that it 'actually conflicts with a . . . federal statute.'" International Paper Co., v. Quellette, 479 U.S. 481, 492 (1987) (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978)). "Such a conflict will be found when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Quellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713).

It is our opinion that State statutes which purport to legalize marijuana stand as such an obstacle to the accomplishment of the purpose of section 576(b)(1) of the Public Housing Reform Act, i.e., to require owners of federally assisted housing to "establish standards that prohibit admission to federally assisted housing" for the two categories of households identified in section 576(b)(1). To the degree that a PHA may look to these State laws for authorization to admit families with a member who is using medical marijuana on the grounds that under State law the use of medical marijuana is not the illegal use of a controlled substance, we believe that the PHA would not be in compliance with section 576. We therefore conclude, with regard to required standards prohibiting admission to federally assisted housing of households with members who are illegally using a controlled substance, that State medical marijuana statutes which purport to remove medical marijuana from classification as a controlled substance are preempted by section 576 of the Public Housing Reform Act.

II. Termination of Tenancy and Assistance

With regard to existing public housing tenants and program participants, section 577(a) of the Public Housing Reform Act requires that PHAs and owners:

establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that **allow** the agency or owner . . . to terminate the tenancy or assistance for any household with a member--

- (1) who the public housing agency or owner determines is illegally using a controlled substance; or
- (2) whose illegal use (or pattern of illegal use) of a controlled substance . . . is determined by the [PHA] or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13662(a) (emphasis added). Unlike the prescribed admission standards, which "prohibit" admission of households identified in section 576(b)(1), the prescribed continued occupancy and assistance standards merely "allow" termination when a PHA or owner determines that a household member is illegally using a controlled substance or when a household member displays a past and noncontinuing pattern of illegal use which is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. See 64 Fed. Reg. at 40274 (to be codified at 24 C.F.R. § 882.518(b)(1)(i)).

As discussed above, with respect to the classification of medical marijuana, Federal law preempts any discretion on the part of the PHA or owner from determining that medical marijuana is not a controlled substance. Therefore, an owner or PHA could not make a determination that use of medical marijuana per se is never grounds for termination of tenancy or assistance. And, consequently, could not establish standards or lease provisions that generally permit occupancy of Federally assisted housing by medical marijuana users.

That being said, the statute provides the PHA and the owner with the discretion to determine on a case-by-case basis when it is appropriate to terminate the tenancy or assistance of a household. The propriety of any decision to evict a household or to terminate assistance for past or current illegal use of a controlled substance, or for a stated or demonstrated intent by a resident prospectively to use medical marijuana, requires a highly individualized, fact-specific analysis that is tailored to the relevant circumstances of each case. See Southern Management Corp., 955 F.2d at 918; Forrisi v. Bowen, 794 F.2d 931, 933 (4th

Cir. 1986) (decided under Rehabilitation Act). It is therefore not practicable to articulate specific guidance which is relevant to all cases where a PHA is considering eviction or termination of assistance for past or current illegal use of a controlled substance or for a resident's stated or demonstrated intent prospectively to use medical marijuana.

In determining how to exercise the discretion which section 577 of the Public Housing Reform Act affords, however, PHAs and owners should be guided by the fact that historically, HUD has not extensively regulated the area of eviction and termination of assistance, leaving the ultimate determination of whether to evict or terminate assistance to their reasoned discretion. HUD intends that PHAs and owners utilize their discretion under section 577 to make consistent and reasoned determinations with respect to eviction and termination of assistance determinations. In cases where a household member states or demonstrates an intent prospectively to use medical marijuana, PHAs and owners should consider all relevant factors in determining whether to terminate the tenancy or assistance, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or if assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions prohibiting the illegal use of controlled substances.

For households with a member who a PHA or owner determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment, the prescribed continued occupancy and assistance standards, like the prescribed admissions standards, must allow the PHA or owner to consider evidence of successful rehabilitation or current participation in a supervised drug rehabilitation program when determining whether to terminate tenancy or assistance to such a household. Section 577(b).

