Table of Contents

CHAPTER 1 Introduction

Online Resources 1-1
Introduction to Fair Housing and Reasonable Accommodation:
Overview of Course Learning Outcomes 1-1
Chapter 1 Learning Outcomes 1-3

Section 1.1 Assisted Housing as a Positive Social Force – Mission of the PHA 1-4
The PHA Is a Leading Institution in Its Community 1-7
The PHA's Obligation to Affirmatively Further Fair Housing 1-8
What Does Discrimination Mean in the Fair Housing Context? 1-10

Section 1.2 General Principles of Fair Housing 1-15
Test Your knowledge 1-15
Understanding the Difference Between Local, State, and Federal Law 1-21

Section 1.3 Working with Legal Aid and Other Advocacy Groups 1-24
Outreach 1-25

Section 1.4 Fair Housing Complaints 1-29

Section 1.5 Disability Awareness and Etiquette 1-35
People with Disabilities 1-35
Aging in Place 1-36
Attitudinal Barriers and Etiquette 1-36
Statutory Communication Requirements 1-42
The Obligation to Provide Auxiliary Aids 1-43
Learning Activity 1-1: Overview Quiz 1-46

CHAPTER 2 Fair Housing Laws and HUD Requirements

Learning Outcomes 2-1

Section 2.1 Civil Rights Act of 1964 (Title VI) 2-1

Section 2.2 The Fair Housing Act 2-3
Fair Housing Act Overview 2-3
Summary of the Fair Housing Act 2-4
Testing 2-8
Promoting Fair Housing 2-8

Section 2.3 Section 504 of the Rehabilitation Act of 1973 2-9
504 Coordinator Description and Duties 2-11

Section 2.4 Title II of the Americans with Disabilities Act (ADA) 2-15

Section 2.5 Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) 2-16

Section 2.6 Fair Housing Executive Orders and Other Regulatory Requirements 2-17
The Violence Against Women Act (VAWA) 2-17
Learning Activity 2-1: Laws Quiz 2-19

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CHAPTER 3 PHA Compliance with HUD Regulations and Fair Housing Laws

Learning Outcomes . . . 3-1

Section 3.1 Introduction . . . 3-1

Notice of Nondiscrimination and Record Keeping for HUD . . . 3-1

Prohibition Against Differential Treatment . . . 3-2

Section 3.2 HUD's Nondiscrimination/Fair Housing Compliance Requirement . . . 3-3

Section 3.3 Consolidated Plan/Fair Housing Planning . . . 3-4

Civil Rights Certification . . . 3-6

Section 3.4 ACOP, Admin Plan, and Annual Plans . . . 3-7

Section 3.5 Affirmative Marketing Techniques . . . 3-9

Things to Consider . . . 3-10

Section 3.6 Promoting Access for People with Disabilities . . . 3-18

PHA Actions . . . 3-20

Section 3.7 HUD Civil Rights Monitoring Audits . . . 3-22

Learning Activity 3-1: General Compliance Quiz . . . 3-32

CHAPTER 4 Persons with Disabilities

Learning Outcomes . . . 4-1

Definitions of the Term "Disability" . . . 4-1

Section 4.1 HUD Definition of a Person With a Disability . . . 4-2

Section 4.2 Definition of a Person with a Disability for Purposes of Reasonable Accommodation 4-4

Physical, Mental, or Emotional Impairment that Substantially Limits One or More Major Life Activities . . . 4-5

Record of an Impairment . . . 4-8

Regarded as Having an Impairment . . . 4-8

Section 4.3 Limitations Specifically Excluded from Disability Protection . . . 4-10

Section 4.4 Nexus . . . 4-11

Section 4.5 Verification of Disability . . . 4-12

Eligibility/Allowances . . . 4-12

What is a Reasonable Accommodation? . . . 4-12

Reasonable Accommodation Purposes . . . 4-14

What a PHA May Request . . . 4-15

What the PHA May NOT Request . . . 4-18

Requirement to Keep Information Confidential . . . 4-24

Section 4.6 Denial of Admission . . . 4-25

Application and Admission Case Studies . . . 4-26

Learning Activity 4-1: Disability Definitions Quiz . . . 4-30

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CHAPTER 5 Reasonable Accommodations

Learning Outcomes 5-1

Section 5.1 Reasonable Accommodation Process 5-1
Introduction 5-1
PHA Obligation to Notify 5-3
Procedural Guidelines for Considering Requests for Accommodation 5-3
The Applicant or Tenant Must Request a Specific Accommodation 5-5
The Request for an Accommodation Begins a Process 5-5

Section 5.2 Consideration of Reasonableness of Request 5-10
Undue Financial and Administrative Burden 5-10
Fundamental Alteration 5-12
Learning Activity 5-1: Inspection Process—Fundamental Change to Program 5-13
Learning Activity 5-2: Occupancy—Consideration of Reasonableness of Request 5-14
Direct Threats 5-15

Section 5.3 Serious or Repeated Lease Violations by People with Disabilities 5-18
Learning Activity 5-3: Threat to Health and Safety 5-20
Learning Activity 5-4: Health and Safety 5-21
Learning Activity 5-5: Consideration of Reasonableness of the Request 5-22

Section 5.4 Reasonable Accommodation Functions 5-23
Program Areas 5-23
Program Compliance Procedures and Requirements 5-26
Accommodating Participants and Tenants 5-28
Live-in Aides and OIG Audits 5-30
Assistance Animals 5-40
Service Animals 5-41
ADA FAQs about Service Animals 5-44
Documentation from the Internet 5-45
Support Animals (Assistance Animals other than Service Animals) 5-45
General Considerations Regarding Assistance Animals 5-48
Issues in Public Housing and for Other Recipients of Federal Funding 5-49
Other Deposits/Late Fees 5-55

Section 5.5 Modifications 5-58

Section 5.6 Sample Reasonable Accommodation Forms 5-60
Learning Activity 5-6: Reasonable Accommodation Quiz 5-77

CHAPTER 6 Fair Housing Issues in Assisted Housing

Learning Outcomes 6-1

Section 6.1 The Violence against Women Act (VAWA) 6-1
Introduction 6-1
State and Local Law 6-4
Summary of Key Changes in VAWA 2022 6-4
Definitions 6-5
Annual and Five-Year Plans 6-8
Denial of Admission 6-12
Terminations 6-14
Moves 6-16
Emergency Transfer Plan 6-16
Confidentiality 6-18
Notice PIH 2017-08 6-21
Case Studies Scenarios 6-24
Nuisance and Crime-Free Housing Rules and Ordinances 6-28

Section 6.2 Waiting List Management and Preferences 6-30
Preferences for the PHA to Consider 6-31
Prohibited Preferences 6-32
Selection Within the System of Preferences 6-33
Purging of the Wait List 6-34

Section 6.3 Deconcentration of Poverty and Income Mixing 6-36

Section 6.4 Fair Housing: Familial Status Issues 6-37

Section 6.5 Fair Housing: Advertising 6-41

Section 6.6 Sexual and Other Forms of Harassment 6-43
HUD Final Rule on Harassment and Liability for Discriminatory Practices 6-43
The Final Rule and Direct Liability 6-45
State Law 6-46
Federal Law and Sexual Harassment 6-46
Sexual Harassment Claims 6-47
PHAs Should Protect Themselves 6-49
Case Law 6-49

Section 6.7 Race and National Origin Discrimination 6-51

Section 6.8 Discrimination Based on Religion — Case Law 6-53

Section 6.9 Hate Crime and PHA Liability 6-55
Learning Activity 6-1: Other FH Issues Quiz 6-59

CHAPTER 7 Fair Housing Issues in the Housing Choice Voucher Program

Learning Outcomes . . . 7-1

Section 7.1 Leasing Issues That Involve the Owner . . . 7-1

Nondiscrimination Clause in the HAP Contract and Private Landlord Conduct . . . 7-1

Family Members as Landlords in the HCV Program . . . 7-2

Family Evicted for Serious Violation of the Lease . . . 7-4

Section 7.2 Issues Before and During Lease-Up . . . 7-5

Briefings . . . 7-5

HCV Mobility Counseling . . . 7-6

HCV Mandatory Mobility Support for People with Disabilities . . . 7-7

Voucher Extensions . . . 7-8

Moves and Portability . . . 7-8

Exception Payment Standards . . . 7-9

Special Housing Types . . . 7-14

HCV Owner Recruitment and Retention . . . 7-15

Section 7.3 Denial of a Reasonable Accommodation Request . . . 7-16

Informal Hearing . . . 7-16

Learning Activity 7-1: HCV Specific Quiz . . . 7-18

CHAPTER 8 Fair Housing Issues in Public Housing

Learning Outcomes . . . 8-1

Section 8.1 Site-Based Waiting Lists . . . 8-1

Who may Adopt Site-Based Waiting Lists? . . . 8-2

Review of Site-Based Waiting Lists . . . 8-3

Additional Guidance and Information . . . 8-4

Section 8.2 Occupancy and Turnover of Accessible Dwelling Units . . . 8-6

Transfers To an Accessible Unit . . . 8-8

Learning Activity 8-1: Transfers . . . 8-9

Section 8.3 Smoke-Free Public Housing . . . 8-10

Section 8.4 Accessibility of PHA Structures and Program . . . 8-12

Requirements for Accessible Units (UFAS) . . . 8-12

Health and Safety and Accessibility . . . 8-13

Visitability . . . 8-14

Physical Accessibility Regulations and Laws . . . 8-15

Section 8.5 Deconcentration of Poverty and Income Mixing . . . 8-23

Purpose . . . 8-23

Methods to Achieve Deconcentration . . . 8-23

Developments Not Subject to Deconcentration Requirements . . . 8-24

Fair Housing Issues . . . 8-24

Section 8.6 Unit Offers to Elderly Or Disabled Families . . . 8-25

Learning Activity 8-2: PH-Specific Quiz . . . 8-26

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CHAPTER 9 References

Section 1 24 CFR References 9-1

Section 2 HUD Notices and Letters 9-33

Quiz Answer Key

CHAPTER 1 Introduction

ONLINE RESOURCES

In addition to the documents provided in this workbook, additional online links to relevant HUD documents and resources are available at:

- NMAReferences.com (no login required)
- Click the Fair Housing and Reasonable Accommodation link to jump directly to the list of HUD fair housing files

You can find additional resources and references in the following link: FairHousingResources.nanmckay.com. The materials may be accessed and downloaded as often as needed.

INTRODUCTION TO FAIR HOUSING AND REASONABLE ACCOMMODATION: OVERVIEW OF COURSE LEARNING OUTCOMES

Explain and apply critical fair housing laws, regulations, and guidance to assure compliance in HUD's housing choice voucher (HCV) and public housing programs.

Upon completion of the Fair Housing and Reasonable Accommodation training, you should be able to:

- Understand the PHA's role in affirmatively furthering fair housing and why it matters
- Implement the PHA's obligations to assist families in filing a fair housing complaint and how HUD, DOJ, and the courts resolve such claims
- Identify the federally protected classes and any additional state and local laws and/or protected categories that may apply
- Identify and distinguish between the three types of impermissible discrimination

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- Discuss fair housing best practices and common errors resulting in lawsuits
- Discuss the scope and application of various federal fair housing laws
- Compare and contrast the two different definitions of *disability* in HUD programs
- Apply the reasonable accommodation process to all program activities, including application, occupancy, and termination
- List and explain the factors for compliance as well as best practices under the Violence against Women Act (VAWA)
- Describe updated guidance for working with limited English proficiency (LEP) individuals
- Discuss pertinent issues and responsibilities surrounding both sexual and other harassment and hate crimes
- Administer program-specific fair housing issues in HCV and Public Housing
- Understand changes in fair housing guidance following recent Executive Orders and related HUD regulations
- Locate and apply critical fair housing resources and other guidance

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CHAPTER 1 LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Identify the most common fair housing discrimination complaints
- Distinguish between the three different types of impermissible discrimination
- Identify the PHA's duty to further fair housing—its definition and requirements
- Identify and define federally protected classes
- Understand application of additional state and local fair housing laws
- Communicate with sensitivity awareness when working with people with disabilities
- Discuss customer service strategies to avoid fair housing complaints
- Understand how fair housing complaints are filed and handled

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Section 1.1 Assisted Housing as a Positive Social Force – Mission of the PHA

- Given the daily massive onslaught of paperwork and the challenge of ever-changing technical program compliance, we can sometimes lose sight of our important role in supporting fair housing protections by ensuring fairness and equal access in all aspects of the administration of our housing programs.
- Often, poor people become concentrated in certain areas largely because of racial, ethnic, and economic discrimination. The lack of affordable housing throughout a community results in low-income people marooned in areas with high crime, poor schools, unemployment, homelessness, and other conditions associated with the concentration of poverty.

National Center for Health in Public Housing, Demographic Facts: Residents Living in Public Housing (8/25)

- Federal rental assistance enables families to afford good-quality, stable housing, avoid homelessness and other forms of housing insecurity, and make ends meet.
- There are 1.6 million residents living in public housing (1,604,633) and 5.2 million residents receiving voucher-funded assistance. Of those receiving voucher-funded assistance, a little over 2 million live in project-based Section 8 housing.
- Generally, across the various assisted housing programs, about 40% of those receiving housing assistance are senior citizens, one-third of families include minor children, and a quarter of assisted families include a member who is disabled. In addition, 66% of assisted families belong to racial minorities, and 77% of assisted families are extremely low income, even though the primary source of income for one-third of those families is wage income.

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- These demographic trends underscore the importance of housing assistance programs in addressing the needs of diverse communities and ensuring that all individuals have access to stable and affordable fair housing.

National Fair Housing Alliance, 2024 Fair Housing Trends Report

- Annually, the National Fair Housing Alliance (NFHA) gathers data from fair housing organizations and government agencies to provide a look at the current trends as reported by HUD, DOJ, and various local fair housing providers across the country. In 2025, there were 32,321 reported complaints of housing discrimination across the United States.
- Breakdown of 2025 fair housing complaints:
  - **55% were based on disability (17,645)**
  - 16% were based on race (5,034)
  - 7% were based on sex (2,304)
  - 6% were based on familial status (1,786)
  - 6% were based on national origin (1,836)
  - 2% were based on color (777)
  - 1% were based on religion (363)
- By a wide margin, most fair housing complaints alleged disability discrimination based on a failure to provide reasonable accommodations in the rental market.
- While fair housing organizations primarily receive complaints of discrimination based on federally protected classes, they also receive complaints of discrimination based on additional protections provided by state and/or local fair housing laws. In most instances, additional state and local fair housing laws apply to PHAs located in those areas.

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- According to the 2025 report, 5,894 complaints—representing 18.24% of all cases—alleged "other" forms of discrimination covered by various state and local fair housing laws.
  - Source of Income (2,189 complaints)
  - Age/Student Status (434 complaints)
  - Sexual Orientation (257 complaints)
  - Gender Identity/Expression (188 complaints)
  - Marital Status (74 complaints)
  - Criminal Background (310 complaints)
  - Victims of Domestic Violence (297 complaints)
  - Military Status (38 complaints)
  - Retaliation (472 complaints)
  - Immigration Status/Citizenship (36 complaints)
- In 2025, **complaints based on retaliation more than doubled.** There was also an **uptick in discrimination complaints based on immigration status/citizenship.**
- Other key issues in NFHA's report findings:
  - Artificial intelligence (AI) and algorithmic housing tools are creating new threats of digital redlining, steering, and bias in tenant screening and pricing.
  - Complaints based on national origin rose 8.45% from the previous year, marking the highest number since 2018.
  - HUD's Office of Fair Housing and Equal Opportunity (FHEO) reduced its staff by two-thirds in 2025 and made deep funding cuts to fair housing programs.
- The report addresses segregation today and why it matters:
  - Educational attainment
  - Health outcomes
  - Access to transportation
  - Policing and criminal justice
  - Employment opportunity
  - Wealth building and homeownership

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- The report concludes with a number of ways we can better tackle housing discrimination, address segregation, and work toward a more inclusive society.

THE PHA IS A LEADING INSTITUTION IN ITS COMMUNITY

- Assisted housing programs are a critical resource for low-income people, but if families encounter unlawful discrimination in the administration of those programs, the mission of the PHA is thwarted. This class will support the PHA and its staff in steering clear of litigation and in upholding the goal of treating all participants fairly and ensuring that similarly situated families receive consistent, high-quality service. The PHA, as a leading, critically needed institution in the community, plays a vital role in eradicating housing discrimination by staff by:
  1. Knowing applicable federal, state, and local fair housing laws
  2. Knowing what activities may violate local, state, and federal fair housing laws
  3. Creating and supporting PHA policies and procedures that enforce applicant families' and participant families' fair housing rights through taking affirmative steps to eliminate discrimination and provide easy access to fair housing information and the complaint process
  4. Addressing housing discrimination from a community perspective by ensuring that the PHA is part of a proactive community-wide planning effort to provide more affordable housing choices for all people

24 CFR 982.304

  5. Educating applicants and assisted families about their fair housing rights, including reasonable accommodations

24 CFR 1.1; 24 CFR 8.1; 24 CFR 100.5

- What is the ultimate purpose of the fair housing laws?
  - To achieve equal housing opportunity and choice for all people through the application of nondiscrimination laws to housing related services and transactions
- What is the purpose of the PHA?
  - The purpose of a PHA is to serve extremely low, very low, and low-income families. Housing authorities often house the people in their communities who are most vulnerable to housing discrimination.

THE PHA'S OBLIGATION TO AFFIRMATIVELY FURTHER FAIR HOUSING

24 CFR 5.150-151

- Per HUD's Interim Final Rule effective April 2, 2025, HUD revised the definition of *fair housing* and what is required to affirmatively further fair housing:

24 CFR 5.150 Affirmatively Furthering Fair Housing: Definitions

(a) The phrase *fair housing* means housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.

(b) The phrase *affirmatively further* means **to take any action rationally related to promoting any attribute or attributes of fair housing** as defined in the preceding subsection.

"This interim final rule [requires]…a general commitment that [housing providers] will take active steps to promote fair housing. [C]ertifications will be deemed sufficient provided [housing providers] took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination. This interim final rule does not, however, reinstate the obligation to conduct an Analysis of Impediments or mandate any specific fair housing planning mechanism [housing providers] must continue to affirmatively further fair housing as and to the extent required by the Fair Housing Act."

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24 CFR 903.7(o)

- As part of the PHA plan process (or operating plan if the PHA is not required to undergo the PHA plan process), the PHA must submit a signed civil rights certification to HUD that:
  - The PHA will administer the program in conformity with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act; and
  - The PHA will affirmatively further fair housing.
  - In addition, under the new rule, a PHA's certification that it will affirmatively further fair housing is sufficient if the PHA takes, in the relevant period, any action that is rationally related to promoting one or more attributes of fair housing as defined above.
- The FHEO Memo regarding Fair Housing Act Enforcement and Prioritization of Resources, dated September 16, 2025, rescinded the following prior HUD guidance on affirmatively furthering fair housing:
  - "Compliance Based Evaluation of a Recipient's Certification that it has AFFH," issued on March 5, 2013.
  - "FAQs Accompanying Affirmative Fair Housing Marketing Plan Guidance and Instructions for Section 818 PRA Demo," issued on June 1, 2014.
  - "Affirmative Fair Housing Marketing Plan Review Guidance," dated April 14, 2024.

WHAT DOES DISCRIMINATION MEAN IN THE FAIR HOUSING CONTEXT?

