Legal Considerations During Screening and Intake

This document discusses issues related to selection of individual tenants in the context of federal fair housing laws. The concept of “reasonable accommodation” is crucial here and is discussed at length. All questions in this document in some way involve the gathering of information by the provider about applicants for housing. Providers are cautioned to be cognizant of the rights of applicants throughout this process. Credit agencies and tenant “blacklists” are rife with incorrect information about individual people. Consequently, applicants for housing should always be informed of the reason for rejection of their application and be given an opportunity to respond to or correct inaccurate information. Providers should check state and local fair housing laws and regulations before beginning any screening process.

**Topics Covered in this Document Include:**

**Screening and Intake Topics**
- Target populations
- Screening for Program Components
- Single Application
- Zero Tolerance/One-Strike Policies
- Criminal Background Checks
- Criminal Convictions
- Drug Usage
- Drug Testing
- HUD Requirements regarding Drug Use
- Clean and Sober Housing
- Intoxication at Interview
- Tenants Screening Applicants

**Reasonable Accommodation in the Screening Process Topics**
- What Does Reasonable Accommodation Mean?
- Reasonable Accommodation in Screening
- Rejection Grounds for a Disabled Applicant
- Tenancy History Related to Disability
- Drug, Alcohol, and Reasonable Accommodations
- Care and Supervision Requirements

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Note: This document is included within the Housing Operations section of CSH’s Toolkit for Developing and Operating Supportive Housing, which is available at [www.csh.org/toolkit2](http://www.csh.org/toolkit2). This document has been adapted from CSH’s publication *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing - National Edition*, which is available at [www.csh.org/publications](http://www.csh.org/publications).
SCREENING AND INTAKE

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

Answer: If housing may legally be restricted to a particular population, applicants generally can be asked whether they qualify to be admitted to the housing. In addition, the Fair Housing Act provides a list of questions that are permitted to be asked.

The Fair Housing Act Regulations at 24 CFR 100-202 sets forth questions that may be asked of applicants for housing. These questions are limited to the following:

a. 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.)

b. 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.

c. 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.

d. Inquiries to determine whether an applicant is a current illegal abuser or addict of a controlled substance.

e. Inquiries to determine whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. (See Questions 5 and 6 below for additional information regarding inquiries about an applicant’s criminal record.)

State or local laws may also provide guidance on permissible questions.

If these questions are asked of any applicant, then they should be asked of each applicant, regardless of whether the housing provider believes the applicant qualifies for a specific program. 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. Numerous questions arise regarding verification of the information provided by the applicant, particularly when this information relates to the applicant’s disability. For example, if the housing is limited to people with a particular disability, how do you determine that the applicant has the

disability? Also, if an applicant requests a reasonable accommodation, how do you determine whether the applicant qualifies for the 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. If the housing is generally designated for individuals with disabilities and is not targeted to a particular disabled population, the provider may only require documentation that shows the person has a disability, not documentation showing the particular type of disability or the severity of the disability. So, for example, if the applicant provides you with an 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.

It is important to remember that eligibility for SSI is not the only way to establish disability and that the definition of disability under the Fair Housing Act is broader than the SSI definition, including being misclassified or considered by others to have a physical or mental impairment that the individual actually does not have (for example, 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). The expansive definition of handicap under the Fair Housing Act means that housing providers may have to be flexible in the type of documentation they are willing to accept to verify disability status.

The level of documentation that can be requested may depend upon the level of services provided in the housing development. Generally, a housing provider cannot request information regarding the severity of the disability or the applicant’s medical status. 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 having a program component in housing entitle a provider to ask additional eligibility questions as long as they are uniformly asked of all potential tenants?

**Answer:** 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 Question Four below for additional information on this issue. Facilities licensed by state regulators are still subject to the Fair Housing Act but licensing laws may require owners to ask additional questions of applicants. In such a case, providers should comply with the state licensing requirements.

**Question 3:** Should a housing provider have one housing application which asks all questions to determine eligibility for all programs the agency operates or should it have a separate form for self-identification?