Again as discussed above with respect to section 576, State statutes which purport to legalize medical marijuana directly conflict with the quoted provisions of section 577 of the Public Housing Reform Act insofar as they purport to remove marijuana, when used pursuant to a physician's prescription, from the Controlled Substances Act's list of controlled substances. The limited discretion which section 577 affords PHAs and owners to refrain from terminating the tenancy of or assistance for illegal drug use, however, does not include any discretion to determine that marijuana is not a controlled substance within the meaning of the Controlled Substances Act, 21 U.S.C. § 812(b)(1)(c), even if a State statute purports to legalize its use for medical purposes.

If enforced, such laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting section 577 of the Public Housing Reform Act, i.e., to require that PHAs and owners "establish standards which allow them to terminate the tenancy or assistance" for either class of households identified in section 577(a). Ouellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713). If given effect, such laws would operate to divest PHAs and owners of the discretion which Congress intended them to have regarding termination of tenancy or assistance for use of a controlled substance. We thus conclude that State medical marijuana statutes, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, are preempted by section 577 of the Public Housing Reform Act.

III. Conclusion

Based on this analysis, we conclude that PHAs and owners must establish standards that require denial of admission to households with a member whom the PHA or owner determines to be illegally using a controlled substance, or for whom it determines that reasonable cause exists to believe that a household member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment. Section 576(b). The Public Housing Reform Act affords PHAs and owners limited discretion to admit households with a member for whom such a reasonable cause determination is made in the face of evidence of rehabilitation. Section 576(b)(2). HUD's proposed rule would further allow a PHA or owner to impose as a condition to admission a requirement that "any household member who engaged in or is culpable for the drug use . . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)). Because State medical marijuana laws, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, directly conflict with the objective of the Public Housing Reform Act's requirements regarding admissions, they are preempted.

We further conclude that PHAs and owners must establish standards or lease provisions for continued assistance or occupancy which allow termination of tenancy or assistance for any household with a member who the PHA or owners determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. The Public Housing Reform Act affords PHAs and owners limited discretion to refrain from terminating the tenancy or assistance for any household with a member for whom such a determination is made in the face of evidence of rehabilitation. Section 577(b). HUD's

proposed rule would further allow a PHA or owner to impose as a condition for continued assistance a requirement that "any household member who engaged in or is culpable for the drug use . . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The standards which section 577 requires must also allow PHAs and owners to terminate the tenancy of or assistance to a household with a member who states or demonstrates an intent prospectively to use medical marijuana. In determining whether to exercise their discretion to evict or terminate assistance for such a household, PHAs and owners should consider all relevant factors particular to each case, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or if assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions that prohibit illegal use of controlled substances.

With regard to the Office of Housing's question concerning the deductibility of the cost of medical marijuana, the Internal Revenue Service has already concluded, based on the premise that marijuana is a Federally controlled substance for which there are no legal uses, that the cost of medical marijuana is not a deductible medical expense. Rev. Ruling 97-9, 1997-9 I.R.B. 4, 1997 WL 61544 (I.R.S.). While for the purposes of HUD's assisted housing programs, PHAs and owners are not technically bound by the IRS Revenue Ruling, consistent with the conclusions in this memorandum, we believe that PHAs and owners should be advised that they may not allow the cost of medical marijuana to be considered a deductible medical expense.

Obtaining HUD Information and Understanding Federal and State Law Citations

Section A. Obtaining HUD Information

HUD's Website

The HUD website at <http://www.hud.gov> offers information on the Department, its organizational structure, and its policies and programs. Contact information for local offices may also be found on this website.

HUDCLIPS

HUD's Client Information and Policy System ("HUDCLIPS") is HUD's online document repository. Located at <http://www.hud.gov/offices/adm/hudclips>, HUDCLIPS contains full text searchable databases of program notices, handbooks, regulations, federal register notices, Notices of Funding Availability (NOFAs), forms, mortgagee letters, and related materials. The site is comprehensive and relatively easy to use. Of note: when searching the HUDCLIPS database, if no result is returned, the user may want to try a number of alternate search terms or search the site index rather than using the "Search HUDCLIPS" box.

Community Connections

HUD's Office of Community Planning and Development (CPD) offers online information and research on CPD's programs and policies through Community Connections at <http://www.comcon.org>. In addition, staff of Community Connections is available to assist in finding/ordering publications and to make technical assistance referrals by telephone at 1-800-998-9999.