There are three types of impermissible discrimination:

1. OVERT DISCRIMINATION

- Overt discrimination means housing discrimination that is intentionally inflicted.
- An example of overt discrimination is to write into policy that no Arab-Americans will be allowed to live in your PHA, and all applications for housing with the authority by an Arab-American must be denied.
- Overt discrimination is becoming much less acceptable and blatant in the housing market as those in the community with prejudices learn that overt discriminatory policies are sure losers (and expensive!) in court.

2. DISPARATE TREATMENT

- *Disparate treatment* refers to discrimination that occurs when members of a protected class are treated differently and less favorably than others.
  - A PHA manager was dismayed to find among her staff an informal belief that families of a particular national origin were more likely to engage in fraud. Special attention was paid to the verification forms submitted by families of this national origin. Staff often requested additional information and proof from these families.
    - Here, the housing agency is treating a particular ethnic group differently from other housing applicants not of that ethnic group, which could give rise to a fair housing complaint. The employees' actions were not sanctioned by any policy or procedure of the housing agency. However, because the housing authority employees were treating people differently during the application process because of their national origin, illegal discrimination was occurring.

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- A landlord tells a prospective tenant who is Latina that an apartment isn't available, but then readily offers it to a white woman shortly thereafter.
- A PHA charges a higher security deposit or significantly different rent to a family with young children compared to applicants without children, or to a person with a service animal compared to an applicant with no animals.
- A public housing property manager offers an applicant a vacancy in a particular development because of their race or ethnicity or suggests an applicant wait for another development in a different neighborhood based on similar discriminatory reasons.
- A PHA requires verification of primary custody for dads but no such verification is required when a mother says she has primary custody of her children.

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3. Disparate Impact

- Disparate impact discrimination is alleged when the PHA's policy or practice has an unjustified discriminatory effect, even when the PHA had no intent to discriminate. Under this standard, a facially neutral policy or practice that has a discriminatory effect violates the Act if it lacks a legally sufficient justification. Thus, where a policy or practice that restricts access to housing based on criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice has been deemed unlawful under the Fair Housing Act if it was not necessary to serve a substantial, legitimate, nondiscriminatory interest of the PHA, or if such interest could be served by another practice that had a less discriminatory effect.
- On June 25, 2015, the Supreme Court of the United States ruled in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. to uphold disparate impact as a form of discrimination. In doing so, the court clarified that the Fair Housing Act reaches otherwise lawful activities that, while free of discriminatory intent, nonetheless have a "disparate impact" on protected groups. This precedent-setting opinion affirmed both 40 years of legal jurisprudence and the decisions of 11 U.S. appellate courts in holding that disparate impact is recognized under the Fair Housing Act.
- On April 23, 2025, President Trump issued Executive Order 14281: Restoring Equality of Opportunity and Meritocracy, directing federal agencies to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, federal civil rights laws, and basic American ideals."

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Notice PIH 2025-26

- Following EO 14281, HUD rescinded several guidance memos regarding the disparate impact theory (See further discussion in Chapter 6).
- Notably HUD's Office of Fair Housing and Equal Opportunity (FHEO) rescinded Notice 2015-19 and supportive FAQs (11/2/15), OGC guidance on use of arrests and criminal records (4/4/16), and OGC guidance memos on service to people of Limited English Proficiency (LEP) (9/15/16).
- In January 2026, HUD FHEO published a proposed rule to eliminate HUD's discriminatory effects regulations, thereby leaving the interpretation of disparate impact liability solely up to the courts to interpret on the grounds that:
  - Disparate impact liability is not explicitly included in the FHA statute and imposes a presumption of unlawful discrimination when any variance in outcomes exists among protected classes, "even without a showing of a facially discriminatory policy or discriminatory intent"; and
  - The rule states that the courts should be solely responsible for interpreting the statute and whether disparate impact liability continues to be recognized.

- Specifically, HUD proposes to eliminate regulations regarding disparate liability at 24 CFR 100.500. Key takeaways:
  - Executive Order 14281and subsequent FHEO rescissions and guidance memos make clear that the administration is unlikely to pursue investigations or bring new litigation based on a theory of disparate impact liability. PHAs are cautioned, however, that unless and until the scope of the Fair Housing Act is changed by Congress or the Inclusive Communities case issued by the U.S. Supreme Court is overturned, disparate impact liability continues to be a viable and recognized theory of discrimination, and plaintiffs are still able to bring private suits in federal court without involvement by HUD or the DOJ.
  - Moreover, many states impose laws establishing disparate impact liability under their state nondiscrimination laws (although the order instructs the U.S. Attorney General to examine whether any such laws are preempted by federal law or otherwise "have constitutional infirmities that warrant federal action". PHAs facing challenges to practices or charges of discrimination alleging disparate impact liability are advised to consult with counsel.

Section 1.2 General Principles of Fair Housing

24 CFR 1.1; 24 CFR 8.1; 24 CFR 100.5

- Under federal fair housing and civil rights laws, only specific classes of people are protected from discrimination. In this course, we will study eight protected classes under federal fair housing laws: race, color, religion, national origin, sex, familial status, disability, and age. A person can only file a claim under federal fair housing laws if that person is part of a protected class and the discrimination a person faced was because of his or her protected class status.
- The focus used to be solely on protecting those within the protected classes who have experienced the negative end of historical discrimination, but recent U.S. Supreme Court cases have expanded that lens.
- There is no doubt that there is bias in the housing market. A landlord may choose not to rent to students, a home seller can require a very large cash deposit, and a bank can require a certain type of credit history from home loan applicants. To claim discrimination under federal fair housing protections, however, the person must allege the discrimination was based on their status within a protected class. Federal fair housing laws do not prohibit all housing practices that may be unfair.

TEST YOUR KNOWLEDGE

- Read the statements below, then follow the directions that come next.
  1. A landlord refuses to rent to an applicant because she's a bad housekeeper.
  2. A landlord refuses to rent to an applicant because the applicant has her nose pierced, many visible tattoos, and green hair.
  3. A landlord (or a PHA) assigns an applicant family with children to a particular building in a multi-family development so that elderly residents, people with disabilities, and single adults are not disturbed and the children are closer to a nearby park.

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- Let's practice our understanding of being a member of a protected class. Look at the three statements above again.

24 CFR 100.70

  - Question three is the only scenario where the discrimination is occurring based on an applicant's status in a protected class (in this case, a family with minor children) Under federal law, "familial status" prevents a family from being treated differently because of the presence of minor children.

- We will learn more about the definition of *familial status* later in the course. For now, understand that private landlords, housing choice voucher landlords, and public housing authorities cannot treat families with children differently than other renters without children, including isolating families with children in particular buildings.
- Private landlords can choose not to rent to people who are bad housekeepers or people who have piercings or green hair.
  - Why? Because "bad housekeepers" and "people with green hair" are not one of the seven protected classes under federal fair housing laws.
- Private landlords do not have to rent to attorneys, people who love chocolate, or people who hate sports.
- To claim protection of federal discrimination laws, remember that first a person has to experience discrimination in housing because of their membership in a protected category.

DEFINITIONS OF THE EIGHT PROTECTED CLASSES

24 CFR 8.3; 100.20(b)

- The Fair Housing Act and the HUD regulations that implement the Act define only two of the eight protected classes. While a definition is provided as to who qualifies as handicapped and what familial status means under the law, race, color, national origin, religion, and sex have not been formally defined by Congress or HUD for purposes of fair housing enforcement.
- While there is no one way to describe protected classes under the law, below is a framework so that you may understand what is commonly meant in the legal community with regard to the defined words. Please note that state and local statutes may define these terms in different ways when local laws are applied.

Race

OMB "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity" 10/30/97

- ***White*** – All persons having origins in any of the original people of Europe, Northern African, or the Middle East.
- ***Black*** – All persons having origins in any of the black racial groups of Africa. (This is a broader category than African-Americans. Often people whose home country is Brazil, Haiti, Jamaica, etc., are Black.)

Color

- Discrimination can occur between light and dark skinned persons of the same race.

Religion

24 CFR 5.109

- Preference or difference in treatment regarding members of a particular religious group or belief. Under the Fair Housing Act and HUD's enforcement authority, "religion" includes all religions and denominations, as well as atheism, agnosticism, and nonreligion.

- This means protections apply to:
  - Mainstream religions (Christianity, Judaism, Islam, Hinduism, Buddhism, Sikhism, etc.)
  - Non-mainstream or minority religions
  - Indigenous spiritual practices
  - Atheists, agnostics, and those with no religious affiliation
- The law prohibits discrimination because of a person's religion, religious belief, refusal to hold a religious belief, or refusal to attend or participate in religious practices. It also covers discrimination based on religious dress, symbols, or practices, such as wearing a hijab, turban, or religious jewelry.

National Origin

OMB "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity" 10/30/97

- ***Hispanic*** – All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
- ***Asian or Pacific Islander*** – All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands, including China, Japan, Korea, the Philippines, and Samoa.
- ***American Indian or Alaskan Native*** – A person having origins in the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

Familial Status

24 CFR 8.3

- Refers to the presence of children under the age of 18 years living in a household, including pregnant women, foster parents, or a written designee of a minor child's parent.

Handicap/Person with a Disability

- Anyone who:

24 CFR 100.20(b)

  - Has a physical or mental impairment which substantially limits one or more of such person's major life activities
  - Has a record of having such an impairment
  - Is regarded as having such an impairment

Sex

- Sex discrimination may occur when a landlord rents to single women and not single men, when there are different requirements regarding children of the opposite sexes, or when sexual favors are related to housing opportunities (sexual harassment is prohibited under the act).

24 CFR 5.105(a)(2)

- Sexual orientation and gender identity are forms of sex discrimination recognized by current HUD regulations, various state and local laws, and court decisions. The Equal Access Rule, published in 2012 and updated in 2016, requires all programs administered by HUD's Office of Community Planning and Development to serve individuals in accordance with their gender identity and without regard to their sexual orientation.

FR Notice 4/28/26

- HUD published a proposed modification of the Equal Access Rule to remove sexual orientation and gender identity) and define sex in the HUD regulations in light of Executive Order 14168.

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Age

47 FR 57858

- The Age Discrimination Act of 1975 bans age bias in federally funded housing programs.

64 FR 16324; 42 U.S.C. 1437e

- The Housing for Older Persons Act (HOPA), which exempts certain senior housing (like 55+ or 62+ communities) from familial status rules, expressly does not apply to federally funded housing. Instructions for the implementation of HOPA state that "no public housing development funded by HUD may exclude families with children."

Protections Extend to "Reverse Discrimination" Claims

Ames v Ohio Dept of Youth Services (June 2025)

- The U.S. Supreme Court unanimously determined that all plaintiffs must meet the same basic standards to make out a discrimination claim based on a federally protected classification, regardless of their group membership or whether the affected individual is someone from a historically discriminated minority based on such classification or an individual of the majority group.
- Protections against discrimination on a protected class apply equally to all individuals, and courts should not impose special hurdles for majority-group plaintiffs.
- Examples:
  - An individual may allege race discrimination regardless of whether the individual was discriminated against because the individual is white or because the individual is black.
  - An individual may allege sex discrimination regardless of whether the individual is a man or a woman.
  - An individual may allege sexual orientation discrimination regardless of whether the individual is straight or gay.

UNDERSTANDING THE DIFFERENCE BETWEEN LOCAL, STATE, AND FEDERAL LAW

1. PHAs must be in compliance with the federal fair housing laws. Every PHA must submit a signed certification to HUD of the PHA's intention to comply with each of the following federal laws:

24 CFR 5.105(a); 903.7(o)(i); 906.40(e); 960.103(c); 982.53; 938.8

- Fair Housing Act (known as Title VIII of the Civil Rights Act of 1968)
- Title VI of the Civil Rights Act of 1964
- Age Discrimination Act of 1975
- Section 504 of the Rehabilitation Act of 1973
- Title II of the Americans with Disabilities Act of 1990

24 CFR 5 Subpart L

- Violence Against Women Act

24 CFR 968.110(a)

- Architectural Barriers Act of 1968

PHAs must also be in compliance with additional protections afforded in the HUD regulations that may not yet be part of federal law.

New HCV GB, Fair Housing Chapter

2. Public housing authorities must be in compliance with state or local laws that may have additional protections.

- If state or local laws impose different nondiscrimination requirements than federal law, generally the more rigorous standard, the one that promotes the higher level of protection for the tenant, is controlling.

- Generally, state and localities must follow any state or local laws, including extending protections to any additional protected classes beyond the federal list of protected classes, such as:
  - Source of income protections.
  - Almost half of all states have comprehensive nondiscrimination laws regarding marital status, sexual orientation, and gender identity. Additionally, some states interpret existing state-level bans on sex discrimination to include sexual orientation and/or gender identity.
    - But see HUD's proposed rule seeking to eliminate gender identity protections in HUD housing programs, and preempt any state or local laws that attempt to provide such protection upon penalties including loss of federal funding.
    - The rule is available at: https://www.govinfo.gov/content/pkg/FR-2026-04-28/pdf/2026-08244.pdf
  - Several states have additional limitations on the use of criminal records, including New Jersey's Fair Chance in Housing Act (FCHA), which restricts landlords (including public housing landlords) from asking about or considering most criminal history during the initial rental application process. California's Fair Employment and Housing Act (FEHA) and Unruh Civil Rights Act prohibit discrimination in nearly all housing transactions. Illinois and New York also have several laws pertaining to the use of arrest and criminal records.
  - Some cities and localities also offer broader protection than the state does, so the PHA should be sure to also review applicable local regulations and requirements. For example, the City of Austin Fair Housing Ordinance offers broader protection than Texas state law by prohibiting discrimination based on additional protected classes beyond what is protected under state law.

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- If you do not know if your PHA is in a state, city, or county with additional protections – find out! A quick internet search for your local human rights ordinances or landlord-tenant law will usually give you the answer.

Section 1.3 Working with Legal Aid and Other Advocacy Groups

> "Faced with changing one's mind, or proving that there is no need to do so, most people get busy on the proof."
>
> John Kenneth Galbraith

- A public housing authority will be richly rewarded for being proactive with local advocacy groups. Every program needs checks and balances for the health and integrity of its programs and policies. Advocacy groups are one of those checks—to keep us from going too far in any one direction.
- Not every contact with an advocacy group must be adversarial. It may reveal a problem that had been previously overlooked or give you a new perspective on an issue. Often, the housing agency and legal aid should be on the same side, since both are committed to serving the larger interests of low-income people.
- A public housing agency should locate and contact local advocacy groups. The housing agency should educate advocacy groups about HUD regulations and talk with them about PHA policy formulation. Helping advocacy groups understand the intricacies of the HUD regulations for which your PHA is obligated may give the advocacy group a better appreciation of the work you do and the limitations that you face from HUD mandates and guidance.
- By developing long-term rapport with the key personnel of these organizations, you lay a foundation of trust and accountability with the community. As issues arise, your preexisting relationship can calm the intensity of the moment and lead to a quick resolution.

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OUTREACH

- How does your PHA reach out to fair housing and legal advocacy groups in your state or city? What nonprofit agencies does your PHA work with to further fair housing practices in your community?
  - If you're not reaching out, you are not part of a regional solution to meet the fair and affordable housing needs of the community that the PHA serves. Recent case law shows the need for housing authorities to come to the table with advocacy groups and other housing agencies to reach regional solutions to housing issues in your community, or face the possibility of explaining your absence in court.
  - A great way to approach beginning work with legal nonprofits that may have a long tradition of being viewed by your PHA as foe rather than friend, is to simply use (and mean) these four words: we want your help.
  - Come to the table honestly asking "How can we do better?" Helen Keller said, "Security is mostly superstition." Just because your PHA has not faced a fair housing case does not mean that your policies and procedures could not be challenged. Who better to help you develop your polices than the same groups that will otherwise challenge them later?

CUSTOMER SERVICE

- Identify and develop relationships with nonprofit housing groups, ask for help, recognize common goals, be open to change, and approach your work with the nonprofit community on the offensive—don't wait for a lawsuit.
- Most fair housing complaints could have been entirely prevented with improved employee training or better customer service practices in place. FHEO offices and state attorney general offices often report that the majority of the fair housing complaints filed are most likely not the result of actual discrimination but poor business practices or communication.

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- We are not responsible *for* people but we are responsible *to* people.
  - We are not responsible *for* people. The idea here is that PHAs cannot control an individual applicant's or tenant's choice to lie, abuse program rules, or become angry or frustrated when rent is increased. If the PHA has followed its policy, and done all it can to communicate its policy and reasons behind its decision (including HUD requirements) to change the rent, then the PHA has been responsible in its business practices and acted professionally.
  - Our programs are voluntary programs. If individuals choose to be noncompliant after the PHA has done all it can to best communicate program expectations and requirements, then sometimes the PHA will have to terminate participants. Just remember, we have a role and so do our participants. It's our job to remain professionals and help families understand our programs and the PHA's role. After we've been strong communicators of program expectations and requirements and documented our efforts, should families choose to abuse the program, be nonresponsive to our requests for necessary information, take part in illegal activities or otherwise take actions that subject their families to loss of housing assistance, that is out of the PHA's control.
  - There are many PHAs who can attest that their local legal aid groups have drastically reduced the incidence of any actions being taken against the PHA. In these cases, they've found over time that the PHA's business practices are so strong, that if a PHA is moving to terminate or deny admission, the PHA has done all it can to communicate effectively with the tenant and give the family the benefit of the doubt before taking action to reduce or terminate assistance.

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- We are responsible *to* people. The idea here is that if a PHA says they are going to call or follow up by a specific date, they should. If a PHA says “this is our policy or procedure for calculating income,” then that policy or procedure should be communicated to and followed for all families. Having best business practices in place, such as how to work with emotional or aggressive clients in a professional and respectful way or how quickly phone calls to tenants should be returned, actually helps prevent fair housing complaints. Applicants and tenants can then begin to trust the PHA and feel as though the PHA is looking out for their best interests and treating them fairly within HUD program guidelines. Keeping information confidential, explaining to families why you are collecting certain pieces of information and what the PHA does to maintain tenant information safely (such as with social security numbers) helps establish a rapport with families that the PHA cares and recognizes the sensitivity of much of the information the family shares.

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- *We can't control people. We can control processes*. Often our work with families can become very emotional. Having a steadfast, reliable, and easy-to-follow set of policies and procedures can make all the difference when working with families and situations that can otherwise escalate to become antagonistic, "he said/she said" between the family and the PHA, and result in the tenant running to the local media, legal aid, or HUD office.
  - It's important that PHA staff understand that the decision to terminate or other actions that have a detrimental impact on the participant are not made because we "want" or "don't want" to work with a particular family or because we "believe" or "don't believe" the family. The more we can stick to the black and white of our policies in situations where there are emotions (on both sides involved), the safer we will be from fair housing complaints. What can we document? What can the PHA and the family show on paper? What will the judge see? How will this come across on the front page of the newspaper? Consider these questions before making decisions in emotionally charged situations.
  - This certainly means the PHA should consider the integrity and neutrality of its informal and formal hearing (grievance) processes as one way to ensure fewer fair housing complaints. The more participant complaints, communications, and program abuse concerns reviewed by a third party (i.e., a perspective from a person that may not have months of built up frustration from working with a difficult family), the safer the PHA is from having complaints filed or losing in court proceedings.
  - There must be an environment set by and enforced by management that there will be zero tolerance for discrimination. That includes jokes and off-handed comments about families.