**Answer:** 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 of which has 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 context would be to have a single housing application for all the 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. This in itself can lead to discrimination claims.

Question 4: May a housing provider use psychosocial history in making tenant selection decisions?

Answer: 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 or when a housing provider works with a social services agency to provide service-enriched housing. Before performing or participating in any such screening, the housing provider should consult with a knowledgeable fair housing attorney.

Generally, the use of psychosocial evaluations or histories is not appropriate in tenant selection because such an evaluation provides information unrelated to the individual’s ability to meet the terms and conditions of tenancy and should be discouraged. Due to the subjective nature of the information obtained in such a process, a rejected applicant could argue that housing was denied for personal traits rather than on the basis of objective criteria related to tenancy and it would be difficult for a housing provider to prove otherwise. This does not mean a housing provider cannot inquire into tenant histories, which may include information relating to behaviors relevant to a psychosocial evaluation. However, such an inquiry must be limited to behaviors, rather than mental or physical conditions, and must be related to terms of tenancy such as maintaining the apartment and paying rent.

The operation of supportive housing sometimes requires obtaining some psychosocial history in order to provide appropriate and necessary services to the tenant. Psychosocial information not related to a tenant’s ability to pay rent or allow peaceful enjoyment of the property should be asked only after the tenant has been admitted to the housing program, thus ensuring that none of the information obtained by a service provider in order to provide social services is used for housing decisions, since this 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 sides of the programs, and to allow access to each set of files only to the staff working in each program area. Such strict controls maintain the confidentiality on both sides of the program and also ensure that housing decisions are made on valid grounds.
The reality of many programs, however, is that there is limited staff, so that the same people work in both the social service arm of the program and the housing arm. If staff members responsible for making decisions regarding occupancy have access to information about the applicant that is not directly relevant to the housing decision and which in an ordinary landlord-tenant relationship would not be available to the landlord, caution should be exercised. In these situations where staff members wear many hats or work closely together, the staff members selecting tenants should not base their decisions on information that is extraneous to the landlord-tenant relationship. Before making a tenant selection decision, the staff member may want to ask a series of questions to ensure that the decision is being made on defensible grounds.

- Is the information that is guiding the decision information that would have been obtained if the applicant’s only point of contact with the agency was in applying for housing?

- Is the basis of the 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 5) and the housing provider is made aware of this disability, is there a reasonable accommodation that can be provided that will enable the applicant to meet the terms and conditions of tenancy?

In a licensed facility a housing provider may be required to ask for information that is 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 because it is required to do so by law.

**Question 5:** What is HUD’s “zero tolerance” or “one-strike” policy and what housing programs are covered by it?

**Answer:** “One-strike” is a set of federal statutory requirements that requires pre-occupancy screening and rejection of applicants for drug and alcohol abuse and certain criminal activity, and also requires tenant lease provisions that facilitate eviction of tenants in some circumstances related to drugs, alcohol and criminal activity. “One-strike” applies to many federal programs.

In 1996, President Clinton 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. Much of the original “one-strike” policy was contained in the Housing Opportunity Program Extension Act of 1996 (42 U.S.C. 1437), which is described in HUD Notice PIH 96-27 (HA) and HUD Notice PIH 96-16 (HA). The one-strike policy was considerably expanded under the Quality Housing and Work Responsibility Act of 1998 and now applies to publicly or privately owned housing assisted under the following federal programs: public housing; tenant-based Section 8 and project-based Section 8 (including new construction, moderate

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2 The Quality Housing and Work Responsibility Act (Title V of H.R. 4194) is also known as the “Public Housing Reform Act,” and amended the United States Housing Act of 1937 (the “Act”), at 42 U.S.C. 1437. It also contains four free-standing sections (576 through 579) which are codified in Chapter 135 (“Residency and Service Requirements in Federally Assisted Housing”) at 42 U.S.C. 13661, 13662, and 13664.
rehabilitation and substantial rehabilitation); Section 202 and Section 811; Section 221(d)(3) and Section 236 mortgage insurance; and Section 514 and Section 515 rural housing. McKinney Act programs are not included in the current one-strike or zero tolerance requirements described above, with the exception of McKinney Act Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care. HUD has confirmed that both of these programs are considered Section 8 programs that are covered by the one-strike law; however, the primary focus of one-strike has been in public housing.