HUD USER

HUD's Office of Policy Development & Research (PD&R) established HUD User as an information resource for housing and community development researchers and policy makers. Federal government reports, case studies, economic and housing data, and other information are available from HUD User either online at <http://www.huduser.org> or by telephone at 1-800-245-2691.

Section B. Understanding Federal and State Law Citations

A "citation" is a shorthand description of where a particular law has been published. Citations exist for all types of laws. The following paragraphs introduce how to work with citations, with several examples of federal and state law citations relevant for supportive housing. More information can be found in books such as Finding the Law by Cohen, Berring, and Olson (from which some of the examples listed below are drawn) and through publishers such as Nolo Press.

- I. Statutes are located in publications known generically as "session laws," which publish bills Congress or a legislature passes. Session law publications are usually arranged chronologically by statute passage date, with subject indexes at the back.

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A. The official federal session law publication is known as United States Statutes At Large, published annually by Little, Brown & Co. under Congressional authorization. Here is an example of a federal session law citation: Public Law 92-195. This citation refers to a statute that was adopted during the 92nd Congress (in 1971), and it is the 195th statute to appear in United States Statutes At Large for the 92nd Congress. United States Statutes At Large is available in many law libraries. Session laws enacted in recent years are also available at <http://thomas.loc.gov> (a website operated by the Library of Congress).

B. State session law citations vary from state to state. An example of a California session law is as follows: Stats.1990, c. 113 (S.B. 504), § 2. This session law was adopted in 1990 (and is therefore part of the California compilation called "Statutes 1990" or "Stats.1990" for short; it is listed under chapter 113, under section 2; and it was proposed as a law in Senate Bill 504. Session laws are available in some law libraries. In addition, Internet access varies by state; in California session laws and legislative bills are available at <http://www.leginfo.ca.gov>, a website operated by California's Legislative Counsel.

II. Statutes are also published and arranged by topic in publications known generically as "codes." Codes are generally much more useful than session laws publications because they are located among the relevant laws of a particular set of laws and are usually cited once a statute becomes "codified" and enrolled as law.

A. The federal statutory code is known as the "U.S. Code," and it is arranged into fifty subject titles, generally in alphabetical order. Title 42 of the U.S. Code deals with the public health and welfare and contains most of the statutes that created federal housing programs. An example of a U.S. Code citation is 42 USC 3601. This citation refers to a statute that is located at Section 3601 of Title 42 of the U.S. Code. The U.S. Code is available in most law libraries. It is also available at <http://uscode.house.gov/search/criteria.shtml> (a website operated by the House of Representatives).

B. State statutory code citations vary from state to state. An example of a California statutory code citation is as follows: Health and Safety Code Section 1502.2. This statute is found in California's Health and Safety Code (one of several dozen California code subject titles) at section 1502.2. This statute also happens to be the statute used in the California session law example above. State statutory codes are generally available in law libraries, but only the largest law libraries maintain state statutory codes from other states. In addition, Internet access varies by state; in California, state statutory codes are available at <http://www.leginfo.ca.gov/calaw.html> (a website operated by California's Legislative Counsel). Other states' statutory codes are available at <http://www.findlaw.com/casecode/state.html> (a website operated by Findlaw).

III. U.S. and state agencies develop regulations to specify in greater detail how a law will be implemented. Regulations are sometimes published in chronicles similar to session laws for statutes.

A. When a federal agency intends on changing or introducing new regulations, the federal regulations are published in a daily chronicle of federal administrative activities known as The Federal Register. The Federal Register publishes not only regulations, but also many other administrative pronouncements, including executive orders and notices (including NOFA's, or notices of funding availability). Here is an example of a Federal Register citation: 12 Fed.Reg. 32 (1947). This citation refers to a 1947 administrative pronouncement that

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appears on page 32 of volume 12 of The Federal Register. The Federal Register is available in many law libraries. It is also available at <http://www.gpoaccess.gov/fr/index.html> (a website operated by the National Archives and Records Administration).

B. State practices vary on the publication of regulations. California has no chronicle analogous to The Federal Register. State agencies often notify the public of new or changed regulations through their agency's website.

IV. Federal and state regulations are also published and arranged by topic in codes of regulations, which are regulations that have gone through the public notice and agency approval.