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Section 1.4 Fair Housing Complaints

- Where can a fair housing complaint be filed? A person can choose to file a fair housing complaint with any of the following:
  - The PHA directly per Admin Plan/ACOP Policy;
  - HUD's Fair Housing and Equal Opportunity Office online, by phone, or by mail (https://www.hud.gov/reporthousingdiscrimination);
  - State or Federal Court; and/or
  - State or Local Human Rights Commission
- Complainants **do not** have to file a fair housing complaint with the PHA or with HUD and wait for the results—they can choose to go straight to court with or without a private attorney.
  - NOTE: Many fair housing laws require the PHA to pay for the attorney's fees and costs if the claim is successful in court.

PH Occupancy GB, Chapter 1, Part 1.1, page 15

- How will the PHA handle complaints from applicants or participants who believe that they have been subject to unlawful discrimination?
  - The PHA should make the fair housing complaint process well-known and easy to access. Everybody wins when discrimination is eliminated.
  - In all cases, the PHA must advise the family on how to file a fair housing complaint with HUD's office of FHEO if the family feels they have been discriminated against under the Fair Housing Act.

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- Upon receipt of a housing discrimination complaint, the PHA is required to:
  - Provide written notice of the complaint to those alleged and to inform the complainant that such notice was made
  - Investigate the allegations and provide the complainant and those alleged with findings and either a proposed corrective action or an explanation of why corrective action is not warranted

Notice PIH 2014-20

  - Keep records of all complaints, investigations, notice and corrective actions

24 CFR 8.53

- The PHA should establish an internal policy for processing discrimination complaints. Applicants or participants who believe that they have been subject to unlawful discrimination should be able to notify the PHA either orally or in writing.
- The PHA should attempt to remedy discrimination complaints made against the PHA in a timely matter. Time frames should be clearly expressed to complainants.

24 CFR 982.301(b)(10); 24 CFR 103, Subpart B

- In addition, the PHA should provide a copy of a discrimination complaint form to the person making the complaint and provide them with information on how to complete and submit the form to HUD's Office of Fair Housing and Equal Opportunity (FHEO) if the individual either does not want to use the PHA's internal complaint process or does not agree with the final PHA findings.
- PHAs should examine discrimination complaints with an eye for areas of customer service improvement. Often discrimination complaints could have been prevented with better policies or communication practices in place.

24 CFR 103.201

- Understand that even if a PHA has not discriminated in any way, if a complaint is filed against a PHA or landlord and the PHA in some way thereafter treats the participant differently out of anger, frustration or "pay back" for the fair housing complaint, under the Fair Housing Act, a PHA may be found guilty of retaliation. Retaliation in and of itself can result in charges and financial loss under the Fair Housing Act regardless of whether there existed any discriminatory conduct in the beginning.

- A possible beginning outline of questions that your PHA might ask when complaints are filed with the PHA, or the PHA is put on notice by legal aid or HUD that a complaint has been filed include:
  1. Is there a history with this participant?
  2. What staff are involved?
  3. What is it that this participant really wants?
  4. Is this really just miscommunication?
  5. What could we do differently to work with this family or similar families in the future so that a complaint is not filed?

- Notice, none of these questions is about *blame*. The PHA and staff could be absolutely top notch. The participant could have been entirely in the wrong and the PHA entirely in the right. This process is important regardless of who is "right" or "wrong" in a given situation. It's about being creative and proactive, and constantly looking to learn and improve even good business practices. Consistently brushing off complaints just because there is no "wrong-doing" found by HUD or the courts is a missed opportunity for improvement. As experienced PHA staffers know, next time, even with the same set of facts, with a different judge or different HUD staff person handling the complaint, the PHA may not be so fortunate. Best to do all we can to prevent complaints from being filed in the beginning. It is also good to note, that while complaints may consistently be filed and the PHA cleared of any wrong doing, the very fact that complaints are filed continues to open the door for a much more extensive audit or request for documents and policies than if the complaint door had never opened.
- HUD's Office of Fair Housing and Equal Opportunity (FHEO) has developed an interactive diagram to help housing providers-owners and PHAs alike-understand their obligations if named as a respondent in a Fair Housing Act (FHA) investigation. The interactive diagram provides simple clarification of the complaint process, along with helpful resources, on the following subject areas:
  - Equal Treatment Under the Law
  - Notification of a Filed Complaint
  - The Complaint Process
  - Conciliation
  - Resolution of the Case
  - Tips and Resources

- You can access the diagram on HUD Exchange at:
  - https://files.hudexchange.info/resources/documents/Respondent-Obligations-in-Fair-Housing-Investigations-Interactive-Diagram.pdf
- Should you receive notification that claim of discrimination has been made against you, you may file a written response within 10 days of receiving notification. Your formal response to the allegations must be truthful and signed.
  - If you forgot to include information in your response, you can amend your answers later.
- During the complaint investigation, you may be required to provide written responses to requests for information, including copies or records or documents related to your responses. Requests for information will be based on the allegations. HUD may also issue subpoenas to aid in the investigation.
  - The law requires HUD to complete its investigation within 100 days of the official filing of the complaint unless it is impractical to do so.
  - You have the right to be represented by an attorney at any time.
- HUD's fair housing process may result in conciliation or a determination of reasonable cause and charge. HUD is required by law to provide the parties an opportunity to conciliate the complaint.
  - Participation in conciliation is completely voluntary during the investigation. However, the investigator will discuss with you the complainant's request for relief to settle, which may include damages.
  - HUD may also resolve the investigation through a document called a conciliation agreement, or if other civil rights laws are involved, a voluntary compliance agreement-conciliation agreement. In addition to relieve for the compliant, these agreements include relief in the public interest to aid in eliminating the discriminatory practices and policies in the future.
  - Following a signature by both parties, HUD will close the investigation and monitor compliance with the agreement.

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- If the complaint is not successfully conciliated, the investigator uses evidence to recommend a "finding" on whether there is reasonable cause to believe that a fair housing violation occurred.
  - If HUD determines there is reasonable cause, it will issue a Determination of Reasonable Cause and a Charge of Discrimination.
  - All complainants and respondents have 20 days after receiving notice of the charge to decide whether to have the case tried before a Federal District Court judge. If no one does so, the case is heard by a HUD administrative law judge.
  - After the hearing, the administrative law judge may require you to pay damages or order injunctive relief and order you to pay a civil penalty.
  - If HUD finds there is no reasonable cause, the complaint will be dismissed.
- Useful tips for the complaint process include the following:
  - Take the complaint process seriously and be open to the complaint process.
  - Keep in mind that the investigator, who is an impartial professional, did not file the complaint.
  - Ask for clarification if you need help understanding the process.
  - Review the allegations carefully and respond accordingly with factual evidence.
  - Cooperate fully with the investigation.
  - Know the law.
  - Get training on fair housing laws that may be available in your community and online and with NMA, of course!

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Section 1.5 Disability Awareness and Etiquette

PEOPLE WITH DISABILITIES

U.S. Dept. of Justice Civil Rights Division "Access for All: Five Years of Progress," Introduction 10/12/06

- People with disabilities are the largest minority group in the country. On average, adults with disabilities are poorer and are far more likely to be unemployed than those adults without disabilities. Almost 27 percent of adults aged 25-64 with a severe disability live in poverty. In comparison, 11.2 percent of individuals with a non-severe disability and 7.7 percent of individuals with no disability live in poverty.
- Sometimes people with disabilities live outside the typical American social and economic lifestyles. People with disabilities are more likely than people without disabilities to live alone or with non-relatives, further creating isolation.
- People with disabilities may not have been born with their disabilities. Illness, accidents and tragedies can strike any of us and any of our loved ones at any time. Remember that every face in our community could eventually need to turn to the housing authority for assistance and every face should feel welcome if such circumstances arise.

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AGING IN PLACE

- A term that is important to be familiar with as we discuss persons with disabilities is the concept of "aging in place." *Aging in place* means that a person can grow older and not have to move.

www.seniorresource.com

- Approximately 70 percent of seniors spend the rest of their lives in the same home or apartment where they celebrated their 65th birthday.
- While being elderly certainly does not mean that a person has disabilities or will develop disabilities, some elderly people do develop disabilities or special medical needs as they age.
- Housing authorities need to include in their planning processes how they will meet the rising need in communities over the coming years to house and assist elderly residents.

ATTITUDINAL BARRIERS AND ETIQUETTE

1. LANGUAGE

- People with disabilities are people first. When discussing or referring to people with disabilities, using people-first language is the most respectful approach to describing a person's particular needs or differences.
  - For example, are you cancerous or do you have cancer? Are you schizophrenic or do you have schizophrenia? Are you disabled/handicapped or do you have a disability?
  - In all three examples, the latter description is the correct language to use to identify and discuss people with disabilities.
- People-first language describes what a person has—not what a person is. A person has a cognitive disability or a learning disability. She is not mentally retarded. People-first language helps create and reinforce a respectful community understanding, perspective and appreciation for people with disabilities.

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- The term *handicapped* is not an appropriate way to refer to someone with a disability. You may still see or read the term *handicap* or *retarded* as these words still continue to be used in a legal context. Many laws which support people with disabilities were passed decades ago when language use was not as respectful or empowering. While the term *handicap* may still be used to describe architectural barriers (e.g., "handicapped parking space" may be acceptable depending on the community), it should not be used to describe a person with a disability. Sometimes housing authority staff believe this is just about being "PC." It's not. Bottom line: It's about showing respect. Disability rights groups and Web sites continue to express the importance of using people first language.

2. Presume Competence and Presume Ability

- Assuming that because someone looks different, talks or acts differently, that this person is not competent to speak or think on his own behalf or is not able to do particular physical or mental tasks, is disrespectful and often just plain wrong.
- In other words, staff at housing authorities should approach working with people with disabilities as people with different abilities, not presume limited or no abilities.

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- It is also important to remember that before assisting a person with a disability, you should first ask if the person wants help.
  - For example, imagine you are at an intersection and a person in a wheelchair has just finished crossing the street and is having difficulty getting up an incline back onto the sidewalk.
  - While you may have the best of intentions, grabbing the wheelchair arm bars and assisting the person up onto the sidewalk without first asking if the person wants assistance, is not appropriate.
  - Of course, asking if you may be of assistance may be perfectly appropriate, but you may be surprised that more often than not, the person is looking to accomplish the task on his own—it just may take a few moments longer.
- It is important to understand that canes, walkers and wheelchairs are often considered extensions of the physical self for people with disabilities. Grabbing someone's wheelchair to "help them along" without first asking can be offensive and degrading to someone who simply needs a few extra moments to complete a particular task.

3. Other Important Points for Working with People with Disabilities

- When meeting with a person who uses a wheelchair, use a chair so that the two of you are at eye level.
- Speak directly to a person with a disability. Ask questions to the person with the disability, even if there is an aid present.
- Treat a person with a disability like any other person. Speak with them as you would speak with anyone—do not use child-like language or "talk down" or speak more loudly than usual (unless you have been asked to do so).

- Sometimes we are concerned that we will say the wrong thing, so we say nothing at all—further segregating people with disabilities. Relax. It's okay to feel uncomfortable when we begin working with people who may appear different or act differently than we are accustomed to. The most important part of our interactions is to show respect and courtesy to the person with the disability. Remember that it's okay to ask questions when you're unsure of what to do.

24 CFR 100.202(c)

- However, do not forget that a person is not required to disclose a disability. The PHA should not ask any questions about the nature or extent of any disability (even an obvious one) unless it is solely for the purpose of finding what accommodation will work best for that person, once an accommodation is requested.

Scheduling

- Make sure the place where you plan to conduct the interview is accessible by checking the following:
  - Is accessible parking located nearby?
  - Is there a ramp, or a step-free entrance?
  - Are there accessible restrooms?
- Be considerate of the additional travel time that may be required by a person with a disability. When scheduling an interview, be aware that the person may be required to make a transportation reservation 24 hours or more in advance. When arranging the interview time, give the interviewee an estimated finish time so they can schedule their return trip.
- If a person requests a home visit as a reasonable accommodation, it may be appropriate for staff to travel to the person's home. However, do not assume that a person with a disability would prefer a home visit or that a home visit is necessary to allow this person to meet their housing obligations.

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- Also, as we will see in our discussion of reasonable accommodation, just because a person with a disability requests a home visit rather than the usual office visit does not mean that the PHA automatically does a home visit. Depending on other factors, a location such as a public library meeting room might be a better location to meet the needs of a person with disabilities as well as staff's already stretched-thin time.

PIH Notice 2010-26

  - A PHA must make special arrangements to take the application of persons who are unable to come to the PHA's offices because of a disability.

Working with Individuals with Visual Impairments

- When greeting a person with a visual impairment, always identify yourself and introduce anyone else who may be present.
- If the person does not extend their hand (to shake hands), orally extend a welcome. Example: "It is nice to meet you. Please have a seat."
- A person may prefer oral directions of where the interview is to be conducted and the physical location of a chair, or they may prefer to take your arm and be escorted to the chair. Ask the person what is most helpful. Do not grab the person. When you have reached the chair, put the person's hand in contact with the arm or back of the chair. A verbal cue is also helpful.
- Point out obvious obstacles to avoid in a calm and respectful manner.
- Be descriptive when giving directions. For example, if you are approaching steps, mention how many steps.

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- Inform the person of the possibility of providing auxiliary aids to facilitate equal access to the required program information such as tapes or materials in Braille.
- Never touch or distract a service dog without first asking the owner.
- Tell the individual when you are leaving.

Communicating with Individuals with Hearing Impairments

- Gain the person's attention before starting a conversation (i.e., tap the person gently on the shoulder or arm).
- Look directly at the individual, speak clearly in a normal tone of voice, and keep your hands away from your face. Use short, simple sentences.
- If the individual uses a sign language interpreter, speak directly to the person, not the interpreter.

Communicating with Individuals with Speech Impairments

- If you do not understand something the individual says, do not pretend that you do. Ask the individual to repeat what he or she said and then repeat it back.
- Be patient. Take as much time as necessary and plan for the time in your schedule.
- Try to ask questions which require only short answers or a nod of the head.
- Do not speak for the individual or attempt to finish their sentences. If you are having difficulty understanding the individual, consider writing as an alternative means of communicating, but first ask the individual if this is acceptable.

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STATUTORY COMMUNICATION REQUIREMENTS

24 CFR 8.6

- The PHA must provide accessible materials for persons with sight and hearing impairments and otherwise provide effective communication, upon request for people with disabilities.
- In recent years one of HUD's strongest enforcement efforts with fair housing has been to help PHAs understand that they must take appropriate steps to ensure effective communication with all people with disabilities.

ACCESSIBILITY AND PLAIN LANGUAGE

24 CFR 8.6

- The PHA must ensure that the application process is open and accessible to applicants with disabilities. Documents must be accessible to people with a visual impairment. They should be written simply and clearly to enable those with learning or cognitive impairments to understand the critical program requirements. All program information must be available to people with hearing impairments.
- The issue of "plain language" is significant because federally assisted housing, like many government programs, uses a lot of jargon. Eligibility, rent computation, reasonable accommodations, and family obligations are complicated enough in simple language; in legalese or bureaucratize, words become a barrier to programming. The staff should try to help participants understand the rules by giving simple examples and explanations.

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- At the point of initial contact, the housing authority must offer the opportunity for all applicants to request additional materials in alternative formats. Alternatives may include the following:
  - Audio recordings
  - Oral explanation by staff or local volunteers
  - Sign language interpretation
  - Large-type materials
  - Having a third-party representative receive a copy of all notices and accompany the participant to meetings with PHA staff
- The PHA should inventory the community resources available to assist them in providing program accessibility and guidance. Staff should be prepared to provide referrals to agencies that help people with disabilities. This third party assistance could range from transportation, to interpreting, to advocacy.

THE OBLIGATION TO PROVIDE AUXILIARY AIDS

24 CFR 8.6;
PIH Notice 2010-26

- PHAs have an affirmative duty to provide and pay for "auxiliary aids" where needed to facilitate effective communications with applicants and tenants with impaired sensory, manual, or speaking skills. This might include:
  - Braille materials and audio materials for individuals who are blind
  - TTY phone devices or sign language interpreters for individuals who are deaf

24 CFR 8.6(a)(1)(ii)

- This does not include personal items such as hearing aids or magnifying eyeglasses.

- Because this is such a critical focus of FHEO and advocates, we have included excerpts below from a current PIH notice that has been extended indefinitely illustrating HUD's expectations for communication efforts in the HCV and public housing programs:

PIH Notice 2010-26

- "The PHA shall provide appropriate auxiliary aids and services, where necessary, to afford an individual with disabilities an equal opportunity to participate in the PHA's programs, services, and activities."
- "In determining what auxiliary aids are appropriate, the PHA shall give primary consideration to the request(s) of the individual with disabilities unless doing so would result in a fundamental alteration of the PHA's programs or in undue financial and administrative burden. If an action would result in such an alteration or burdens, the PHA shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the PHA's program or activity. The PHA is not required to provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature. See 24 CFR 8.6, 28 CFR 35.160 and 35.161."

PIH Notice 2010-26

- "At the initial point of contact with each applicant, the PHA must inform all applicants of alternative forms of communication."

- "When the PHA has initial contact with the applicant, resident, or member of the public, the PHA staff should ask whether the applicant, resident, or member of the public requires an alternate form of communication."
    - "Examples of alternative forms of communication might include, but are not limited to: the provision of a qualified sign language interpreter; having written materials explained orally by staff either in person or by telephone; provision of written materials in large/bold font; information on audiocassette; permitting applicants to file applications by mail; and permitting alternative sites for the receipt of applications."
- "In addition, the PHA may never require the applicant to provide, or pay for, his/her own sign language interpreter. Rather, it is always the PHA's responsibility to provide, upon request, a qualified sign language interpreter. However, the PHA's responsibility to provide a qualified sign language interpreter does not preclude an individual's right to have a friend, relative or advocate accompany him/her for purposes of conducting business with the PHA."

Learning Activity 1-1: Overview Quiz

1. If a participant informs you that they want to file a fair housing complaint against the PHA, the PHA must immediately provide information on how to file the complaint with HUD's office of Fair Housing and Equal Opportunity (FHEO).
   a. True
   b. False
2. A person can only file a viable claim under federal fair housing laws if that person is part of a historically discriminated minority based on a protected classification and not if that person is a member of the majority group.
   a. True
   b. False
3. A PHA complies with their duty to affirmatively further fair housing if they take any action rationally related to promoting affordable, safe, decent housing that is accessible and free of unlawful discrimination.
   a. True
   b. False
4. Under the disparate impact theory of liability, PHAs may violate the Fair Housing Act when policies or practices have an unjustified discriminatory effect, even when there is no intent to discriminate.
   a. True
   b. False
5. Source of income is a protected class under the Federal Fair Housing Act.
   a. True
   b. False
6. If state or local laws differ from federal fair housing laws, the PHA should follow the law that is most protective of the individual.
   a. True
   b. False

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7. A participant may only bring a discrimination complaint if PHA policy overtly (openly) discriminates against a protected class.
   a. True
   b. False
8. If a participant needs a sign language interpreter for a PHA meeting, who pays the costs?
   a. PHA
   b. Family
9. A religion must be an "official" religion to be protected under the Fair Housing Act.
   a. True
   b. False
10. Supreme Court decisions cannot affect the interpretation of the PHA's obligations under the Fair Housing Act.
    a. True
    b. False

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Notes

CHAPTER 2 Fair Housing Laws and HUD Requirements

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- State which fair housing laws apply to PHA programs through the use of fair housing regulations, HUD notices, and memoranda
- Discuss voluntary compliance agreements, administrative enforcement, and other enforcement efforts conducted by HUD

Section 2.1 Civil Rights Act of 1964 (Title VI)

24 CFR 1.1

- The Civil Rights Act of 1964, enacted July 2, 1964, is a landmark piece of civil rights legislation in the United States that outlawed major forms of discrimination against racial, ethnic, national, and religious minorities and women. It ended unequal application of voter registration requirements and racial segregation in schools, at the workplace, and by facilities that serve the general public (referred to as "public accommodations").