HUD’s rules regarding screening and eviction for drug abuse and criminal activity were adopted in 2001, and can be found at 24 CFR Parts 5, 200, 247, 880, 882, 884, 891, 960, 966 and 982. These laws require owners of this housing to prohibit admission to covered projects to: (a) households with a member the owner determines is illegally using a controlled substance; (b) households that the owner determines has a reasonable cause to believe that a household member’s illegal use of a controlled substance or abuse of alcohol may interfere with the health, safety or right to peaceful enjoyment of the premises by other residents; and (c) persons evicted from federally-assisted housing because of drug-related criminal activity for three years following the eviction. “Drug-related criminal activity” is defined to mean the illegal manufacture, distribution, use or possession with intent “to sell, distribute or use of a controlled substance” (42 U.S.C. Section 1437f(5)). (Note that subsection (c) above requires rejection of applicants previously evicted for drug-related activity and does not necessarily require a criminal conviction.) The Act permits owners to waive the requirements described in (b) and (c) above (and admit tenants) in certain circumstances where the household member demonstrates he or she has successfully completed or is enrolled in a rehabilitation program and is no longer using illegal drugs or abusing alcohol. The requirement may not be waived if the household member is currently using a controlled substance. While “current use” is not defined, this term has been interpreted to exclude persons whose illegal use of drugs occurred recently enough to justify a reasonable belief that their drug use is current (see discussion under Question 8 below).

Owners of covered projects are also required to prohibit admission of any individual who is subject to a lifetime registration requirement under a state sex offender registration program. Finally, the law grants authority to owners of covered projects (but does not require them) to deny admission to households with a member that, during a reasonable time preceding the date of application, engaged in any drug-related or violent criminal activity or other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner or project employees. Again, note that this law authorizes owners to exclude applicants who the owner believes have engaged in certain criminal activity; the law does not require a criminal conviction in order for an owner to deny application for tenancy, nor does it offer guidance on the type of evidence an owner should rely on to determine if an applicant has engaged in criminal activity. However, 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.

One-Strike also includes a set of requirements to facilitate the eviction of certain tenants who abuse drugs or alcohol or engage in certain criminal activity. These are described in Chapter Six, Section D, Question 5 below.
Question 6: May a housing provider ask applicants if they have a criminal conviction?

Answer: 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 determining whether the applicant can comply with the lease.

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, it is reasonable for a housing provider to 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 about criminal convictions that are unrelated to drug crimes, such a question can be related to complying with the terms of tenancy as well as the provider’s obligation to ensure the safety of occupants. Thus, such a question is reasonable, although there is no case law to provide guidance on that point and providers may find themselves fighting a discrimination claim if such a question is asked.

Arrest records that did not result in a conviction are not a valid reason for rejecting an applicant, except as provided under the HUD “one-strike” requirement in projects where that requirement applies (see Question 5 immediately above).

Question 7: May an applicant be rejected because of a criminal conviction?

Answer: Yes, depending on the type of crime that was committed.

A housing provider may deny housing to a person with a criminal conviction history 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 crime occurred in the housing development. 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. 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 5 of this Section, require exclusion of people with certain criminal convictions from many federally-funded housing projects.

Question 8: 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?

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

Under the Fair Housing Act, housing providers may ask an applicant if he or she is a current illegal user or addict of a controlled substance. 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.

The Fair Housing Act and the Americans with Disabilities Act (“ADA”) do not deal with how a housing provider determines whether someone is a current drug user versus a former drug user.
There is no definition of former drug user that 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 only standard available appears to be in the regulations implementing the ADA, which 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” (28 CFR 36.104). A similar definition of current illegal drug use is contained in the proposed regulation for “one-strike” (Federal Register V.64 No. 141, July 23, 1999).

