Reasonable Accommodations in Tenant Selection Processes

Guidelines for the Tenant Selection Process

The housing interview (location, process) must be accessible to all applicants. The housing provider should also determine if accommodations are available to allow applicants with disabilities to occupy the unit. Throughout the application and screening process, the housing provider is obligated by law to consider and offer reasonable accommodation to applicants who request it and who qualify.

The following are guidelines on reasonable accommodation related to tenant screening excerpted from the Public and Assisted Housing Occupancy Task Force's Report to the Secretary-United States Department of Housing and Urban Development, Washington, D.C. April 7, 1994

1. Applicant screening methods should be targeted toward assessing the likelihood that any applicant will be able to meet the essential requirements of tenancy as expressed in the lease. These essential requirements may be summarized as follows:
    - To pay rent and other charges under the lease in a timely manner;
    - To care for and avoid damaging the unit and common areas, to use facilities and equipment in a reasonable way, to create no health or safety hazards, to reasonably report significant maintenance needs;
    - To respect the personal and property rights of others;
    - Not to engage in criminal activity that threatens the health, and/or safety of other residents or staff; and not to engage in drug-related criminal activity on or near the premises; and
    - To comply with health and safety codes and necessary and reasonable rules and program requirements of HUD, and/or other government entities, and/or the housing provider.

2. Any initial evaluation of an applicant must be disability-neutral, not seeking any information beyond the minimum required to clarify specific eligibility and screening issues, and not based on any disability-related presumptions about the applicant's ability to meet the essential obligations of the lease.

3. If any applicant with a disability or handicap cannot satisfy the requirements of tenancy because of previous rental history, housing providers must, if requested by the applicant:
    - Consider whether any mitigating circumstances related to the disability could be verified to explain and overcome the problematic behavior; and
    - Make a reasonable accommodation that will allow the applicant to meet the requirements.
4. A reasonable accommodation allows the applicant with a disability to meet essential requirements of tenancy. Applicants and providers are each responsible for working together to identify the specific accommodation that each accepts as reasonable.
5. Accommodations are not reasonable if they require fundamental alterations in the nature of a program or impose undue financial and administrative burdens on the housing provider. Likewise, providers may not be required to make specific accommodations or physical modifications, if equally effective alternatives permit full program participation.

6. If an applicant with disabilities who would otherwise be rejected based on objective screening criteria asserts that mitigating circumstances would overcome or outweigh the negative information obtained in screening, the provider may not dismiss the assertion but instead may require the applicant to verify the mitigating circumstances. If the Applicant's claim of mitigating circumstances is based on a disability, the housing provider may make inquiries about the applicant's assertions, but only to the extent necessary to confirm the applicant's assertions.

Reasonable Accommodation in Tenant Selection

Note: The following questions and answers are taken from CSH's publication *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing – National Edition* (prepared by the Law Offices of Goldfarb and Lipman and available at www.csh.org).

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

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

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

The Federal Fair Housing Act prohibits discrimination against persons with disabilities in the provision of housing, but also goes further and creates an affirmative duty for housing providers to accommodate persons with disabilities. "Failure to accommodate" is a separate and distinct charge under of the law. In other words, housing providers must make changes to their rules, policies, and procedures that will allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. A housing provider must also permit physical or structural changes to housing that are necessary to afford people with disabilities equal access to housing.[1] 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.[2]

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

[1] 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.
[2] Smith & Lee Associates v. City of Taylor, 102 F.3d 781 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397 (1979)

accommodation or modification, but a statement in the application form informing applicants of these rights is a prudent practice that may eliminate some discrimination claims, and initiate communication between the applicant and the provider before a claim is filed.

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

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

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

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

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

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

During the applicant screening process, housing providers must satisfy two levels of reasonable accommodation requirements. First, the screening process itself must be accessible to all applicants. For example, if an applicant is hearing impaired, the housing provider will need to

provide sign language interpretation or some other method for communicating with the applicant to ensure that the applicant has an opportunity to participate in the tenant selection process.

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

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

If an applicant requests a reasonable accommodation or modification, a housing provider may request documentation or some proof that the applicant has a disability and the link between the disability and the requested accommodation. The housing provider may not, however, require an applicant to submit medical records as proof of his or her disability; such records are private. Instead, the housing provider should request a doctor's letter indicating the need for the accommodation or modification, a Supplemental Security Income award letter, or some similar verification. Even when the housing provider is seeking proof of the applicant's disability, the provider may not ask about the particular type or severity of disability or other specifics, unless the housing is designated only for a person with a particular disability, or unless the specific information relates to the provision of the requested accommodation or modification[3].

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.

[3] 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).

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

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

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

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

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

In at least two reported federal court decisions, courts have refused to evict tenants with disabilities who physically assaulted other tenants. In those cases, the owners of the housing failed to show that a reasonable accommodation would not have removed the threat to others.[4] These

[4] 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).

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

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

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

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

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

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

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

As a reasonable accommodation, the housing provider should focus on the applicant's current behavior and ability to meet the terms of the tenancy. The landlord will need to know what mitigating circumstances 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[5]. In this case, the housing authority deemed the need for in-home caregivers or assistance as a disqualification from a public housing project, even if the applicant demonstrated that he/she was receiving the necessary assistance. The court ruled that the independent living requirements resulted in discrimination against those with disabilities.

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

In one recent court case, a housing development had specific rules about who could have keys to the main entrance of the building. The housing provider threatened eviction of a resident for giving a key to a care attendant. The court found that allowing the care attendant to have a key

[5] Cason v. Rochester Housing Authority ,748 F. Supp. 1002 (W.D.N.Y. 1990).

was a reasonable accommodation[6]. 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 building codes or health and safety codes, such as allowing a live-in care attendant in a room limited by law to one person, would not be reasonable if it violates applicable building code requirements.

Housing providers operating assisted living facilities or other licensed facilities should exercise caution in applying screening standards that may violate the prohibitions on independent living requirements. Licensed facilities that provide housing are generally subject to fair housing laws. Requirements in assisted living facilities that residents meet a certain level of self-care may violate these fair housing laws. The federal government has been active in challenging assisted living requirements, even for offenses less egregious than in *Cason*. In *U.S. v. Resurrection Retirement Community* (unpublished but reported in the Journal of Fair Housing and Fair Lending), the court sanctioned a housing provider for violating the Fair Housing Act by discouraging wheelchair-dependent prospective tenants from applying and for imposing medical exams as a leasing precondition.

[6] 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).