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- Powers given to enforce the Civil Rights Act were initially weak but were supplemented during later years. Congress asserted its authority to legislate under several different parts of the United States Constitution, principally its power to guarantee all citizens equal protection of the laws under the Fourteenth Amendment and its duty to protect voting rights under the Fifteenth Amendment.
- In addition to enforcing other federal statutes that prohibit discrimination in housing, HUD has a statutory obligation to ensure that families and individuals are not subjected to discrimination on the basis of race, color, or national origin by any HUD-funded grantee or sponsor.

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Section 2.2 The Fair Housing Act

FAIR HOUSING ACT OVERVIEW

- This section covers the Fair Housing Act. HUD has a special arm, the Office of Fair Housing and Equal Opportunity (FHEO) that administers federal fair housing laws and establishes national policies ensuring that all Americans have equal access to the housing of their choice. FHEO is easily accessed on the Web at https://www.hud.gov/fairhousing.

WHAT THE FAIR HOUSING ACT COVERS

24 CFR Part 100;
24 CFR 100.10

- The Fair Housing Act covers most kinds of housing transactions, including rentals, sales, mortgage lending, insurance, and zoning activities. However, there are limited exceptions to the act. The act exempts owner-occupied buildings with no more than four units, single family housing sold or rented without the use of a real estate agent, and housing that is operated by private organizations that limit occupancy to members only. In the private market (not in public housing developments), the act also allows housing developments that meet HUD's definition of "housing for older persons" to limit occupancy to older adults and exclude children.
  - For more information about exemptions to the fair housing act applicable to the private market, see 24 CFR 100.10.

ASSESSING CIVIL PENALTIES FOR FAIR HOUSING ACT CASES

FR Final Rule, June 12, 2025; 24 CFR 180.671(a)

- On June 12, 2025 HUD's Office of General Counsel (OGC) published a Federal Register final rule providing an updated list of civil penalties for Fair Housing Act cases, considering inflation in the revised methodology. Such adjustments are required under the Federal Civil Penalties Inflation Adjustment Act of 1990. As listed in 24 CFR 180.671, effective July 14, 2025:
  - A maximum amount of $26,262 if there are no prior discriminatory housing practices
  - A maximum of $65,653 if there was only one within the past five years
  - A maximum of $131,308 if there was two or more within the past seven years

SUMMARY OF THE FAIR HOUSING ACT

42 U.S.C. 3600-3620; 24 CFR Part 100

- The Fair Housing Act, as amended, can be found in its entirety at http://www.justice.gov/crt/about/hce/title8.php.
- The HUD regulations that implement the Fair Housing Act as applied to PHAs are included in the reference section of this book and can be found in Title 24 CFR Parts 100 through 125. Below is a summary of all the types of housing services and transactions that are covered under the Fair Housing Act, as amended:

24 CFR 100.60

1. Refusing to sell or rent or negotiate with a person on the basis of a protected class (including imposing different prices or rental charges)

24 CFR 100.65

2. Discriminating in the conditions or terms of sale, rental, or occupancy (including failing to deliver or delaying maintenance repairs and limiting or denying the use of services or facilities)

24 CFR 100.75

3. Discriminatory advertising

24 CFR 100.80

4. Representing to a person that housing is not available when, in fact, such housing is available (This may include limiting information regarding price, availability, and ability to view or inspect a unit)

24 CFR 100.85

5. Attempting to cause persons to sell or rent by indicating that members of a protected class are moving into the neighborhood (known as "blockbusting")

24 CFR 100.90

6. Discriminating in the financing, brokering, or appraising of housing by a bank or other business

24 CFR 100.60(b)(7); 100.90(a)

7. Denying participation or membership in a multiple listing service, or other real estate related service organization

24 CFR 100.400

8. Coercing, intimidating, threatening, or interfering with a person's exercise or enjoyment of obtaining the full benefit of the Fair Housing Act (includes preventing landlords from retaliating against tenants who file claims under the act).

- The Fair Housing Act provides for three means of enforcement.

24 CFR 103.500(b); 103.510(a)

1. ***The Department of Justice (DOJ)*** may bring lawsuits where a "pattern or practice" of housing discrimination exists or where alleged discrimination raises an issue of general public importance such as widespread discrimination by a defendant seller, developer or rental firm. The DOJ may also bring an action on behalf of an individual upon receiving a referral from HUD.
    - In February 2006, the DOJ began implementing its own fair housing initiative separate from HUD's enforcement and education efforts. Introduced after Hurricane Katrina, its purpose was to help curb discriminatory actions against hurricane victims during the relocation process.

24 CFR 8.56(j); 146.31

2. ***Voluntary Compliance Agreements (VCAs)*** are a compliance agreement or contract between a PHA and FHEO. Each contract is specific to the PHA who signs it, but the following are common areas of enforcement:
    - Affirmative marketing
    - Articulated reasonable accommodation process
    - Physical accessibility
    - Transfer process
    - Language services

24 CFR 8.56(i)

- PHAs are generally asked to comply with a VCA within tight time frames, and the contract can have an impact on administrative time due to excessive reporting requirements. VCAs will also impact a PHA's budget as they have financial obligations built into them.
- There is no specific reason that a housing authority is presented with a VCA, but generally they are the result of a finding of noncompliance with fair housing through an FHEO civil rights review, HUD consolidated reviews, complaint investigation, or local enforcement effort by a field office.
- To find more information about VCAs being administered in their area, a PHA can contact their FHEO field office or look on FHEO's website.

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24 CFR Part 103

3. ***Administrative Enforcement:*** Administrative complaints can be made to HUD. Complaint forms are easy to complete and may be submitted at a HUD field office, through electronic submission online, by a letter in the mail, or over the phone. Housing authorities need to be aware that filing a complaint with HUD is a simple process that is easily accessible to all people. HUD and its FHEO offices investigate discrimination complaints and attempt to resolve complaints informally, as is required by the Fair Housing Act.
   - If a complaint cannot be resolved through informal processes, HUD completes its investigation and makes a determination whether there is "reasonable cause" to believe the law has been violated. If HUD determines there is reasonable cause to pursue the complaint further, the claimant may bring the matter before an administrative law judge who may order injunctive relief, compensatory damages, and civil penalties. A complainant may also elect to bring a complaint in court, whether or not HUD makes a "reasonable cause" determination.
     - It is important to note that administrative complaints filed with HUD may be turned over to a local, HUD-certified fair housing agency.
     - Administrative complaints could also begin at a state or local fair housing agency or a local human rights commission.

24 CFR 103.100

4. ***Private actions*** can also be brought in local, state, or federal court at anytime.
   - Individuals do not need to file a complaint with the PHA, HUD, or any other administrative body first.

TESTING

- During the 1990s, HUD filed—and the courts accepted—discrimination claims which came about from "testers." The "testing" process is where HUD trains fair housing agencies to use teams of equally qualified black and white individuals (or other combinations of minority group members and non-minority group members) who might, for example, seek to rent the same apartment.
- Testers are trained to objectively report on their treatment, and fair housing agencies assess the reports and analyze any differences in treatment the minority group may have experienced. Such documentation of unequal treatment is the basis for a fair housing claim against a landlord or real estate agent.

PROMOTING FAIR HOUSING

- HUD promotes fair housing through its Fair Housing Assistance Program (FHAP), which helps state and local governments administer their own laws and ordinances that are consistent with federal fair housing laws. HUD also administers the Fair Housing Initiatives Program (FHIP), which provides funding to nonprofit organizations that operate fair housing programs. FHEO promotes fair housing through civil rights monitoring at agencies which receive HUD funds, such as PHAs.

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Section 2.3 Section 504 of the Rehabilitation Act of 1973

29 U.S.C. 701 et seq.

- Before 1988, the definitive law that protected people with disabilities was Section 504 of the Rehabilitation Act of 1973:
  - "No otherwise qualified individual with handicaps in the United States...shall, solely by reason of her or his 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..."
- HUD's regulations implementing Section 504 can be found in 24 CFR Parts 8 and 9.

24 CFR 8.3 "Recipient"

- This law only applies to recipients of federal dollars. Therefore, Section 504 applies to PHAs but not private housing choice voucher landlords.
- Subsequent disability rights laws have either taken their wording directly from Section 504 or adopted language similar to it. Courts have adopted decisions from Section 504 to interpret the meaning of more recently enacted disability laws.

24 CFR 8.4(b)

- Section 504 requires PHAs to affirmatively ensure that people with disabilities are given an equal opportunity to participate in PHA programming and receive assistance.

24 CFR 8.4(b)

- Under Section 504 a "qualified" person with a handicap:
  - Must be afforded an opportunity equal to that afforded to others
  - Must be provided housing or benefits as effective as those afforded to others
  - May not be provided different or separate housing or benefits unless necessary to provide the person with a handicap with housing or benefits that are as effective as those provided to others

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24 CFR 8.4(b)(2)

- Section 504 regulations make clear that it is not necessary to produce an "identical" result. Instead, the law affords people with disabilities an "equal opportunity" to obtain the same result or to gain the same benefit.

24 CFR 8.4(d); Notice PIH 2010-26, Parts 7 & 10

- In addition, there is an obligation to administer the program in the ***most integrated setting appropriate*** to the needs of qualified individuals with disabilities.
  - For example, it is better that a hearing-impaired person should participate in the general tenant briefings, with perhaps a sign language interpreter, than to segregate the applicant in an individual briefing.
  - However, in the case of a housing choice voucher participant with severe Attention Deficit Disorder (ADD), it may be appropriate to work one-on-one with them to make sure they understand the briefing material.
  - In each case, a participant with a disability must ask for an accommodation of their disability before the housing agency treats them differently.

24 CFR 8.4; 8.20; 8.21(c); 8.24; 8.33

- Section 504 makes clear that PHAs administering public housing will most likely have to incur additional costs to fully comply with the law (i.e., modifications to a unit for a person with a physical disability).

24 CFR 100.203

- In the housing choice voucher program, neither the PHA nor the private landlord is obligated to pay for modifications to an assisted families' unit. However, PHAs may use their voucher administrative fees to assist with modifications and should be aware of other disability resources in the community that could help families with costs and landlord negotiations over the modification process.

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504 Coordinator Description and Duties

24 CFR 8.53(a)
24 CFR 8.53(b)

- If a housing authority employs fifteen or more people, it *must* have a designated employee to coordinate compliance with Section 504. Section 504 regulations also require that the PHA adopt grievance procedures that incorporate due process standards to provide for the resolution of complaints.
- In HCV, the appeal process for applicants and participants could be included in the PHA's administrative review and informal hearing criteria, or could be part of a separate appeal process.
- In public housing, residents have the right to request a grievance hearing for any PHA action or failure to act.
- Depending on the size of the PHA, the 504 coordinator may have other roles at the PHA. For example, in a small PHA, the executive director may be designated as the 504 coordinator. As a manager or supervisor in a small to medium PHA, you may be given the role of 504 coordinator in addition to your other duties. Whether a full- or part-time role, the 504 coordinator will be responsible for reviewing reasonable accommodation and modification requests by PHA employment applicants, employees, housing applicants, and tenants.

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ESSENTIAL DUTIES OF THE 504 COORDINATOR

Notification

24 CFR 8.54(a)

- The 504 coordinator must ensure that notification procedures are defined and implemented. Applicants for employment, employees, applicants for housing, and tenants who identify themselves as individuals with disabilities may be entitled to reasonable accommodations.

24 CFR 8.11

1. *Applicants for employment* – The PHA will conduct job interviews in wheelchair accessible locations. Applicants will be notified of the availability of reasonable accommodations when an interview is being scheduled.

24 CFR 8.6; 24 CFR 8.10

2. *Employees* – All employees of the PHA will be given a copy of the reasonable accommodation policy.

24 CFR 8.6(b)

3. *Applicants* – All application forms the PHA uses will contain language that states that persons with disabilities may request accommodations.

24 CFR 8.6;
Notice PIH 2011-31,
Section V.1

4. *Tenants* – All PHA tenants are notified that they may request accommodations and/or modifications. Tenant handbooks include this language as well.

Confidentiality

24 CFR 1.7(e);
24 CFR 8.56(c)(2);
24 CFR 8.56(k);
24 CFR 103.204(c);
24 CFR 945.205(a)(5)

- All requests for modifications and/or accommodations and related information must be kept confidential.
- Confidential conversations with residents, knowledgeable professionals, and advocates should be kept separate from the tenant file. The PHA should determine who and how has the responsibility and authority to keep documentation of these conversations in a separate and secure location. A best practice would be to assign this to the 504 coordinator.

Modification Review

Notice PIH 2011-31, Section V.1

- The PHA should define which requests the 504 coordinator should review. It may be that the PHA decides that the 504 coordinator reviews:
  - All requests
  - Requests for which additional information is requested
  - A request that requires a meeting with the person requesting
  - Any request that is not considered reasonable by the property manager, and for which reasonable alternatives will be explored;
  - Any denial of a request for an accommodation
- The PHA needs to establish:
  - Timelines in which the PHA will respond, after receipt of the request
  - Forms adequate to establish a reasonable accommodation process and to document good-faith consideration of PHA to the individual request
  - Written notices of the PHA's decision

Monitoring

- The PHA should define the 504 coordinator's role in:
  - Developing protocol for receiving requests for and responding to complaints, requests for reasonable accommodation, appeals, and hearings
  - Tracking and monitoring requests for reasonable accommodation
  - Record-keeping for all requests for reasonable accommodation, complaints, appeals, and grievance procedures conducted at the PHA's projects
  - Dissemination and implementation of new regulations and guidance
  - Regular training of staff

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- The 504 coordinator may be assigned to assist in the admissions function, the property manager decision-making function, and other PHA functions in reviewing reasonable accommodation requests. The position may be required to make recommendations to resolve a variety of problems.
- The PHA needs to be very specific about who receives a request for a reasonable accommodation, who makes the decision to approve or deny, who offers alternative solutions in the case of denial, the process of appeal and grievance, and who makes the final decision if the request is determined to be unreasonable (undue financial and administrative burden, a threat that cannot be mitigated or resolved by the reasonable accommodation, or a fundamental alteration of the program).
- The PHA should post a copy of its reasonable accommodation policies and procedures in the central office and in each project office.
  - Information should include:
    - Name of 504/ADA coordinator
    - Address
    - Telephone number
    - Dedicated toll-free telephone number
    - TDD/TTY number or state relay service number
    - FAX number

Enforcement

- The 504 coordinator should be given adequate authority to ensure and enforce the PHA's commitment for fair housing and reasonable accommodation.

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Section 2.4 Title II of the Americans with Disabilities Act (ADA)

28 CFR 35

- Signed into law in 1990, the ADA is the most comprehensive civil rights law for people with disabilities. Title II of the ADA and the regulations that implement it, extended Section 504's nondiscrimination policy to the activities of all public entities regardless of whether the public entity receives federal dollars.
- State and local government actors, whether or not they receive federal dollars, cannot discriminate against people with disabilities in programming, services, and activities such as public education, transit, health care, social services, town meetings, voting, and court access.
- Title II did not add many additional obligations to the PHA's obligations that were not already there under the HUD 504 regulations. It mostly extended to all levels of state and local government activity the antidiscrimination requirements already in effect for federal agencies.

28 CFR 35, Subpart D

- The ADA also resulted in a new set of accessibility guidelines for buildings and facilities.

28 CFR 35, Subpart D

- ADA's accessibility guidelines for buildings and units are important for PHA compliance under HUD regulations, and federal, state, and local law.
- Unless an "undue administrative and financial burden" can be shown, state and local governments are required to make reasonable accommodations to polices, practices, and procedures (includes relocating programs or otherwise providing access to inaccessible older buildings). Equal opportunity must be given for all people to benefit from public programs.

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Section 2.5 Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)

24 CFR Part 146

- The Age Discrimination Act prohibits discrimination on the basis of age in federally assisted programs and activities.

24 CFR 146.13(a)(1)

- A recipient of HUD program funds may not use age distinctions or take any other actions that have the effect of excluding individuals, denying them benefits, or subjecting them to discrimination because of age.
- Examples of prohibited activities include:
  - Setting a minimum age (for example, age 50) for persons with disabilities in a public housing mixed population project.
  - Setting a minimum age (for example, age 25 or older) for participation in the housing choice voucher or public housing programs.
    - State law determines who is legal to enter into a contract. Some state laws set the age of 18; other states deem emancipated minors legally able to enter into a contract.
- The Age Discrimination Act is also applicable to employment and hiring practices.

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Section 2.6 Fair Housing Executive Orders and Other Regulatory Requirements

- Before Congress passed the major civil rights laws in the 1960s, discrimination was prohibited in many federal programs by order of the president. Executive orders must be complied with by the affected federal agencies and any public or private entity receiving assistance from an affected federal agency.
  - For example, Executive Order No. 11063, issued by President Kennedy in 1962, prohibits discrimination based on race, religion, or national origin in housing owned, operated, or assisted by the federal government. President Kennedy took this action before Congress was able or willing to pass legislation to this effect.

THE VIOLENCE AGAINST WOMEN ACT (VAWA)

24 CFR Part 5, Subpart L
Public Law 117-103, Division W
FR Notice 1/4/23

- VAWA is not new legislation and does not amend the Fair Housing Act—it is a separate piece of federal legislation, a reauthorization of ongoing federal priorities to protect victims. VAWA, despite its title, is gender neutral.

CONSOLIDATED AND 5-YEAR PLANS

- VAWA amends jurisdictions' consolidated plan processes to require that victims of domestic violence, dating violence, sexual assault, and stalking are included among the estimated housing needs of the jurisdiction.

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- VAWA also requires PHAs to include in their five-year plans a statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking. PHAs are strongly urged to consult with legal counsel, victim advocacy groups, service providers, law enforcement specialists, and participants/tenants when adopting policy changes required by VAWA.
- PHA obligations will be described in Chapter 6.

Learning Activity 2-1: Laws Quiz

1. All PHAs are put under a voluntary compliance agreement if found in violation of an FHEO civil rights review audit.
   a. True
   b. False

2. PHA programs must serve persons with disabilities in the most integrated setting appropriate. This means that PHAs must have a sign language interpreter attend all public meetings, even if no one has requested one.
   a. True
   b. False

3. Section 504 of the Rehabilitation Act applies to both PHAs and HCV owners.
   a. True
   b. False

4. Under Section 504, a PHA with 15 or more employees must have a designated 504 coordinator.
   a. True
   b. False

5. Under federal law, all requests for a reasonable accommodation must be reviewed by the PHA's 504 coordinator.
   a. True
   b. False

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6. The Fair Housing Act only applies to recipients of federal financial assistance.
   a. True
   b. False

7. A fair housing complaint may only be brought if a PHA purposefully delays or does not act on a reasonable accommodation request.
   a. True
   b. False

8. Where may a person file a fair housing complaint?
   a. With HUD
   b. With a nonprofit or fair housing agency
   c. A federal court or private action with legal aid
   d. All of the above

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CHAPTER 3 PHA Compliance with HUD Regulations and Fair Housing Laws

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Discuss fair housing PHA best practices and common PHA errors resulting in lawsuits
- Identify the forms and processes used by HUD to investigate fair housing complaints

Section 3.1 Introduction

- While it can seem like there are myriad local, state, and federal fair housing laws, the most important part of fair housing law is not to be able to name the laws, but to be able to understand and implement fair housing legal obligations in the practical, everyday application of PHA policies, procedures, and relationships with applicants and assisted families.