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 thus was entitled to protection as disabled under the Fair Housing Act.3 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 beyond this test there is no bright-line test emerging.4

HUD has attempted in HUD Handbook No. 4350.3, which applies to Section 202, Section 811, Section 221 and Section 236 housing projects, to provide some guidance for housing providers on how to determine current versus former drug use by defining disability to include 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 such use; (2) is participating in a supervised drug 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. The proposed regulations implementing “one-strike” in the programs covered by “one-strike” contain similar language. This expanded definition, obviously, presents some interpretation problems for housing providers and does not give any guidance on how a housing provider determines that an applicant is “not currently engaging in such use” or has “successfully” completed a drug rehabilitation program. However, HUD’s guidance may assist in formulating some form of policy for dealing with applicants.

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 it is necessary 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 individually assess an applicant who may not fall within the bright-line time period, but can show that they are drug free. Others argue that any bright-line policy is illegal primarily because such policies fail to treat people with disabilities as individuals, and instead, make assumptions about them 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 at this time may be to adopt a carefully crafted policy that

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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 of time 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 time period. Obviously, this screening process will require some knowledge and skill on the housing provider’s part in determining each applicant’s likelihood of actually being drug free, but until further guidance is provided in the way of court decisions or regulations, there is no bright-line test that can be applied.

**Question 9: Is pre-admission drug testing legal?**

**Answer:** 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 all applicants to all the housing operated by the provider are required to take drug tests as a condition of tenancy. Drug testing might not be lawful if a provider only utilized it in certain types of projects (like projects for people with disabilities or people who are homeless) and not in others. HUD has issued no official guidance on this topic.

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.

**Question 10: Does HUD have a requirement that current drug users must be rejected as tenants?**

**Answer:** Yes, it is sometimes called the “one-strike” or “zero tolerance” policy, but it does not apply to all HUD programs.

Federal law requires owners of certain kinds of HUD projects to establish standards that prohibit admission to the housing of any household with a member who the owner determines is illegally using a controlled substance or who the owner determines it has a reasonable cause to believe 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 is not required. This law applies to public housing, tenant-based Section 8, project-based Section 8 (including new construction, moderate and substantial rehabilitation), Section 202 projects, Section 811 projects, McKinney Act Section 8 Moderate Rehabilitation for SRO Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care, and federally insured Section 221(d)(3) and Section 236 projects, and permits limited exceptions where a person has participated, or is participating, in a drug rehabilitation program and is no longer engaging in
illegal use of drugs (42 U.S.C. 1437; 42 U.S.C. 13661, 13662, and 13664) (see extended discussion of the HUD “one-strike” or “zero tolerance” policy under Question 5 above in this Section).

Question 11: Can a housing provider require an applicant to be sober?

Answer: Generally, a housing provider cannot require an applicant to be sober. However, HUD programs permit exclusion of applicants whose use of alcohol may interfere with their ability to perform the responsibilities of tenancy or interfere with the health and safety of other tenants.

Unlike their treatment of 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 include alcoholism within the definition of handicap. Since alcohol is a legal substance, whether the applicant is currently partaking of 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 individuals with handicaps. If the applicant’s problems with alcohol have caused behavior problems that interfere with the applicant’s ability to meet the terms of tenancy, this may be a basis for rejection. 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 in order to accommodate the tenant if the tenant can show that steps have been taken to reduce the chances of the negative behavior reoccurring.

It should be noted that HUD’s definition of “individual with handicaps” in HUD Handbook No. 4350.3, which applies to Section 202, Section 811, Section 221 and Section 236 housing projects, as well as the definition in Section 504, excludes an individual whose current use of alcohol prevents the individual from participating in the program or activity being applied for, or whose participation, by reason of current use of alcohol, would constitute a direct threat to property or the safety of others. This definition would appear to allow housing providers to reject alcoholics on the basis of current drinking, if the drinking results in behavior problems in projects covered by Section 504 and in the HUD programs listed above. However, caution should be exercised in any such rejection. The HUD definition and Section 504 require that the individual not be able to participate in the program or activity offered because of drinking in order to be excluded from the housing. If the program offered is simply rental of an apartment, with no services provided, which is the case for some of the HUD programs listed above, the housing provider will need to show that the applicant’s drinking prevents the applicant from meeting the terms and conditions of tenancy (i.e., payment of rent or maintaining 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.