A. The code of federal regulations is known, aptly, as the Code of Federal Regulations, or CFR. Like the U.S. Code, the CFR is arranged into fifty subject titles. HUD's program regulations are generally located in Title 24 of the CFR. Here is an example of a CFR citation: 24 CFR 100.202. This citation refers to Section 100.202 of Title 24 of the CFR. The CFR is available in many law libraries. It is also available at <http://www.gpoaccess.gov/cfr/index.html> (a website operated by the National Archives and Records Administration).

B. The codes of state regulations vary from state to state. In California, the code of regulations is known, aptly, as the California Code of Regulations, or CCR. The CCR is arranged into numerous subject titles. The State Department of Housing and Community Development has program regulations in Title 25 of the CCR. Here is an example of a CCR citation: 25 CCR 6000. This citation refers to Section 6000 of Title 25 of the CCR. Codes of state regulations are generally available in law libraries, but only the largest law libraries maintain codes of state regulations from other states. In addition, Internet access varies by state; in California, the CCR is available at www.calregs.com (a website operated by California Office of Administrative Law and Westlaw). In addition, several state agencies have their own websites, some of which include relevant regulations of the state agency.

V. Some federal and state administrative agencies, including HUD, publish program-specific handbooks that summarize and/or explain the statutory and regulatory requirements that govern the applicable program. While handbooks are not official parts of the law, they are given great weight by the courts that interpret statutes and regulations, because they represent official executive branch interpretations of the statutes and regulations. Handbooks are generally available only from the agency that published them (sometimes, as with HUD's handbooks, including through the agency's website).

VI. Judicial decisions or cases are published chronologically in collections known as "reporters."

A. Reporters of federal court cases exist at each level of federal court.

1. Three common reporters publish decisions of the United States Supreme Court: U.S. Reports, which is published by the government; United States Supreme Court Reports, Lawyers' Edition, which is published by a commercial publisher; and Supreme Court Reporter, which is published by a commercial publisher. All three reporters are commonly used. Here is an example of a case citation in U.S. Reports: Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984). This citation refers to the 1984 Supreme Court decision in the case of Clark versus Community for Creative Non-Violence, published at page 288 of volume 468 of U.S. Reports. This

case can also be cited as Clark v. Community For Creative Non-Violence, 82 L. Ed. 2d 221 (1984). This citation refers to the same case, published at page 221 of volume 82 of the Second Series of United States Supreme Court Reports, Lawyers' Edition. Finally, this case can also be cited as Clark v. Community For Creative Non-Violence, 104 S.Ct. 3065 (1984). This citation refers to the same case, published at page 3065 of volume 104 of Supreme Court Reporter. Supreme Court reporters are available in most law libraries. U.S. Reports, one of the Supreme Court reporters, is also available at <http://www.findlaw.com/casecode/supreme.html> (a website operated by Findlaw).

2. For lower federal courts, the reporters are known as Federal Reporter (for appellate court cases) and Federal Supplement (for district court cases). Here is an example of a case citation in Federal Reporter: Keith v. Volpe, 855 F.2d 467 (9th Cir. 1988). This citation refers to the 1988 decision of the Ninth Circuit Court of Appeals in the case of Keith versus Volpe, published at page 467 of volume 855 of the Second Series of Federal Reporter. The Federal Reporter includes multiple series, and each series is indicated in the number following the "F" that denotes the Federal Reporter (e.g., F.3d, for the Third Series, or F. for the First Series). Here, too, is an example of a case citation in Federal Supplement: Independent Housing Services v. Fillmore Center Associates, 840 F. Supp. 1328 (N.D. Cal. 1993). This citation refers to the 1993 decision of the District Court for the Northern District of California (the specific district is noted in parenthesis with the date) in the case of Independent Housing Services versus Fillmore Center Associates, published at page 1328 of volume 840 of the Federal Supplement. Lower federal court reporters are available in most law libraries. Circuit court opinions are also available at <http://www.findlaw.com/casecode/courts/index.html> (a website operated by Findlaw), and district court opinions are available at http://www.findlaw.com/10fedgov/judicial/district_courts.html (a website operated by Findlaw).