NOTICE OF NONDISCRIMINATION AND RECORD KEEPING FOR HUD

24 CFR 121.2 and 982.158(f)(1)

- HUD requires PHAs to maintain records on applicants and participants for at least three years to provide HUD with racial, ethnic, gender, and disability status. This data is captured in your 50058 PIC reporting.
- FHEO may compare such data to census data of who lives in your PHA's community to be sure that the PHA is reaching all populations of low-income individuals.

24 CFR 110.10

- Every PHA must have a fair housing poster on nondiscrimination. It must state that the housing provider will not discriminate on account of:

- Race	- Color	- Sex	- Religion
- Disability	- Age	- National origin	- Family status

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24 CFR 110.10 through 110.25

- Fair housing posters must be prominently displayed so as to be readily apparent to all persons seeking housing accommodations and maintained at all offices where dwellings are offered for rental. You will find the required poster at: https://www.hud.gov/sites/documents/928.1.pdf.
- How does the PHA staffer handle this if the HoH doesn't want to fill this in on the application?

PH Occupancy GB, page 15

- "If an applicant refuses to identify him or herself with one of the racial and/or ethnic categories, the PHA should choose an appropriate category, based on observation, and enter it."

PROHIBITION AGAINST DIFFERENTIAL TREATMENT

- Housing choice voucher and public housing managers must ensure consistent application of program rules, services and procedures for all applicants and participants. A fair housing claim against the housing agency may arise the moment a family is treated differently from a similarly situated family. Policies must apply equally to all families, and procedures must be followed the same way for everyone.
- PHA program policies and procedures must not discriminate against a particular population. The entire staff needs to know their responsibility to ensure equal administration of the program.
- At all times, it needs to be clear that discriminatory practices will not be tolerated at any level. Staff should know that comments that unfairly stereotype an applicant or occupant based on ethnic background, mimic an accent, or jokingly discuss a client's perceived mental state are inappropriate in the workplace.

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Section 3.2 HUD's Nondiscrimination/Fair Housing Compliance Requirement

- Every PHA has an affirmative duty to comply with federal fair housing laws.

24 CFR 1.4(b)(6)

  - *Affirmative duty* means that PHAs must be vigilant and proactive.

24 CFR 5.150-151

- PHAs are also obligated to affirmatively further fair housing in their policies, procedures, and capital activities.
  - Fair housing means housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.
  - Affirmatively further means to take any action rationally related to promoting any attribute or attributes of fair housing as defined above.
- Simply not discriminating is not enough to be in compliance under the laws.
- Not only must PHA employees know what laws apply, you need to know how to affirmatively comply with these laws. *Doing nothing is not an option under fair housing laws.*

Section 3.3 Consolidated Plan/Fair Housing Planning

24 CFR 903.7(o)(i); 104(b)(2) of the Housing and Community Development Act of 1974

- In 1995, HUD consolidated the comprehensive housing affordability strategy (CHAS), the community development plan required for CDBG, and the submission and reporting requirements for four community development grant programs into a single plan, the consolidated plan (Con Plan). The four community grant programs are:
  - Community development block grant (CDBG)
  - Home investment partnerships (HOME) program
  - Emergency shelter grant program (ESG)
  - Housing opportunities for persons with AIDS (HOPWA) program.
- The consolidated plan is designed to be a collaborative process whereby a community establishes a unified vision for community development actions. It creates the opportunity for the various housing and community development programs to engage in strategic planning and citizen participation in a comprehensive context, and to reduce duplication of effort at the local level.
- For example, Texas' con plan is developed by the Texas Department of Housing and Community Affairs (TDHCA), the Texas Department of Rural Affairs (TDRA), and the Department of State Health Services (DSHS), referred to collectively as "the state." The con plan reports on the intended use of funds received by the State of Texas from the U.S. Department of Housing and Urban Development (HUD).

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- The consolidated plan requires that jurisdictions describe the means of cooperation and coordination among the state and any units of general local government in the metropolitan area in the implementation of its consolidated plan. The jurisdiction should consult with adjacent units of general local government, including government agencies with metropolitan planning responsibilities, particularly for problems and solutions that go beyond a single jurisdiction, like transportation, workforce development, economic development, and comprehensive planning.
- HUD encourages partnerships that integrate housing, transportation, water infrastructure, and land use planning, and the implementation of strategies that provide more transportation choices, promote affordable housing, enhance economic competitiveness, support existing communities, coordinate policies and leverage investment, and value communities and neighborhoods.

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CIVIL RIGHTS CERTIFICATION

24 CFR 903.7(o)

- The PHA must certify that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964, the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and other applicable federal civil rights laws, and that it will affirmatively further fair housing consistent with 24 CFR 5.150 and 5.151. The certification is applicable to both the 5-year plan and the annual plan.

90 FR 11023

- Grantees' Affirmatively Furthering Fair Housing ("AFFH") certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination.

24 CFR 903.15

- The PHA must ensure that the PHA 5-year plan and annual plan ("PHA plan") are consistent with any applicable consolidated plan for the jurisdiction in which the PHA is located. It must submit a certification by the appropriate state or local officials that the PHA plan is consistent with the consolidated plan and include a description of the manner in which the applicable plan contents are consistent with the consolidated plans. A PHA is obligated to affirmatively further fair housing in its operating policies, procedures, and capital activities. All admission and occupancy policies for public housing and Section 8 tenant-based programs must comply with Fair Housing Act requirements and other civil rights laws and regulations and with a PHA's AFFH plans. The PHA may not impose any specific income or racial quotas for any development or developments.

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Section 3.4 ACOP, Admin Plan, and Annual Plans

- The admissions and continued occupancy policy (ACOP) or the administrative plan (admin plan) are the policies of the board of commissioners governing PHA occupancy policies. The ACOP and/or the admin plan set forth the board's mandatory requirements for staff and management agents performing occupancy-related work. The ACOP and admin plan cannot be altered or amended by staff. They may only be revised by PHA board resolution.
  - PHAs must certify to affirmatively furthering fair housing requirements in their PHA plans via form HUD-50077-SL (Certification by State or Local Officials of PHA Plans Consistency with the Consolidated Plan).

24 CFR 903; 24 CFR 982.54

- These plans need to be inclusive of fair housing compliance requirements including detailing policy areas such as how:
  - The PHA managers will ensure that all policies, procedures, and staff conduct are consistent with the PHA's fair housing oath
  - Residents will be briefed about fair housing
  - Residents who believe they have been illegally discriminated against are informed of their right to be put in contact with the local fair housing agency
  - The PHA prevents steering an applicant or tenant toward a particular development or area based on their race, national origin, or any other arbitrary classification
  - The PHA is part of a regional housing solution planning process
    - How does the PHA work with local entities to further fair housing initiatives?
  - The reasonable accommodation process is administered and how staff are trained in the implementation of the process
  - The PHA compliance officer oversees the fair housing and reasonable accommodation efforts of the PHA

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  - The PHA is proactive in providing assistance for people with disabilities to find accessible units
  - The PHA maintains records reflecting its efforts and actions

- Keep in mind that the PHA is obligated to HUD through its annual contributions contract (ACC). Such obligations include:
  - The PHA must report race and ethnicity data for each family in IMS/PIC.
  - PHAs located in a jurisdiction with a consolidated plan need to be aware of their obligations to HUD and other HUD-funded constituents in the community.
  - Fair housing obligations must also be considered when determining preferences and waiting list management operations.

Section 3.5 Affirmative Marketing Techniques

24 CFR Part 108

- HUD requires PHAs, in their marketing strategies, to comply with the Fair Housing Act requirements and with additional HUD regulations to affirmatively further fair housing.
  - Such outreach efforts should overcome the effects of conditions that have resulted in, or may result in, limiting participation of persons because of their race, color, religion, sex, disability, familial status, or national origin.
- How will the PHA determine what outreach is appropriate and what specific strategies should be undertaken? For support see:

24 CFR 200, Subpart M

  - HUD regulations 24 CFR 200.600, Subpart M.
  - HUD has a detailed publication: The Fair Housing Planning Guide available on its website (includes information about affirmative marketing, consolidated plans, conducting analysis of impediment reports, partnering with agencies, etc.).
    - https://www.hud.gov/sites/documents/fhpg.pdf
  - HUD has a helpful handbook that provides guidance for creating a compliant marketing plan in HUD handbook 8025.1, Implementing Affirmative Fair Housing Marketing Requirements.
    - https://www.hud.gov/sites/documents/80251trnfhehh.pdf
- An effort should be made to target all agencies that serve and advocate for potentially eligible applicants (e.g., people with disabilities, to ensure that accessible or adaptable units are used by people who can best take advantage of their features). Marketing materials should make clear that individuals with both physical and mental disabilities are eligible for the program and that reasonable accommodations will be made where necessary to ensure equal participation in housing assistance.

24 CFR 982.301(b)(12)

- In its activities to encourage participation by owners, the HCV program must also encourage participation by owners having accessible units.

THINGS TO CONSIDER

- If the PHA has a standard list of other media outlets that it uses, those may be included in a local policy on outreach. However, in general, additional outreach efforts are usually very purpose-specific.
  - In other words, the PHA is undertaking additional outreach in order to meet specific objectives of reaching underserved populations, reaching extremely low-income families, and furthering fair housing objectives, among others.
  - For this reason, PHAs are better served to consider the situation and assess the appropriateness of various media outlets on an as-needed basis.

AFFIRMATIVE FAIR HOUSING MARKETING PLAN

PH Occupancy GB, Ch. 1, Part 1.3, pages 20-21

- PHAs should be able to show affirmative fair housing marketing strategies that include actions such as:
  - Advertising the availability of housing to the population that is less likely to apply, including both minority and non-minority groups, through various forms of media (e.g., radio stations, posters, newspapers, social media platforms, websites) within the marketing area
  - Use of the equal housing opportunity logo and the equal housing opportunity statement
  - Educating persons within an organization about fair housing and their obligations to follow nondiscrimination laws
  - Conducting outreach to advocacy groups (e.g., disability rights groups) on the availability of housing.
- Marketing should use clear and easy to understand terms, and if appropriate, provide translation of written materials or interpretations to facilitate education and outreach to the limited English proficiency population.

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4350.3 REV-1, 2-5.D.

- Each owner who participates in HUD's multifamily program must develop and provide a description of the Affirmative Fair Housing Marketing Plan.
  - For example, an owner must engage in affirmative marketing to groups least likely to apply.

Template

The following is an electronic worksheet for HUD's multifamily program. This document serves as excellent guidance for PHAs and jurisdictions.

Note to all applicants/respondents: This form was developed with Nuance, the official HUD software for the creation of HUD forms. HUD has made available instructions for downloading a free installation of a Nuance reader that allows the user to fill-in and save this form in Nuance. Please see http://portal.hud.gov/hudportal/documents/huddoc?id=nuancereaderinstall.pdf for the instructions. Using Nuance software is the only means of completing this form.

Affirmative Fair Housing Marketing Plan (AFHMP) - Multifamily Housing

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity

OMB Approval No. 2529-0013
(exp. 8/31/2013)

1a. Project Name & Address (including City, County, State & Zip Code)

1b. Project Contract Number **1c. No. of Units**

1d. Census Tract

1e. Housing/Expanded Housing Market Area

Housing Market Area:
Expanded Housing Market Area:

1f. Managing Agent Name, Address (including City, County, State & Zip Code), Telephone Number & Email Address

1g. Application/Owner/Developer Name, Address (including City, County, State & Zip Code), Telephone Number & Email Address

1h. Entity Responsible for Marketing (check all that apply)

☐ Owner ☐ Agent ☐ Other (specify)

Position, Name (if known), Address (including City, County, State & Zip Code), Telephone Number & Email Address

1i. To whom should approval and other correspondence concerning this AFHMP be sent? Indicate Name, Address (including City, State & Zip Code), Telephone Number & E-Mail Address.

2a. Affirmative Fair Housing Marketing Plan

Plan Type Please Select Plan Type Date of the First Approved AFHMP:

Reason(s) for current update:

2b. HUD-Approved Occupancy of the Project (check all that apply)

☐ Elderly ☐ Family ☐ Mixed (Elderly/Disabled) ☐ Disabled

2c. Date of Initial Occupancy

2d. Advertising Start Date

Advertising must begin *at least* 90 days prior to initial or renewed occupancy for new construction and substantial rehabilitation projects.

Date advertising began or will begin

For existing projects, select below the reason advertising will be used:

To fill existing unit vacancies ☐

To place applicants on a waiting list ☐ (which currently has ☐ individuals)

To reopen a closed waiting list ☐ (which currently has ☐ individuals)

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3a. Demographics of Project and Housing Market Area
Complete and submit Worksheet 1.

3b. Targeted Marketing Activity

Based on your completed Worksheet 1, indicate which demographic group(s) in the housing market area is/are *least* likely to apply for the housing without special outreach efforts. (check all that apply)

☐ White ☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American
☐ Native Hawaiian or Other Pacific Islander ☐ Hispanic or Latino ☐ Persons with Disabilities
☐ Families with Children ☐ Other ethnic group, religion, etc. (specify)

4a. **Residency Preference**

Is the owner requesting a residency preference? If yes, complete questions 1 through 5. Please Select Yes or No
If no, proceed to Block 4b.

(1) Type Please Select Type

(2) Is the residency preference area:
The same as the AFHMP housing/expanded housing market area as identified in Block 1e? Please Select Yes or No
The same as the residency preference area of the local PHA in whose jurisdiction the project is located? Please Select Yes or No

(3) What is the geographic area for the residency preference?

(4) What is the reason for having a residency preference?

(5) How do you plan to periodically evaluate your residency preference to ensure that it is in accordance with the non-discrimination and equal opportunity requirements in 24 CFR 5.105(a)?

Complete and submit Worksheet 2 when requesting a residency preference (see also 24 CFR 5.655(c)(1)) for residency preference requirements. The requirements in 24 CFR 5.655(c)(1) will be used by HUD as guidelines for evaluating residency preferences consistent with the applicable HUD program requirements. See also HUD Occupancy Handbook (4350.3) Chapter 4, Section 4.6 for additional guidance on preferences.

4b. **Proposed Marketing Activities: Community Contacts**
Complete and submit Worksheet 3 to describe your use of community contacts to market the project to those least likely to apply.

4c. **Proposed Marketing Activities: Methods of Advertising**
Complete and submit Worksheet 4 to describe your proposed methods of advertising that will be used to market to those least likely to apply. Attach copies of advertisements, radio and television scripts, Internet advertisements, websites, and brochures, etc.

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5a. Fair Housing Poster

The Fair Housing Poster must be prominently displayed in all offices in which sale or rental activity takes place (24 CFR 200.620(e)). Check below all locations where the Poster will be displayed.

☐ Rental Office ☐ Real Estate Office ☐ Model Unit ☐ Other (specify)

5b. Affirmative Fair Housing Marketing Plan

The AFHMP must be available for public inspection at the sales or rental office (24 CFR 200.625). Check below all locations where the AFHMP will be made available.

☐ Rental Office ☐ Real Estate Office ☐ Model Unit ☐ Other (specify)

5c. Project Site Sign

Project Site Signs, if any, must display in a conspicuous position the HUD approved Equal Housing Opportunity logo, slogan, or statement (24 CFR 200.620(f)). Check below all locations where the Project Site Sign will be displayed. Please submit photos of Project signs.

☐ Rental Office ☐ Real Estate Office ☐ Model Unit ☐ Entrance to Project ☐ Other (specify)

The size of the Project Site Sign will be ____ x ____

The Equal Housing Opportunity logo or slogan or statement will be ____ x ____

6. Evaluation of Marketing Activities

Explain the evaluation process you will use to determine whether your marketing activities have been successful in attracting individuals least likely to apply, how often you will make this determination, and how you will make decisions about future marketing based on the evaluation process.

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7a. **Marketing Staff**

What staff positions are/will be responsible for affirmative marketing?

7b. **Staff Training and Assessment: AFHMP**

(1) Has staff been trained on the AFHMP? Please Select Yes or No

(2) Has staff been instructed in writing and orally on non-discrimination and fair housing policies as required by 24 CFR 200.620(c)? Please Select Yes or No

(3) If yes, who provides instruction on the AFHMP and Fair Housing Act, and how frequently?

(4) Do you periodically assess staff skills on the use of the AFHMP and the application of the Fair Housing Act? Please Select Yes or No

(5) If yes, how and how often?

7c. **Tenant Selection Training/Staff**

(1) Has staff been trained on tenant selection in accordance with the project's occupancy policy, including any residency preferences? Please Select Yes or No

(2) What staff positions are/will be responsible for tenant selection?

7d. **Staff Instruction/Training:**

Describe AFHM/Fair Housing Act staff training, already provided or to be provided, to whom it was/will be provided, content of training, and the dates of past and anticipated training. Please include copies of any AFHM/Fair Housing staff training materials.

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8. Additional Considerations Is there anything else you would like to tell us about your AFHMP to help ensure that your program is marketed to those least likely to apply for housing in your project? Please attach additional sheets, as needed.

9. Review and Update

By signing this form, the applicant/respondent agrees to implement its AFHMP, and to review and update its AFHMP in accordance with the instructions to item 9 of this form in order to ensure continued compliance with HUD's Affirmative Fair Housing Marketing Regulations (see 24 CFR Part 200, Subpart M). I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate. Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (See 18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802).

Signature of person submitting this Plan & Date of Submission (mm/dd/yyyy)

Name (type or print)

Title & Name of Company

For HUD-Office of Housing Use Only

Reviewing Official:

Signature & Date (mm/dd/yyyy)

Name (type or print)

Title

For HUD-Office of Fair Housing and Equal Opportunity Use Only

☐ Approval ☐ Disapproval

Signature & Date (mm/dd/yyyy)

Name (type or print)

Title

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OPPORTUNITY (MOBILITY) COUNSELING PROGRAM

https://www.hudexchange.info/programs/public-housing/housing-mobility-toolkit/

- The opportunity counseling program, also known as the mobility counseling program, is designed to assist families with housing choice vouchers to move from high-poverty to low-poverty neighborhoods. Public housing agencies, in partnership with local nonprofit organizations, provide counseling services and conduct outreach to landlords. The five major objectives of this program are to:
  - Expand landlord participation in the housing choice voucher program and increase the number and diversity of neighborhoods in which "housing opportunity" voucher families live
  - Assist and encourage housing choice voucher program families to move to low poverty neighborhoods that offer quality housing, education, and employment opportunities
  - Address existing barriers to mobility and opportunity in the housing choice voucher program, including administrative barriers to portability
  - Promote greater cooperation and joint problem solving among housing choice voucher programs operating in a metropolitan housing market
  - Create or strengthen institutions that administer the housing choice voucher program on a regional basis, including the provision of regional mobility counseling

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Section 3.6 Promoting Access for People with Disabilities

https://www.federalregister.gov/documents/2001/06/21/01-15758/community-based-alternatives-for-individuals-with-disabilities

"Wherever a door is closed to anyone because of a disability, we must work to open it. Wherever any job or home, or means of transportation is unfairly denied because of a disability, we must work to change it. Wherever any barrier stands between you and the full rights and dignity of citizenship, we must work to remove it, in the name of simple decency and simple justice." *President George W. Bush, announcing the New Freedom Initiative at the White House, February 1, 2001*

- Starting in the early 2000s, the federal government began actively instituting initiatives to more strongly enforce the Americans with Disabilities Act (ADA), a comprehensive civil rights law passed in 1990 to eliminate discrimination on the basis of disability in employment, state and local government programs and services, public accommodations, commercial facilities, transportation, and telecommunications.
- Among these was the "New Freedom Initiative," the purpose of which is to promote ADA compliance and encourage businesses, state and local government actors to vigorously promote full access to community life for people with disabilities. Businesses, state and local actors must examine their affirmative efforts to integrate people with disabilities into their communities and assure that people with disabilities have full access to services.
- Such efforts continue to this day in the form of various notices and guidance with which PHAs must comply. More recently, HUD has issued guidance on the role of housing in accomplishing the goals of the Olmstead decision, detailed below.