Finally, under the Quality Housing and Work Responsibility Act of 1998 (also known as the “one-strike” policy), owners of certain kinds of HUD-assisted projects must deny occupancy to
households where a household member’s pattern of abuse of alcohol may interfere with the health, safety or right to peaceful enjoyment of the premises by other residents. The law applies to public housing, tenant-based Section 8, project-based Section 8 (including new construction, moderate and substantial rehabilitation), Section 202 projects, Section 811 projects, federally insured Section 221(d)(3) and Section 236 projects, and Section 514 and Section 515 rural housing, and includes limited exceptions for people who have completed or are participating in rehabilitation programs and are no longer abusing alcohol (42 U.S.C. 14377; 42 U.S.C. 13661, 13662, and 13664). Please see the detailed discussion of “one-strike” in Question 5 of this Section.

**Question 12:** May an applicant be rejected for showing up intoxicated at the intake interview?

**Answer:** An applicant may not be rejected solely because he or she is intoxicated at the interview. An applicant may be rejected due to behavior that is inconsistent with tenancy.

An applicant may not be rejected solely by virtue of being intoxicated at the interview, since alcoholism is a protected disability. But if the applicant is unable to participate in the interview fully, is abusive or exhibits behaviors not consistent with good tenant behaviors, this may be grounds for rejection.

**Question 13:** What are the legal ramifications of tenants screening each other?

**Answer:** This is a very risky practice, unless proper precautions and oversight are implemented.

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.

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. 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.
REASONABLE ACCOMMODATION IN TENANT SELECTION

Question 1: What does “reasonable accommodation” mean?

Answer: The duty to make a reasonable accommodation extends to two areas:
(1) Physical Modifications: Housing providers must allow tenants with disabilities to make reasonable, necessary physical modifications to their units. Under the Fair Housing Act, housing providers are under no obligation to pay for these physical modifications; they must simply allow the modifications to be made. If a housing development receives federal funds and is therefore, subject to Section 504, then housing providers must pay for modifications, unless to do so would cause financial hardship. If a housing development receives non-federal government funding, Title II of the ADA may apply, and would require the provider to pay for reasonable modifications.5
(2) Policy Changes: Housing providers must make changes in their “rules, policies, practices or services” when necessary to allow persons with disabilities equal access to housing.6

The Fair Housing Act prohibits discrimination against persons with disabilities in the provision of housing, but also goes further and creates an affirmative duty for housing providers to accommodate persons with disabilities. “Failure to accommodate” is a separate and distinct charge under the Fair Housing Act. 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. Such accommodations, or changes, 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.7 However, the provider must bear some costs and make some special provisions for persons with disabilities. 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, it is reasonable for the provider to require the tenant to demonstrate ongoing treatment or services for the underlying condition that caused the behavior problem. Housing providers are not required to inform tenants of their rights to a reasonable accommodation, 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 provisions, requiring a housing provider in certain instances to pay for necessary physical modifications to a disabled tenant’s unit. If non-federal

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public funds are received, the assisting public agency’s obligations under Title II of the ADA impose a similar reasonable modification requirement on the provider.

In determining what is a reasonable accommodation, courts will balance the financial and administrative burden on housing providers against the benefit to a person with a disability. It is unclear under current law exactly what constitutes a “reasonable” accommodation or an “undue financial and administrative burden,” and these questions have produced a great deal of litigation and controversy. Despite this indeterminate state of the law, it is critical that housing providers attempt to understand what accommodations a tenant needs and attempt to provide those accommodations, if feasible, in order to enable the tenant to enjoy the use and benefits of the housing.

The most successful approach for housing providers is to regard reasonable accommodations 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?

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

In the applicant screening process housing providers have two levels of requirements for reasonable 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 tenant selection process.