B. State court case reporters vary from state to state. In addition, within a state, there may be different reporters for the different levels of court. However, the conventions for state court citations are similar to those for federal court citations. For example, the case Harris v. Capital Growth Investor XIV was cited as 52 Cal.3d 1142 (1991) in the body of Between The Lines. This citation refers to the 1991 California Supreme Court decision in the case of Harris versus Capital Growth Investor XIV, published at page 1142 of the 52nd volume of the Third Series of the California Reporter. State court case reporters are generally available in law libraries, but only the largest law libraries maintain state court case reporters from other states. In addition, Internet access varies by state. A general-purpose website for finding state court cases is <http://www.findlaw.com/casecode/state.html> (a website operated by Findlaw).

Glossary of Commonly Used Legal Terms

This glossary is a tool to help establish a common vocabulary of selected law-related terms for people who work in a supportive housing environment, and to help those people communicate with others (whether colleagues, tenant-clients, lawyers, or others). One lawyerly disclaimer is that many of the definitions in this glossary are not technically precise or complete.

AFFIRMATIVE DUTY means a duty to take a specified action (as opposed to a duty to refrain from taking a specified action).

CARE AND SUPERVISION means, under California law governing community care facilities, any of the following activities a facility provides to meet the needs of its clients/residents: (1) assistance in dressing, grooming, bathing, and other personal hygiene; (2) assistance with taking medication; (3) central storage and/or distribution of medications; (4) arrangement of and assistance with medical and dental care; (5) maintenance of house rules for the protection of clients (as opposed to for the benefit of the housing provider); (6) supervision of schedules and activities; (7) maintenance and/or supervision of cash resources or property; (8) monitoring food intake or special diets; or (9) providing the basic services required to be provided in a community care facility.

CIVIL RIGHTS LAW means the area of law that deals with specific types of discrimination against members of protected classes of people. Fair housing law is a subset of civil rights law.

COMPELLING GOVERNMENT INTEREST means a government interest of the greatest importance. An example is the protection of a person's life or health.

CONDITIONAL USE PERMIT means an administrative approval of a land use that requires a specific type of approval. Typically, a planning commission or city council would issue a conditional use permit, but a city may also issue approval administratively. For example, a zoning law might only permit taverns in a certain district with a conditional use permit.

CONSTITUTIONAL ACTION means a judicial action based on an alleged violation of a constitution. Constitutional actions usually challenge a governmental actor's authority to act.

CONTROLLED SUBSTANCE means, for most purposes, a substance whose possession or use is controlled by the federal Drug Enforcement Administration pursuant to Section 102 of the Controlled Substance Act, including medicines for which a prescription is required and drugs for which no prescription is available (such as heroin, cocaine, and marijuana).

DISABILITY (or handicap) means, in general, a physical or mental impairment that substantially limits one or more of a person's major life activities. This term has several different context-specific definitions set forth in several different laws.

DISCRIMINATION means the act of treating people or things differently. Not all discrimination is unlawful, but many civil rights laws make it illegal to engage in specific types of discrimination against members of protected classes of people.

EVICTION means the expulsion of a tenant from leased premises after a court has terminated tenancy.

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EXECUTIVE ORDER means a directive from the chief executive of a governmental body. The federal government commonly uses executive orders issued by the President of the United States in applying and/or enforcing various fair housing and other civil rights laws.

FAIR HOUSING LAW means any of several federal and state civil rights laws that prohibit discrimination in housing.

FUNDAMENTAL RIGHT means a right that the courts consider to be so important that governmental impairment of the right is permitted only to the extent necessary to advance a compelling governmental interest. Examples of fundamental rights include the right to speak and express oneself, the right to practice one's religion, and the right of bodily privacy (including abortion).

HOMELESS means, in general, without a fixed residence. HUD defines the term in Section 103 of the McKinney Act (42 U.S.C. 11302) more specifically as individuals or families: (1) who lack a fixed, regular, and adequate nighttime address; (2) who have a primary nighttime residence that is a park or 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: (4) individuals who reside in a shelter or place not meant for human habitation and who are exiting an institution where they temporarily resided; (5) individuals or families who will 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, who have no subsequent residence identified, and who lack the resources or support networks needed to obtain other permanent housing; (6) certain unaccompanied youth and homeless families with children and youth defined as homeless under other federal statutes; or (7) individuals or families who are fleeing or attempting to flee domestic violence or other dangerous life-threatening conditions. This definition specifically excludes any individual imprisoned or otherwise detained pursuant to state or federal law, but individuals who are exiting an institution where they temporarily resided are considered homeless if the individual was homeless upon entering the institution. HUD generally has defined "temporarily residing" in an institution as 30 calendar days or fewer. Other federal, state or local programs may include a different definition of "homeless."