THE OLMSTEAD DECISION

- The Supreme Court's decision in *Olmstead v. L.C.* (1999) reinforced the ADA's mandate on state and local governments to serve people with disabilities in the most integrated setting, with the most integrated services possible.
  - The *Olmstead* decision holds that needless institutionalization is discrimination under the Americans with Disabilities Act (i.e., someone with disabilities could succeed as well if not better in a community setting rather than in an institution).
  - Persons with disabilities continue to be assisted out of "homes" and institutions and into the community. Where will they go? To PHA units.
  - As people with physical and mental impairments leave institutional settings, rehabilitation centers, and nursing homes, they seek rental housing in the community. Many will need assistance with activities of daily living ranging from the occasional support of social service or health providers, who will visit as needed. Others will need live-in aides to allow them to be successful.

https://www.medicaid.gov/medicaid/long-term-services-supports/money-follows-person/index.html

- As part of the New Freedom Initiative, there are "The Money Follows the Person" Demonstration Grants that many states have received to help change the way Medicare and Medicaid dollars are used to assist people with disabilities in their state.
  - "We have a Medicaid system in this country that is spending approximately two-thirds of its dollars on institutional care and approximately one-third on community services. This bill is an important step toward switching those numbers around. It is shameful that our federal dollars are being spent to segregate people, not integrate them. It has been 15 years since we passed the Americans with Disabilities Act, which said "no" to segregation. But our Medicaid program says "yes" and we need to change it."

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PHA ACTIONS

Notice PIH 2012-31 and HUD Guidance on Accomplishing Goals of Olmstead

- HUD has issued notices and guidance on actions PHAs may take to assist persons with disabilities transitioning from institutions and persons at serious risk of institutionalization access PHA-assisted housing.
- The following actions are HUD's examples of how PHAs may partner with their jurisdiction:

http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf

- Establish a local admission preference for persons with disabilities who are ready to exit institutions. PHAs may include in this preference persons at serious risk of institutionalization. The preference may apply to HCV and/or public housing. The preference may be limited to a set number of vouchers or units or a percentage of vouchers or units as they become available.

Notice PIH 2011-32

- Dedicate non-elderly disabled (NED) vouchers. PIH 2011-32 provides guidance to PHAs awarded special vouchers for non-elderly people with disabilities concerning the requirement to reestablish these vouchers for use by the intended population.

HUD Section 811 PRA NOFA

- Leverage Section 811 project rental assistance (PRA) funds within public housing. PRA funds may be applied to PHA mixed finance or other alternative funding developments. A maximum of 25 percent of the total units in eligible properties can be provided PRA funds, be used for supportive housing for persons with disabilities, or have any occupancy preference for persons with disabilities.
- Enhance outreach. This may include advertising the opening of waiting lists to social service agencies, nursing homes, board and care homes, psychiatric hospitals, mental health facilities, and institutions and hospitals for individuals with disabilities.

24 CFR 8.27(b)

- Develop an accessible housing list. Enhance the list of known accessible HCV units by adding information about partially accessible units in the area.

24 CFR 8.28(a)(4)

- Provide flexibility. Adopt a policy to address the challenges related to portability and locating accessible housing when considering requests for voucher extensions.

"Community Living Initiative" letter May 20, 2010 http://www.olmsteadva.com/mfp/downloads/tn.pdf

- Seek service-based resources. States have access to technical assistance; PHAs should support infrastructure reform and network with aging and disability resources centers.

Notice PIH 2012-40

- Request a waiver of the 40 percent affordability requirement, if necessary, to permit a person with disabilities to lease an assisted living unit.

- For more information, you can find HUD's exhaustive guidance on accomplishing the goals of Olmstead in the following document:
  - http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf

Section 3.7 HUD Civil Rights Monitoring Audits

FR Notice, Vol. 72, No. 40, March 1, 2007, page 9347-9348

- HUD's Office of Public and Indian Housing (PIH) conducted civil rights monitoring reviews of 20 PHAs in fiscal year 2007. The reviews involved the use of two checklists, one to be filled out by a PIH reviewer and the other to be filled out by the PHA under review.
- Before conducting the reviews, PIH retrieves information on the racial and ethnic characteristics of program participants from PIC and other HUD systems.
- The onsite PIH reviewer checks to see:
  - Whether the following items are posted:
    - Equal opportunity in housing poster
    - Notice that the PHA must give each family information on how to fill out and file a housing discrimination complaint
    - PHA policies, rules, and regulations
  - Whether the PHA's agency plan and administrative plan are available for public review
  - Whether the PHA has taken the following steps to ensure meaningful access to programs by persons with limited English proficiency (LEP):
    - Conduct a four-factor analysis
    - Develop a written language assistance plan
    - Hire bilingual staff
    - Contract with a telephone language line service to provide interpretation for residents and applicants

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- The PHA will have to answer questions on the following topics:
  - The identity of the agency's Section 504 coordinator or staff person who handles questions and issues related to meeting the needs of persons with disabilities
  - The number and size of units designated as accessible
  - Agency policies and procedures relating to requests for reasonable accommodation (including requests for assistance animals and exceptions payment standards
  - Steps the PHA has taken to communicate with persons with hearing, speech, and visual impairments
- While the following historical forms are not current, they can be useful as a self-evaluation tool.

ATTACHMENT A
1

OMB Approval No 577-0251
Exp. (05/31/2010)

Public reporting burden for this collection of information is estimated to average 1 hour per response. This includes the time for collecting, reviewing, and reporting the data. The information collected will be used to evaluate PHAs' compliance with the Fair Housing laws. This agency may not collect this information, and you are not required to complete this form unless it displays a currently valid OMB control number.

U.S. Department of Housing and Urban Development

OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO)
AND
OFFICE OF PUBLIC AND INDIAN HOUSING (PIH)

GUIDANCE FOR THE ON-SITE LIMITED MONITORING REVIEW OF CIVIL RIGHTS-RELATED PROGRAM REQUIREMENTS (CRRPR) FOR LOW-RENT PUBLIC HOUSING (LR) PROGRAM AND HOUSING CHOICE VOUCHER (HCV) PROGRAM

1. The Office of Public and Indian Housing (PIH) must complete this review checklist in conjunction with a PIH scheduled on-site comprehensive/consolidated review that is planned based on the PIH risk analysis in accordance with the Management Plan Guidance. PIH should include the language in Attachment C – "Letter Template" – in the PHA notification letter. This checklist and any comments should be completed by PIH and forwarded to FHEO within ten (10) business days of PIH completing its on-site comprehensive/consolidated review. Please highlight those issues, which address or may have an effect on FHEO requirements. FHEO will then take appropriate action, if necessary.

2. PIH, prior to going on-site, should retrieve data from the appropriate HUD/PIH/FHEO data bases, e.g., Public Housing Information Center (PIC) System data on the racial and ethnic characteristics of Housing Choice Voucher holders by census tract, and data on the racial and ethnic composition of the PHA's Low-Rent Public Housing developments, including the location of scattered-site projects by census tract.

3. The PIH reviewer may make additional comments on a separate sheet of paper and attach it to this checklist. These comments should be identified clearly so that the response is associated with the appropriate question.

4. PIH should forward to local FHEO a copy of the completed checklists within ten (10) business days after completing the onsite comprehensive/consolidate review.

form HUD-52510-A (06/2007)

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OMB Approval No 577-0251
Exp. (05/31/2010)

ON-SITE LIMITED MONITORING REVIEW OF CIVIL RIGHTS-RELATED PROGRAM REQUIREMENTS (CRRPR) FOR LOW-RENT PUBLIC HOUSING (LR) AND HOUSING CHOICE VOUCHER (HCV) PROGRAM

The Office of Public and Indian Housing (PIH) must complete this checklist when conducting its on-site comprehensive/consolidated review of a Public Housing Agency (PHA). These questions cover areas that PIH is expected to observe or data that PIH is expected to collect. This checklist is not intended to cover the full range of civil rights and fair housing concerns and PIH will not provide any evaluation or analysis of the data. This checklist alerts PIH and FHEO to certain PHA practices in the Low-Rent Public Housing (LR) and/or Housing Choice Voucher (HCV) Program(s) that may indicate noncompliance with civil rights and fair housing regulations. PIH should forward the completed checklist to local FHEO within ten (10) business days of PIH completing the on-site comprehensive/consolidated review, whether problems are noted or not.

PHA Name: _____

PHA Identification Number: _____

Location: _____

Indicate type PHA program, number of units and vouchers in each, as applicable:

LR Elderly _____ Number of Units _____ Number of Vouchers _____
LR Family _____ Number of Units _____ Number of Vouchers _____
HCV _____ Number of Units _____ Number of Vouchers _____

Reviewer's Name: _____

Reviewer's Title: _____

Reviewer's Telephone Number and Extension: _____

Date of Review: _____

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Exp. (05/31/2010)

PART I. POSTING OF DOCUMENT/MATERIAL REQUIREMENTS

Place an "x" in the appropriate column and provide comments whenever an explanation is warranted.

Are the following displayed and readily visible or are they otherwise made available in accordance with the applicable regulations?	**YES**	**NO**	**COMMENTS (if applicable)**
1. Equal Opportunity in Housing Poster (HUD 928.1-English/HUD 928.1A-Spanish) prominently displayed in all public areas. [24 CFR 110.15]			
2. Is the Public Housing Agency Plan readily available for public review? [24 CFR 903]			
3. Is the Administrative Plan available for public review. [24 CFR 982.54]			
4. Notice that the PHA must give the family information on how to fill out and file a housing discrimination complaint. [24 CFR 982.54 (d)(6); 982.304].			
5. Are policies, rules, and regulations posted in the project office? [24 CFR 966.5].			

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Exp. (05/31/2010)

PART II. OTHER

	YES	NO	COMMENTS (if applicable)
1. Is there anything else that is related to civil rights or fair housing that should be noted? [For example, fair housing discrimination complaints brought against the PHA by its employees, or media reports of racial/ethnic tensions at the PHA's developments?] If **yes**, please note.			
2. Limited English Proficiency (LEP). Executive Order 13166, titled "Improving Access to Services by Persons with Limited English Proficiency," requires all agencies and their recipients to ensure that their programs provide meaningful access for LEP persons. (Final Guidance will be published in Federal Register, and is also noted in the Public Housing Occupancy Guidebook, Section 6.2 "Accessibility and Plan Language," page 68.)			
Has the PHA taken the following steps to ensure meaningful access to programs by LEP persons?			
• Conducted a four-factor analysis. If "**yes,**" bring a copy to FHEO.			
• Developed a written Language Assistance Plan? If "**yes,**" bring a copy to FHEO.			
• Hired bi-lingual staff.			
• Contracted with a telephone language line services to provide interpretation for residents and applicants.			

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OMB Approval No 577-0251
Exp. (05/31/2010)

ATTACHMENT B
1

U.S. Department of Housing and Urban Development

OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO)
AND
OFFICE OF PUBLIC AND INDIAN HOUSING (PIH)

ON-SITE LIMITED MONITORING REVIEW -- SECTION 504

Public reporting burden for this collection of information is estimated to average 2 hour per response. This includes the time for collecting, reviewing, and reporting the data. The information collected during the onsite comprehensive reviews of Public Housing Agencies (PHAs) will be used by HUD to evaluate the PHAs' compliance with civil rights and fair housing laws and regulations (Regulatory Authorities: 24 CFR 1.6(b); 24 CFR 8.55; 24 CFR 125).
The information is subject to the confidentiality requirements of the HUD Reform Legislation. This agency may not collect this information, and you are not required to complete this form unless it displays a currently valid OMB control number.

This checklist is to be completed by the Public Housing Agency (PHA), collected by Public and Indian Housing (PIH) during the on-site program management review. PIH will forward the completed checklist to FHEO within ten (10) business days of completing the PIH on-site program management review. If the data is not available for the reviewer to bring to FHEO, the PHA must forward the completed checklist directly to FHEO within five (5) business days of the PIH exit interview. This checklist is not intended to cover the full range of civil rights and fair housing concerns and PIH will not give any evaluation or analysis of the data. This checklist serves as an alert to PIH and FHEO to certain PHA practices regarding Section 504. Results are to be referred to FHEO for possible follow-up.

PIH should forward Attachment B "On-Site Limited Monitoring Review Section 504 Monitoring" checklist to the PHA for completion prior to the PIH on-site program monitoring review. The PHA should be instructed that PIH will collect the completed checklist during the on-site management review. PIH will then forward this material to FHEO within the appropriate timeframe.

PHA Name: _____

PHA Identification Number: _____

Location: _____

Name of Person Completing Checklist:
_____

Title of Person Completing Checklist:
_____

form HUD-52510-B (06/2007)

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Telephone Number of Person Completing Checklist:

_____

Date of Completion:

_____

1.a. If the PHA has fifteen (15) or more staff members, please provide the name of the PHA Section 504 Coordinator:

_____

1.b. If the PHA does not have a Section 504 Coordinator, identify the person who handles issues/questions regarding meeting the needs of persons with disabilities.

_____

These questions are directed to the person named in answer to Questions 1.a. or 1.b. If no one was named, the person in the PHA with the most knowledge concerning persons with disabilities should respond to these questions and that name should be indicated.

2. How many dwelling units has the PHA designated UFAS-accessible (i.e., comply with the Uniform Federal Accessibility Standards)? NOTE: An "accessible housing unit" is a dwelling unit that is designed, constructed, altered, or adapted to comply with UFAS and is located on an "accessible route."

_____

3. What is the distribution by bedroom size of the accessible dwelling units?

Bedroom size	TOTAL units	Number of UFAS-accessible units	Number of Units Accessible for hearing/ visual impaired people
1 bedroom			
2 bedroom			
3 bedroom			
4 bedroom			
Other (specify)			
TOTALS			

4. How are requests from applicants or residents asking for a reasonable accommodation handled, if the PHA does not have a policy?

_____
_____
_____
_____

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5. When is the reasonable accommodation policy given to an applicant?

_____
_____
_____

6. When is the reasonable accommodation policy given to present tenants?

_____
_____
_____

7. Where there is no policy addressing assistance animals, how are applicants' or tenants' requests to have such animals handled?

_____
_____
_____

8. Is the tenant/applicant required to make a special deposit to have an assistance animal?

_____
_____

9. Does the PHA have the required TTY/TDD or other equally effective telecommunications system? _____ Yes _____ No

10. What is the TTY/TDD number?

_____

11. How does the PHA staff communicate with persons who have hearing, speech, and/or visual impairments? Identify the system used by the PHA.

_____ TTY/TDD
_____ Interpreter
_____ Relay system
_____ Large print materials
_____ Braille
_____ Other (Specify)_____

12. Does the PHA's letterhead list:

_____ direct TTY number, provide number: _____or
_____ relay telephone service number, provide number: _____

_____

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13. What reasonable accommodation assistance does the PHA provide for persons seeking Housing Choice Voucher (formerly Section 8) housing?

_____ Extension of time to find housing
_____ Exception to fair market rent
_____ Transportation
_____ Other (Specify)_____

14. How many times in the last year has the PHA granted a fair market rent exception for persons with disabilities needing accessible features?

_____

15. Has a fair market rent exception ever been granted? _____
When?_____
_____
_____

16. Has a fair market rent exception ever been denied? _____
When?_____
_____

17. What other rules or policies has the PHA implemented that affect persons with disabilities? (Identify.)
_____
_____
_____

As the duly authorized representative of the PHA, I certify to the best of my knowledge and belief that the information presented on this checklist is true and accurate.

Signature of Authorized Official	Name Printed
Title of Authorized Official	Date (mm/dd/yy)

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Learning Activity 3-1: General Compliance Quiz

1. PHAs have an affirmative duty to be both vigilant and proactive with regard to fair housing compliance.
   a. True
   b. False

2. PHAs are required to keep data on racial, ethnic, gender, and disability status of applicants and participants for at least three years.
   a. True
   b. False

3. HUD encourages PHAs to assist persons with disabilities transitioning from institutions and persons at serious risk of institutionalization with access to PHA-assisted housing in order to accomplish the goals of the New Freedom/Money Follows the People Initiatives (Olmstead Act).
   a. True
   b. False

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CHAPTER 4 Persons with Disabilities

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Compare and contrast two different definitions of *disabled:*
  1. HUD's "stricter" definition of ***disabled*** used for eligibility, rent calculation, and PIC
  2. The Fair Housing Act's "looser" definition of ***disabled*** used for reasonable accommodation

DEFINITIONS OF THE TERM "DISABILITY"

- PHA staff must be able to apply two different definitions of "disabled." There is a HUD definition for *disabled* used for income rent calculation allowances and eligibility determinations. There is also a broader ADA/Fair Housing definition that is used for reasonable accommodation purposes. Sections 4.1 and 4.2 of this chapter parse out these two separate and distinct definitions and how each is used. Sections 4.3 and 4.4 discuss who does not qualify as a person with a disability and those persons who do not have a disability but who are perceived as such.

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Section 4.1 HUD Definition of a Person With a Disability

- HUD's definition is a "strict" or "narrow" definition of who qualifies as a person with a disability.

Q. When does a housing authority use HUD's definition of a *person with a disability*?

24 CFR 5.611

A1. The ***HUD Definition*** of a *person with a disability* is used for determining the following income allowances:

- The disabled family preference (the $400 disabled household deduction)
- The disabled family allowance for medical expenses
- The $480 dependent allowance for a person with disabilities
- The allowance for disability assistance expenses

A2. The ***HUD Definition*** of a *person with a disability* is used for eligibility determinations if:

- Your PHA gives people with disabilities or disabled families preference on your waiting list system
- Your PHA has special voucher assistance money earmarked only for people or families with disabilities
- Your PHA operates public housing that has developments that are designated disabled or mixed population developments

Q: How does a person meet HUD's definition of a *person with a disability*?

A. The person must provide third-party documentation that s/he meets at least one of three qualifying definitions under the HUD definitions of *disabled:*

24 CFR 5.403

- The person meets the Social Security Administration definition of a *person with disabilities* as defined in 42 U.S.C. 423

24 CFR 5.403

- The person has a physical, mental, or emotional impairment that:
  - Is expected to be of long-continued and indefinite duration
  - Substantially impedes their ability to live independently
  - Is of such a nature that the ability to live independently could be improved by more suitable housing conditions

42 U.S.C. 15041 et seq.

- The person has a developmental disability as defined in the Developmental Disabilities Assistance and Bill of Rights Act of 2000: "A severe, chronic disability of an individual that:
  - Is attributable to a mental or physical impairment or combination of mental and physical impairments
  - Is manifested before the individual attains age 22
  - Is likely to continue indefinitely
  - Results in substantial functional limitations in three or more of the following areas of major life activity…

- Persons who have acquired immunodeficiency syndrome (AIDS) or any conditions arising from the AIDS virus are not excluded from this definition.
- For purposes of qualifying for low-income housing, the HUD definition does not include a disability based solely on any drug or alcohol dependence.