The housing provider’s second responsibility in applicant screening is to determine if there is a reasonable accommodation 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, but housing providers also should not ignore obvious disabilities. Nor do housing providers have to try to determine what the reasonable accommodation might be. But if an applicant requests a reasonable accommodation as part of the screening process, the housing provider is required to consider the request and implement the accommodation 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 must be an accommodation that is related 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, a housing provider may request documentation or some proof of the 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, an SSI 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 for only a particular disabled population, or unless the specific information relates to the provision of an accommodation.\(^8\)

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. 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.

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

**Answer:** Subject to reasonable accommodation requirements, a disabled applicant may be rejected for failure to meet legal occupancy requirements that are applied to all applicants.

Property managers can refuse to accept applicants for occupancy if the applicant does not meet the requirements for occupancy adopted by the housing provider, provided the requirements are legal and are 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 so clear cut. Making the determination of who is a “good” tenant without violating fair housing laws presents a challenge to property owners and managers. Before denying an applicant occupancy, the housing provider or manager should ask him or herself whether the conditions or behaviors demonstrated by the applicant that are causing the denial could be related to a disability. If so, the next question is whether a reasonable accommodation could allow the applicant to live in the facility. Although the fair housing laws do not require the property owner or manager to affirmatively offer reasonable accommodations if the tenant or applicant does not request them, thinking through whether there are any reasonable accommodations that can be helpful may avoid some discrimination claims.

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 past behavior rather than a sense that the person might be violent or destroy the property. Thus, an applicant’s history of eviction from other housing for violent behavior might 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 there is no documented previous history of

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\(^8\) 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).
threatening behavior, then it would not be appropriate to deny occupancy to the applicant on the basis of posing a threat to others. If a reasonable accommodation would eliminate the threat to others, then such an accommodation should be offered to the applicant.

In at least two reported federal court decisions, courts have refused to evict tenants with disabilities who physically assaulted other tenants because the owner of the housing failed to show that there was no reasonable accommodation that could be provided that would remove the threat to others. These court decisions do not indicate whether the tenants requested an accommodation before the eviction, which should be a requirement since without such 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 violent tenant might be to allow the tenant to remain in the housing as long as the tenant is receiving counseling on the violent behavior. Such an accommodation would be reasonable only if the accommodation adequately ensured the safety of the other residents.

Question 4: May an applicant be rejected if he or she has a bad tenancy record caused by his or her disability?

Answer: If an applicant’s bad 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.

For example, 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.

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

Answer: 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 “handicaps” 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, essentially inviting an applicant’s disclosure of the disability.

If the applicant does not have a reason for the past behavior that is 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, the provider must consider whether a reasonable accommodation is appropriate. For example, if the applicant shows that negative behavior was caused by alcoholism, 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:** Can a housing provider exclude tenants with disabilities because they need care and supervision?

**Answer:** Generally, a housing provider cannot exclude a disabled tenant because they need care and supervision or because they cannot live independently, unless they cannot meet the requirements for tenancy.

One Federal court found that a housing authority’s use of an independent living requirement was discriminatory. *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (1990). This case presented the most egregious example of an independent living requirement in that the need for in-home caregivers or assistance was deemed to disqualify the applicant, even if the applicant demonstrated that the necessary assistance was available and being provided. Thus, the court found that the independent living requirements resulted in discrimination against those with disabilities.

The *Cason* case has generally been read to mean that you cannot have an independent living requirement in any housing development, whether or not funded by Section 202. (It should be noted that HUD’s 202 manuals and recommended forms and leases continue to contain independent living requirements, although they appear to be invalid based on *Cason*.) However, this does not mean that a housing provider must allow occupancy to a tenant who clearly cannot care for him or herself and is not receiving the assistance necessary to enable the occupant 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 would not be a reasonable accommodation. 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 in most states would require...
licensing under applicable state licensing laws, 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 rules of the development.

For example, in a recent court case, a housing development had specific rules about who could have keys to the main entrance of the building and was threatening 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.10 This same decision provides clear guidance on how housing providers can deal with care and supervision issues. According to this trial court decision, providers can ask questions to determine if an applicant meets the criteria for the development, including whether the applicant is disabled, if this is a criteria. 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. It should be noted that 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.

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