INITIATIVE means a legislative action enacted through a voter-approved ballot measure placed on the ballot by petition.

JUST CAUSE or **GOOD CAUSE** means, in some tenancies, the standard by which a landlord can terminate a tenancy. Just cause standards are often found in rent control laws and in housing assistance program regulations and requires a specific reason for termination of tenancy, rather than general landlord-tenant law, in which a landlord may terminate tenancy for any non-retaliatory reason, as long as the lease agreement term has expired.

LAND USE law means the area of law regulating how land is used, typically distinguishing residential from non-residential uses, and within residential uses, typically regulating population density.

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LANDLORD means a person who owns or manages rental property and leases it to a tenant. In the event of a master tenant leasing property to a subtenant, the master tenant acts as a landlord to the subtenant.

LEASE AGREEMENT (or rental agreement) means the oral or written agreement between a landlord and a tenant in which the landlord gives the tenant an exclusive right of occupancy to a specified property.

LEASE VIOLATION (or lease default) means a violation of a lease agreement. Most lease agreements provide for the exercise of specified remedies upon a lease violation.

MASTER TENANT means a tenant of a leased property who transfers his or her exclusive right of occupancy in the property to another person (a "subtenant") and then acts as a landlord with respect to the subtenant.

OCCUPANCY STANDARD means a limit on the number of people allowed to live in a dwelling.

PROTECTED CLASS means a class of people sharing a specified characteristic (such as race, sex, nationality, religion, family status, or handicap) who are protected by civil rights laws against denial of specified benefits on account of the characteristic.

QUIET ENJOYMENT means the unimpaired use and enjoyment of leased premises. A tenant generally has a right to quiet enjoyment of leased premises.

REASONABLE ACCOMMODATION is a concept used within certain fair housing laws that requires a landlord to make accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford to a disabled person an equal opportunity to use and enjoy a dwelling and would not require an alteration in mission or program goals.

REASONABLE MODIFICATION is a concept used within certain fair housing laws that requires a landlord to permit a tenant to make modifications to leased property when necessary to afford to a disabled person an equal opportunity to use and enjoy a dwelling.

REFERENDUM means a ballot measure for the electorate to ratify or reject a legislative action, placed on the ballot either by petition or by the legislature.

RENT CONTROL means a locally adopted law that regulates the landlord-tenant relationship, often setting a ceiling on rent payments or increases and prohibiting eviction except where the landlord can prove just cause.

STRICT SCRUTINY means the standard that a court applies in an action challenging a government attempt to impair a fundamental right or to act in a discriminatory fashion against specific classes of individuals. Under this standard, the government must present significantly more than merely a rational basis for its action, or even an important justification; instead, the courts will permit government action only to the extent necessary to advance a compelling government interest.

SUBTENANT means a tenant of leased property whose landlord is a master tenant and whose right of occupancy in the leased premises is based on the right of the master tenant.

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THIRTY—DAY NOTICE means a notice to terminate a tenancy in 30 days. Either a landlord or tenant may issue this notice. It is the common mechanism to terminate a “month-to-month” tenancy (a tenancy where the landlord and tenant each agree to a term of one month, renewable each month). Under certain housing assistance programs, landlords would also give this notice to a tenant to terminate a tenancy in the event of a lease violation.

THREE—DAY NOTICE means a landlord's notice to a tenant to cure a lease violation in three days, or else the tenancy will terminate.

UNLAWFUL DETAINER means a civil case to rapidly determine who (as between a landlord and a tenant) has a right of possession of leased premises. Only a government official enforcing a court judgment in an unlawful detainer case may force an eviction.

ZONING means an area of land use law dividing a community into zones in which the community permits specified uses automatically or conditionally. Some fair housing laws regulate the extent to which zoning can exclude housing for particular populations or for certain types of housing from an area.