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Section 4.2 Definition of a *Person with a Disability* for Purposes of Reasonable Accommodation

- The definition of a person with a disability for purposes of granting a reasonable accommodation request under either Section 504, the Fair Housing Act or the ADA is much broader than the HUD/Social Security definition of *disability*. This "looser" definition will allow a larger pool of people to qualify as people with disabilities compared to who will qualify when HUD's definition of *disability* is used. In other words, it is easier to qualify as a person with a disability under the reasonable accommodation definition than under HUD's definition.
- PHAs can not pick and choose when they want to use HUD's definition of *person with disabilitie*s or the Fair Housing Act's reasonable accommodation definition of a *person with disabilities*. Each definition must be used as is appropriate under the law and HUD regulations.

Q: How does a person meet the Fair Housing Act's definition of a *person with a disability*?

24 CFR 100.201

A. The person must provide third-party documentation that s/he meets at least one of three qualifying definitions under the Fair Housing Act/ADA/Section 504 definition of *handicap*. The person must:

- Have a physical, mental or emotional impairment that substantially limits one or more of the person's major life activities
- Have a record of such impairment
- Be regarded as having such an impairment

PHYSICAL, MENTAL, OR EMOTIONAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE MAJOR LIFE ACTIVITIES

24 CFR 100.201;
HUD and DOJ Joint Statement on Reasonable Accommodations Under the Fair Housing Act, 5/17/04 Part 3

- The physical or mental impairment can include practically any condition, disease, illness, disfigurement or disorder, as long as the impairment substantially limits one or more major life activities.
  - Examples include: Alcoholism, cerebral palsy, cancer, mental illness, emotional disorders, former drug addiction, and HIV infection, among others
  - Major life activities include, but are not limited to: Caring for oneself, walking, seeing, hearing, breathing, learning, working, concentrating, and thinking
- These federal civil rights laws were intended to cover a wide range of disabilities and do not require the severity of the HUD definition.
  - Qualifying as a person eligible to request an accommodation is the first step in the reasonable accommodation process. It is the establishment of the person's right to make a request of the program.
  - However, the person must also show that they are limited by the program due to their disability, and that the requested accommodation will remove that limitation so that they can completely fulfill the program's requirements. To say it another way, there must be a barrier to housing presented by the person's disability that causes this person, without removal of the barrier, not to have equal access to programming.

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- What about temporary impairments?
  - Temporary impairments may necessitate a reasonable accommodation under federal law. Disabilities do not have to be permanent or have existed for a certain period of time before a request is made. Like all reasonable accommodation requests, requests made by a person regarding a temporary disability or medical condition (think: recovering from a surgery, broken legs, arms, etc.) are resolved on a case-by case-basis.
    - Consideration of the duration of the impairment and the extent to which it limits major life activity and knowledgeable professional verification may certainly be part of the decision making process.
- What about "sensitivities," for example, chemical sensitivity, allergy to cigarette smoke, or allergies to food?
  - Respiratory or neurological functions may be impacted so severely that requirements to be disabled are satisfied OR
  - It may be that the sensitivity may not rise to the level to constitute a disability
  - If a person cannot come into your office due to her allergies to the carpet fibers: Is a home visit a reasonable accommodation? How else could you work with this family member?

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- From the DOJ's "supplemental information" section of 28 CFR Part 35 (the ADA regs):

28 CFR Part 35 and http://www.usdoj.gov/crt/ada/reg2.html

  - "Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).
  - Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.
  - In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments…"

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RECORD OF AN IMPAIRMENT

24 CFR 8.3

- This is someone who doesn't necessarily have a disability today, but has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

REGARDED AS HAVING AN IMPAIRMENT

- A person does not have to actually have a mental or physical impairment to be discriminated against under fair housing laws.
  - Under the Fair Housing Act, ADA and Section 504, a person is *handicapped* if others regard or treat that person as though the person is disabled.
- For example, if a staff member treats an applicant or tenant as though they had an impairment that substantially limits a major life activity, and *because of that perception* discriminates against this person, this person may file a civil rights discrimination claim.
  - This person is NOT actually disabled. It is the perception of being disabled and the response of the housing authority (treating this person differently) that is the cause of his claim.
- Remember – housing authorities presume competence of their applicants and program participants.

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- An example might be a situation where a gay couple apply for housing and a landlord denies the couple housing. The landlord makes remarks when he denies their application that he doesn't want gays around his housing developments since he knows that "all gays have AIDS."
  - Even if this couple does not live in a jurisdiction that further protects them from discrimination because of their sexual orientation (remember, the "equal access" regulations only apply to private market landlords and owners once they've entered into a HAP contract with the PHA), this landlord has discriminated against this couple since he is treating people differently because he regards gays as having an impairment or disability: HIV/AIDS. This couple could bring a complaint under the Fair Housing Act for being regarded or perceived as having disabilities and being denied housing because of this perception.

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Section 4.3 Limitations Specifically Excluded from Disability Protection

24 CFR 100.202 and DOJ/HUD Joint Statements

- The following three categories are specifically excluded from disability laws' protections:
  - People who are engaging in the current illegal use of controlled substances (however, the act does protect persons who are recovering from substance abuse)
  - People 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
  - People whose alcohol use interferes with the rights of others

24 CFR 5.853 and 24 CFR 960.204(a)(2)(i)

- HUD regulations define *current illegal use of drugs* as occurring "recently enough to justify a reasonable belief that the individual's behavior is current."
- The PHA can incorporate the HUD definition into the agency's administrative plan or ACOP as guidance for staff to use in determining whether a family member is or is not "currently using." You may also rely on third-party verification from a professional competent to render an opinion as to whether the person is or is not currently using drugs.

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Section 4.4 Nexus

HUD/DOJ Joint Statement on Reasonable Accommodations Under the Fair Housing Act, 5/17/04 Part 6

- In order for a person to be granted a reasonable accommodation, there must be more than just a disability. There must exist a barrier to the person's housing.
- This barrier to housing exists because of the person's disability. This means the PHA needs to understand and document the relationship between the disability and the barrier to housing. This relationship is often referred to as a "nexus" or the connection between the person's disability and the barrier to housing. Examples include:
  - Maria receives SSDI. She requests that she receive an exception payment standard so that she can rent a particular unit in the city.
    - PHA decision is:_____?
  - Yan uses a wheelchair. Parking spaces were recently reassigned after expansion of the parking lot in her development. Her new spot is much further from her unit. She requests an accessible parking spot.
    - PHA decision is:_____?
  - Momadou uses a wheelchair. He relies on his brother to help him with transportation. Momadou requests an extension of his initial voucher time since his brother can only take him to visit units on the weekends, and he's having a hard time finding an accessible unit.
    - PHA decision is:_____?
  - Carl is deaf and lives in assisted housing. He requests a live-in aide and an extra bedroom so that the live-in aide may have his own room as a reasonable accommodation.
    - PHA decision is:_____?
  - Lee has a mental health disability. They have requested that they move to a unit... outside of their unit.
    - PHA decision is:_____?

Section 4.5 Verification of Disability

ELIGIBILITY/ALLOWANCES

24 CFR 5.403

- In order to qualify the family for certain rent calculation allowances and/or for eligibility purposes, that person needs to meet the HUD definition of *disability.* The PHA will need verification that the person meets HUD's definition of disability.

PH Occupancy GB, Ch. 1, Part 1.2, page 20

  - If the person receives social security based on disability, then third-party verification is not necessary.
  - PHAs need to have verification forms that reflect the HUD definition of disability for this purpose.

WHAT IS A REASONABLE ACCOMMODATION?

- Reasonable accommodations eliminate barriers preventing people with disabilities from fully participating in everyday aspects of life—including housing opportunities.
  - Remember this language: *Barrier to housing*.
  - A person having a disability alone does not qualify them for a reasonable accommodation. There must be a *barrier to the person's housing* for a request to be granted.

24 CFR 100.204(a)

- A change, exception, or adjustment to a rule, policy, practice, or service 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.

Joint Statement of the Dept. of HUFD and Dept. of Justice, page 6, Part 6; May 17, 2004

- 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.

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Joint Statement, page 6, Part 6

- Remember, to show that a requested accommodation may be necessary, there must be an identifiable relationship (nexus) between the requested accommodation and the individual's disability.
- Different ways to describe reasonable accommodation include:

24 CFR 8.11

  - Any change in the way things are customarily done that enables an individual with a disability to enjoy equal employment or housing opportunities
  - Any change or adjustment to a job or housing environment that permits a qualified applicant or employee with a disability to fully participate in the housing or job application process, to perform the essential functions of a job or meet tenancy requirements, or to enjoy the benefits and privileges of housing or employment equal to those enjoyed by employees or tenants without disabilities
  - A change allowed by management to how the terms and conditions of an individual's tenancy are met, in consideration of a known disability, unless this would create an undue hardship and administrative burden on the agency

Notice FHEO 2020-01

- Most HUD charges of discrimination against a PHA or other housing provider following a full investigation involve the denial of a reasonable accommodation to a person who has a physical or mental disability that the PHA or other housing provider cannot readily observe.

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REASONABLE ACCOMMODATION PURPOSES

- When a reasonable accommodation is requested, the disability needs to meet the Fair Housing Act/ADA/504 more liberal definition (unless state or local law is more protective).

HUD/DOJ Joint Statement 5/17/04

- If the disability is obvious or otherwise known, the PHA may not verify the disability.
  - That is, if the person has a disability and the need for the accommodation is obvious or otherwise known, no third party verification should be requested.
- Remember, however, that documentation by the PHA of the request, the barrier and the accommodation provided is most likely always a necessary part of policy.

Notice PIH 2010-26

- An example of an obvious accommodation is if a PHA-assisted individual who uses a wheelchair or walker requests an accessible parking spot. In this case, the housing authority will not request any further documentation.

WHAT A PHA MAY REQUEST

- The PHA should define what is considered as valid third-party for verification of a disability.

HUD/DOJ Joint Statement, May 2004, Q.18

  - Limiting verification to only physicians is not allowed. Depending on the information sought, a social worker, nurse, or other licensed professional might be competent to verify the disability.
  - A suggested definition could be "a professional competent to render the opinion and knowledgeable about the person's situation."

- A PHA may require documentation of the existence of the disability that causes a need for a specific accommodation.

HUD/DOJ Joint Statement, May 2004

- A PHA may ask the applicant, tenant, or participant for authorization to contact the third-party professional to ask clarifying questions that do not go beyond the specific and necessary information required to make a decision.

- Reminder:
  - PHA staff does not decide whether an applicant is "disabled" for eligibility or reasonable accommodation purposes.
  - PHA staff does not decide whether there is a "nexus" between the disability and the requested accommodation.
  - Both of these burdens are placed on "knowledgeable professionals" as defined in PHA policy unless the requester presents an obvious disability and obvious barrier in which case the PHA makes the accommodation without any need for further inquiry.

WHAT THE PHA CAN ASK

- A PHA can ask only for information that is relevant.

Notice PIH 2010-26 and 24 CFR 100.202

- If the person is applying for housing designated for individuals with disabilities, the PHA must verify that the person meets the HUD definition of *disability.*
- If the person is applying for housing designated for individuals with a specific disability, the PHA must verify.
- If the person is trying to qualify for allowances that reduce rent on the basis of a disability (such as the per family allowance for elderly and disabled families, the allowance for unreimbursed health and medical care expenses, or the disability assistance allowance), the PHA must verify that the person meets the HUD definition of disability if the individual is not receiving social security disability or SSI.
- If the person requests an accommodation due to a limitation caused by a disability, you may ask the person to verify that a disability exists (the 504/ADA definition) and the need for the requested accommodation.

PH Occupancy GB, Chapter 4, Part 4.10, pages 58 & 59

- If, during the denial of admission process (i.e., the mandatory written notice of denial given to all denied applicants), the person asserts that their poor history was caused by his disability and that a reasonable accommodation will prevent future violations, or that mitigating circumstances should be taken into account, the individual may be asked to verify that:
  - They have a disability
  - The poor history or violation was a result of the disability
  - There are mitigating circumstances related to the disability, and the problems causing the poor history have been reasonably resolved, or that the requested accommodation is reasonable and likely to cure the violation.

HUD/DOJ Joint Statement, 5/17/04

EXAMPLES OF WHEN/WHAT TO VERIFY

- **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 them in filling out the rental application form as a reasonable accommodation because of their disability. The housing provider may not require the applicant to document the existence of their vision impairment.

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WHAT THE PHA MAY NOT REQUEST

HUD/DOJ Joint Statement, 5/17/04, #17, page 12

- Remember, if a person's disability is obvious, or otherwise known to the PHA, and if the need for the requested accommodation is also readily apparent or known, then the PHA may not request any additional information about the requester's disability or the disability-related need for the accommodation.

Notice PIH 2010-26

- Also, it is inappropriate and unnecessary for a PHA to receive actual medical records.
  - A verification form should ask for only as much information about an applicant's or tenant's disability as is necessary to consider the qualification for a particular reason stated by the PHA.
  - It is recommended that the PHA use the statutory language defining *disability* on its verification forms (HUD's definition of *disabled* for verification of rent allowances and eligibility preferences, and the Fair Housing Act's definition of *disabled* for forms sent to knowledgeable professionals for reasonable accommodation requests).

HUD/DOJ Joint Statement, 5/17/04

- Any information requested or received regarding disability status must be kept confidential and not shared with other persons unless disclosure is required by law.

Notice PIH 2010-26

- If a PHA receives a verification document that provides a person's diagnosis or details of treatment for a disability or medical condition, the PHA should dispose of it. The PHA should note in the file that a disability (in place of the specific disability information) and any other information requested has been verified, the date the verification was received, and the name and address of the knowledgeable professional who sent the information.

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WHAT THE PHA CANNOT ASK

24 CFR 100.202(c); HUD/DOJ Joint Statement, 5/17/04

Notice PIH 2010-26

- The general rule is that the PHA cannot ask:
  - If a person has a disability, unless:
    - A PHA asks everyone they interview if they are a person with disabilities.
    - Being a person with disabilities is relevant to whether the applicant qualifies for the program, a particular preference, a specific unit, a designated development, or rent allowances—the advantages of claiming disability status need to be made clear to the applicant/assisted family member when the question is asked.
  - The nature or extent of the disability
  - Any question that would require the disabled person to waive or disclose a medical condition or history
- Never ask:
  - What happened to you?
  - What's wrong with you?
  - How long have you had that?
  - Is it serious?
  - Who gave it to you?
  - Will it always look that gross?

PH Occupancy GB, Chapter 1, Part 1.2, page 19

- It is always the right of a person with disabilities not to say anything about their disabilities. However, the PHA does not have to provide any accommodation or special preference for that person.

Ability to Live Independently

Notice PIH 2010-26; PH Occupancy GB

- It is a violation of Section 504 and the Fair Housing Act for a public housing authority to inquire whether an applicant or tenant is capable of "living independently." Courts continue to hold that this is not a legitimate inquiry to make of applicants or tenants in HUD-assisted housing. Be sure that your screening materials do not include questions related to such an inquiry [PH Occupancy GB].

24 CFR 100.202(c)

- Recall our discussion of aging in place. A PHA may not deny admissions or assistance to a person because that person needs assistance with daily tasks or has specific medical needs. The PHA can only inquire about the assistance a person may need to the degree necessary to verify disability and the need for a specific accommodation for the disability.
- The DOJ is increasingly taking interest in PHAs, group homes, and retirement communities that are looking to push out people with disabilities who require personal assistants or special medical care. One trend seems to be developments that want to attract "active seniors." Such advertising and imaging of housing can be discriminatory towards people with disabilities.
- While few housing providers hang up a sign that says "no people with disabilities allowed," application policies may bar people with disabilities nonetheless. Although it is prohibited by the Fair Housing Act, some housing providers still require applicants to demonstrate that they are "capable of living independently," and ask questions about their medical history as part of the application process.

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24 CFR 100.202(c)

- Even when these questions are asked "for the good" of the person with a disability, they are illegal. Remember, the FHA explicitly prohibits inquiries into the "nature or severity" of a disability.
  - Providers try to justify these inquiries as an attempt to "help" the applicant.
  - Housing providers must base their decisions on whether the applicant can meet objective tenancy obligations such as: paying rent, complying with reasonable residential rules, not damaging the premises, and not unduly disturbing others.

Notice PIH 2010-26

  - Courts continually hold that tenants are free to meet the obligations of tenancy with or without assistance. An applicant may not be able to clean her house and do her own cooking or even pay her own rent, but as long as she has support to accomplish these tasks, then the PHA may not deny the applicant housing or terminate the person from programming.

- In HUD's sample public housing lease, they include this language that could be of support to PHAs as folks with mental illness or dementia no longer are meeting lease requirements and refuse support to do so:

PH Occ GB, Appendix IV, page 289;
24 CFR 8.3

- "Ability to comply with lease terms: If, during the term of this lease, Tenant, by reason of physical or mental impairment is no longer able to comply with the material provisions of this lease, and cannot make arrangements for someone to aid him/her in complying with the lease, and PHA cannot make any reasonable accommodation that would enable Tenant to comply with the lease THEN; PHA will assist Tenant, or designated member(s) of Tenant's family, to find more suitable housing and move Tenant from the dwelling unit. If there are no family members who can or will take responsibility for moving Tenant, PHA will work with appropriate agencies to secure suitable housing and will terminate the lease. At the time of admission, all tenants must identify the family member(s) to be contacted if they become unable to comply with lease terms."

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1. Cason v. Rochester Housing Authority

www.bazelon.org

- In *Cason v. Rochester Housing Authority*, three disabled individuals (two of them seniors) brought a claim against the PHA after it had rejected them for failing to meet its "ability to live independently" eligibility requirement. The court ruled for the plaintiffs, holding that this requirement and staff's inquiries into disabilities were clear violation of federal law.
    - The court also rejected the PHA's attempt to justify its requirement based on the Fair Housing Act's "direct threat" provision, finding that it had "produced no evidence that the challenged practices allow the authority to screen out potentially dangerous tenants."
    - Finally, the PHA argued that it lacked the staff and resources to provide support services to tenants. The plaintiffs with disabilities had their needed services provided for by other programs such as Medicaid.

2. United States v. Resurrection Retirement Community, Inc.

- The complaint alleged that the defendant violated the Fair Housing Act by discouraging prospective residents who used wheelchairs or had particular medical needs.
    - Here, the defendants had to pay $220,000 in monetary damages and penalties and remove their discriminatory policies.

3. United States v. Pacific Life Insurance Co.

- In December 2004, the DOJ agreed to a consent decree under which the defendants had to pay $420,000 to resolve allegations that they discriminated based upon disability by evicting tenants who could live independently but had mobility impairments or required more than minimal assisted-living services.

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REQUIREMENT TO KEEP INFORMATION CONFIDENTIAL

5 U.S.C. 552a;
24 CFR 5.212

- Under federal and state privacy laws, a PHA is required to keep confidential any personal information about an applicant or tenant obtained in a confidential manner or from a confidential source.
- An applicant or tenant may sign a consent form to allow the PHA to disclose information in their file. Staff should not talk to anyone about a particular individual's medical status or disability without authorization for such discussion in writing from the individual.
  - For example, if a social worker or outside family member is going to support a participant with their annual re-exam, the PHA should get documentation of the participant's consent to discuss rent issues without the participant present.
- NOTE: Confidentiality issues and breach of confidentially are taken very seriously under federal and state privacy laws. A PHA can save a great deal of hassle and confidentiality concerns by streamlining and limiting the number of staff that coordinate reasonable accommodation requests and have access to sensitive, personal disability-related information. A Section 504 coordinator must understand the importance of confidentiality.
  - If your PHA has a confidentiality policy based on a "need to know" approach, be sure that staff is clear as to what this really means in day-to-day work.

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Section 4.6 Denial of Admission

Notice PIH 2010-26, G.6, page 24

- Regardless of housing type, landlords (including the PHA in public housing) are interested in maintaining well-run, financially viable housing that meets the needs of residents. As a consequence, landlords adopt screening criteria to ensure that people who live in rental housing can meet the basic obligations of tenancy, which include:
  - Paying the rent
  - Basic housekeeping requirements
  - Not interfering with the quiet enjoyment of other residents
  - Complying with other rules that are designed to promote health and safety or harmonious living
- When it passed the Fair Housing Act, Congress endorsed such screening criteria, but said that such criteria should not be used in a way that discriminates on the basis of disability.

Application and Admission Case Studies

Case Study: Wait list

Charles applied for XYZ housing programs a couple of years ago during a "rough time." XYZ PHA purged its wait list approximately six months ago, sending out a letter to all wait list families' last known addresses. The letter asked families to contact XYZ if the families wanted to remain on the wait list for housing assistance. The letter specified that the family should contact the PHA by phone or in writing within 14 business days of the date on the letter or be expunged from the list for housing assistance.

Charles did not contact the PHA within 14 business days. Charles was going through a disability-related crisis and was unable to open his mail.

Three months passed. Charles' condition improves and he is able to open his mail. As soon as he reads the letter from XYZ, he immediately contacts the PHA so that he may remain on the wait list. The receptionist informs him that the deadline was three months ago and his information has been deleted from their waitlist. Charles is devastated. He asks the receptionist if there is anything he may do to regain his position on the waitlist, as the current waitlist is now closed.

- Question: What should the PHA's response be? Why?

CASE STUDY: APPLICATION

Maria S. and her four kids are very excited because she has been on the waiting list for five years, and she recently received a letter saying that her name had finally come to the top of the list. She completed her intake interview with the PHA and provided the PHA with all requested forms of documents and verification for eligibility and rent calculation determinations. Maria also brought a letter of recommendation from her social worker at her job placement program and a letter from her current landlord at a supportive living program attesting to her perfect rent payments and good tenancy characteristics.

Three weeks later, Maria receives a letter from the PHA denying her housing based on past evictions. Maria is devastated. Her remaining eligibility time in her supportive living program is very limited. Maria wants an opportunity to explain to the PHA that her two prior evictions occurred when she was abusing alcohol. The property damage to one unit and nonpayment of rent at another location was due to her drinking. She has since completed a 90-day treatment program as well as spent a year in a supportive living program for recovering addicts.

Was the PHA okay in denying Maria housing? Was there any kind of reasonable accommodation obligation issue in this problem?

The PHA denied Maria housing because of past history of evictions, which Maria does not deny occurred. The PHA has limited time and limited staff.

- Question: Was the PHA okay in denying Maria housing?

- Question: Is there evidence that Maria has changed her behavior, which mitigates the risk?

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Housing Authority

DISABILITY VERIFICATION FORM

Public Housing Authorities are required to verify the disability of applicants claiming to be disabled to determine the applicant's eligibility for the housing and to compute rent. The resident has signed a release form below giving you permission to supply us with this information. Please fill out the form below and return it at your earliest convenience.

Sincerely yours, _____

The Department of Housing and Urban Development defines a disabled person in 3 ways:

(1) A disabled person is one with an inability to engage in any substantial gainful activity because of any physical or mental impairment that is expected to result in death or has lasted or can be expected to last continuously for at least 12 months; or for a blind person at least 55 years old, inability because of blindness to engage in any substantial gainful activities comparable to those in which the person was previously engaged with some regularity and over a substantial period.

(2) A developmentally disabled person is one with a severe chronic disability that:

- (a) is attributable to a mental and/or physical impairment;
- (b) as manifested before age 22;
- (c) is likely to continue indefinitely;
- (d) results in substantial functional limitations in three or more of the following areas: capacity for independent living, self-care, receptive and expressive language; learning, mobility, self-direction, and economic self-sufficiency AND
- (e) requires special interdisciplinary or generic care treatment, or other services which are of extended or lifelong duration and are individually planned or coordinated.

(3) A disabled person is also one who has a physical, emotional or mental impairment that:

- (a) is expected to be of long-continued or indefinite duration;
- (b) substantially impedes the person's ability to live independently;
- (c) is such that the person's ability to live independently could be improved by more suitable housing conditions.

I, _____, hereby certify that _____ (person signing the release below should be considered disabled in accordance with definition number _____ above.)

Name and Title_____Date_____
Signature_____Phone_____

TENANT/APPLICANT RELEASE

I, _____, hereby authorize the release of the requested information.

Signature_____Date_____

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Learning Activity 4-1: Disability Definitions Quiz

1. Temporary impairments may necessitate a reasonable accommodation under federal law. Disabilities do not have to be permanent or have existed for a certain period of time before a request is made.
   a. True
   b. False
2. "Sensitivities," like chemical sensitivity, allergy to cigarette smoke, or allergies to food, always rise to the level to constitute a disability under FHA/ADA/504 definition, and the PHAs must grant reasonable accommodations in all cases.
   a. True
   b. False
3. A participant or applicant is protected from discrimination under the Americans with Disabilities Act (ADA) if they have a record of or are perceived as having a disability.
   a. True
   b. False
4. The PHA should define what is considered as valid third-party for verification of a disability. However, limiting verification to only doctors is not allowed.
   a. True
   b. False
5. If a PHA approves a particular request for a reasonable accommodation for one applicant or participant, the PHA is required to approve all accommodation requests of this kind in the future.
   a. True
   b. False
6. If a participant is granted a reasonable accommodation, they will also always be eligible for HUD medical expense deductions.
   a. True
   b. False

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7. A person must have a disability that impacts three or more major life activities to request an accommodation.
   a. True
   b. False
8. HUD's definition of disability is stricter than the ADA/FHA/504 definition of disability.
   a. True
   b. False
9. If the disability is obvious or otherwise known, the PHA may not verify the disability.
   a. True
   b. False
10. It is a violation of Section 504 and the Fair Housing Act for a public housing authority to inquire whether an applicant or tenant is capable of living independently.
    a. True
    b. False
11. If a PHA receives confidential medical information, the PHA should place the information in a sealed envelope in the file.
    a. True
    b. False
12. To show that a requested accommodation may be necessary, there must be an identifiable relationship (nexus) between the requested accommodation and the individual's disability.
    a. True
    b. False

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Notes

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CHAPTER 5 Reasonable Accommodations

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Apply the reasonable accommodation process at all program levels including application, occupancy, and termination
- Discuss best-practice policies and procedures for documentation, verification, confidentiality, and reporting expectations for the reasonable accommodation process

Section 5.1 Reasonable Accommodation Process

INTRODUCTION

- Before we begin working our way through the reasonable accommodation process, you should ask yourself these questions:
  - How are applicants and participants notified of their right to request a reasonable accommodation?
  - If HUD asks your tenants today what is the PHA's reasonable accommodation policy, how would they respond? How would your staff respond?

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- The best way to ensure consistent compliance with legal obligations to provide reasonable accommodation is to standardize the procedure for considering such requests. The process should be included in the ACOP and administrative plan, and should describe protocol and steps beginning with the original request for an accommodation and concluding with the resolution of the request. Have a "desk guide" for easy reference for staff:
  - Do not forget the three most important words in the reasonable accommodation process: document, document, and document.
  - From the moment an applicant or occupant requests an accommodation, a paper trail should be created documenting dates, times, conversations and paperwork exchanged.

FR Notice, Vol. 27, No. 40, 3/1/07, pages 9347–9348

- Also keep in mind that as part of its civil rights monitoring review HUD, as published in the *Federal Register* on 3/1/2007, will ask PHAs:
  - Where they post equal opportunity in housing posters
  - How they notify each family as to how to fill out and file a housing discrimination complaint
  - To make available all PHA policies, rules, and regulations dealing with reasonable accommodation to HUD reviewers

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PHA Obligation to Notify

Notice PIH 2010-26; 24 CFR 966.7

- The PHA has an obligation to inform applicants and assisted families of the right for any person with disabilities to request a reasonable accommodation. The PHA should review forms, letters, posters and signs for inclusion of this information. Such a statement should be on applications for assistance, annual reexamination paperwork, warning or termination letters, and posted in PHA offices in an obvious and well-marked place.
  - Information must be provided in an accessible format, when requested. People must be informed of their right to ask for a reasonable accommodation.
- PHAs should consider adding the following to relevant application and occupancy documents:
  - "If you or anyone in your family is a person with disabilities, and you require a specific accommodation in order to fully utilize our programs and services, please contact (name and phone number)."
- PHAs should create or adopt standardized forms that clearly and simply ask for all the information and verifications the PHA will use in considering the request. It is best to ask the same questions of everyone.

Procedural Guidelines for Considering Requests for Accommodation

- The written procedure should include the points in the occupancy cycle where information on the availability of reasonable accommodation will be provided to assisted families. Though Section 504 has only a general notification requirement, it is a good idea to include notice at every important stage of the occupancy cycle, including: application, intake, tenant briefing, recertification, and termination of rental assistance.

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HUD DOJ Joint Statement 5/17/04, Q #12

- A participant's request triggers the need for an accommodation. The PHA should create or adopt standardized forms that clearly and simply ask for all the information and verifications the agency will use in considering the request. However, the PHA must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the PHA's preferred forms or procedures for making such requests. In these cases, the PHA would thoroughly document the requests.
- Remember: The more standardized the process, the less arduous the process for consideration.
- The PHA should have written procedures that spell out:
  - The person in the PHA responsible for overseeing reasonable accommodation compliance
  - The manner in which the PHA will respond to the request
  - The decision-making process (including a determination of undue burdens or fundamental alterations)
  - Expected and required documentation
  - The time periods for decision and implementation of the accommodation
  - The right of appeal for unfavorable decisions regarding an accommodation or a particular choice of accommodation
  - The procedure for handling confidential verification forms that may disclose private medical facts

THE APPLICANT OR TENANT MUST REQUEST A SPECIFIC ACCOMMODATION

- An applicant's or tenant's request triggers the need for an accommodation.
- The PHA should never offer an accommodation until one has been specifically requested. Treating people differently because of a perceived disability is discrimination.

HUD/DOJ Joint Statement, 5/17/04

- **Reminder:** PHAs must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally *or does not use the PHA's preferred forms or procedures.*

THE REQUEST FOR AN ACCOMMODATION BEGINS A PROCESS

Notice PIH 2010-26

- Here is the process:
  1. Was an accommodation requested?
  2. Is this a person with disabilities?
  3. Is there a nexus between the disability and the specific request?
  4. Is the request reasonable?
- The PHA should develop a reasonable accommodation protocol to be followed by all staff. For example, the PHA can require that the request for an accommodation be in writing, if the person is able to do so.
- It is important to be aware that sometimes the need for an accommodation first presents itself in the form of a complaint (from or about the applicant or assisted family), or through issues of noncompliance.
  - For example, if an applicant is denied admission, or if a tenant is facing lease termination, the need for some type of accommodation may be brought up.
- The reasonable accommodation process may include fluid negotiations on a case-by-case basis. What is reasonable in one situation may not be reasonable in another. The PHA may not be able to exactly meet the specific request, but may offer alternative options.

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- The reasonable accommodation process should be documented beginning with the initial request for an accommodation.
- The PHA's legal protection from a discrimination complaint or lawsuit lies in having written proof that consideration was given to the request.

THE ART OF THE REASONABLE ACCOMMODATION CONVERSATION

- It is important from the beginning for the PHA to understand what the participant perceives to be a barrier to housing. Good communication can make the reasonable accommodation process much less cumbersome for both the PHA and the person with a disability.
- The request for an accommodation should be understood as an invitation for conversation about how the PHA can best provide equal access to housing opportunities to people with disabilities.
  - The initial response to an accommodation request is not "no!" Without supporting documentation and explaining the process to a requester, saying "no" can immediately end a conversation and result in a legal claim for the PHA's lack of process for the request.
  - Accommodation requests may have to go back and forth several times between management and a requester in an interactive process. That is okay. Explain to the requester that this is sometimes part of the process and that the PHA wants to meet the requester's needs brought about by his disability, but must balance its duties to other assisted families and to HUD.
  - Saying "no" at the beginning of the request process rather than obtaining the requester's supporting documentation, offering alternative solutions and understanding what barriers the requester faces is as good as the PHA filing the discrimination claim itself.

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- When involved with the reasonable accommodation process, be sure that your PHA knows the answers to these questions:
  - What is the barrier to equal access or meaningful access to housing that this person is facing?
  - What kinds of accommodations will provide the requestor with full use and enjoyment of the premises or program?
  - What specifically is the requestor asking for as an accommodation to alleviate the effects of the disability on housing?
- Remember that it is important to understand what the requestor is really asking for and why, and to assure the requestor that you understand his/her request or complaint and that it will be objectively reviewed under your PHA's reasonable accommodation policy.
- Helpful conversation starters or responses might be:
  - You have expressed concerns about…
  - I hear you saying that…
  - Do you have any suggestions about how the PHA could help you maintain your housing?
  - What could the PHA do differently next time?
  - We understand that this must be difficult…
  - Would you like to meet to talk about this again?

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CONSIDER THE APPLICANT'S OR PARTICIPANT'S CHOICE OF ACCOMMODATION

HUD/DOJ Joint Statement, 5/17/04

- Special consideration should be given to the applicant's or participant's choice of accommodation.
- PHAs should be aware that people with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability.
- Again, if denying a reasonable accommodation request due to lack of information confirming an individual's disability or disability-related need, the PHA or other housing provider is encouraged to engage in a good-faith dialogue with the requestor called the *interactive process*.
- What is reasonable in one situation may not be reasonable in another. The PHA may not be able to exactly meet the specific request, but if this is the case, the FHA requires the PHA to explore alternative options with the requestor. An attitude of "What else could work for you?" is helpful.
    - There may be a need for further discussion with the knowledgeable professional as well. Documentation of these conversations should be carefully maintained confidentially, as described in the PHA's policy. For example, the 504 coordinator may have the responsibility and authority to keep documentation of any conversation that could contain sensitive or private information.

TREAT EACH CASE INDIVIDUALLY

- The essential intent of federal antidiscrimination laws is that each case should be treated on its individual merits.
- The PHA's legal protection from a discrimination complaint or lawsuit lies in having written proof that good-faith, individual consideration was given to that particular person.
- NOTE: PHAs have argued in and out of court the following:
  - If a particular accommodation is made, it will unleash a flood of similar requests and the PHA will not be able to accommodate all such requests because of undue administrative and financial constraints. This is a common argument with handicap parking requests.
  - **This argument is a loser.** Remember: Accommodations are reviewed on a case-by-case basis. While it is true that determining whether an accommodation is reasonable does balance the needs of the PHA and the requester, requests must be examined as a single request, not as a speculative look into the future.

Section 5.2 Consideration of Reasonableness of Request

- A PHA can deny a request for reasonable accommodation if:
  1. The request was not made by or on behalf of a person with a disability
  2. There is no disability-related need (nexus) for the accommodation
  3. The accommodation is not reasonable
     - The accommodation will result in an undue financial and administrative burden to the PHA
     - The accommodation would fundamentally alter the nature of the provider's operations
     - If, even with an accommodation, there is a direct threat to the health or safety of other individuals, or threat of substantial physical damage to the property of others.

UNDUE FINANCIAL AND ADMINISTRATIVE BURDEN

Notice PIH 2010-26

- Whether an undue financial and administrative burden results is determined on a case-by-case basis reviewing factors such as:
  - The overall size of the PHA's program with respect to the number of employees, type of facilities, and size of budget
  - The type of operation, including the composition and structure of workforce
  - The nature and cost of the requested accommodation
  - The availability of alternative accommodations that would effectively meet the requester's disability-related needs

- The cost of the accommodation will be measured against the resources available at the time of the request. Resources are not static; they are depleted and renewed over time. In considering undue burdens, resource variables might include:
  - Size and type of program
  - Availability of staff
  - Legitimate safety requirements necessary for safe operation including crime prevention measures
  - Prior commitments to reasonable accommodations or program accessibility
  - The point in the budget year at which the accommodation is requested
- The overall financial resources available to the program must be considered in assessing undue financial burdens, and the annual budget is the best indicator of available resources. The budget should also be considered in light of any other resources available to the provider, including:
  - Permitted use of operating reserves
  - Availability of local or state funds (either directly or through the resident or applicant)
  - Help from nonprofits, volunteer agencies, churches and state/local agencies
- An undue administrative burden can be declared when a request would cause a substantial increase in the administrative work load, such as an increase that prevents the staff from performing essential administrative or management duties essential to the operation of the program.
  - The PHA must be able to document both the financial and administrative effects that constitute an undue burden.

FUNDAMENTAL ALTERATION

HUD/DOJ Joint Statement 5/17/04

- An accommodation is not considered reasonable if it would fundamentally alter the nature of the provider's operations.

Notice PIH 2010-26

- The housing agency can deny the request as a fundamental alteration of the program if a requested accommodation will:
  - Require the housing agency to do something it is not in the business of doing
  - Require the housing agency to waive an essential lease obligation like the requirement of the family to pay their portion of the rent
  - Require the housing agency to substantially modify or eliminate essential family obligations
  - Require the housing agency to add supportive services (e.g., counseling, medical or social services that fall outside the scope of auxiliary aids necessary to ensure clear communication with the participant)
  - Impair the ability of the PHA to collect the required information from the participant
- The manager's determinations with respect to fundamental alterations must be made case by case. You cannot simply declare the requested accommodation a fundamental alteration of the program. You are still obliged to take action up to the point of fundamental alteration, so you must try to come up with an alternative that will allow the participant to receive the program benefits and services to the maximum extent possible.
- As we've discussed, PHAs can waive or flex their discretionary policies for a reasonable accommodation. Unless a HUD regulation specifically states that the PHA may waive the requirement as a reasonable accommodation, a request that would require waiving the HUD regulation should be approved by the HUD Field Office.

Learning Activity 5-1: Inspection Process—Fundamental Change to Program

- Arnold has a disability that he has documented for the PHA that causes him to have extreme bouts of paranoia. Arnold and his physician have asked that the PHA not conduct inspections of Arnold's apartment. The stress of having anyone touch his things, move his stuff, or assess his housekeeping is very traumatic and often causes him to have breakdowns over the anxiety of anticipating such a visit for weeks ahead of the scheduled visit. As a reasonable accommodation, the PHA agrees to forgo annual inspections as long as Arnold and his doctor verify annually that this inspection reasonable accommodation is still needed to allow Arnold to have equal access and enjoy his housing programming.
- Is the PHA's decision reasonable? Why? Why not? Did the PHA have any alternatives?

Learning Activity 5-2: Occupancy—Consideration of Reasonableness of Request

- Bob is 75 years old, has a disability which makes everyday tasks a chore, and reports to the PHA that he suffers from depression and high levels of anxiety. His two sons used to live with him but have moved out since Bob's last annual re-exam. Given Bob's new one-person household status, according to PHA subsidy standards, Bob no longer qualifies for his two-bedroom unit voucher and will not be able to meet rent obligations in his current apartment with only a one-bedroom voucher subsidy.
- Bob requests that he be allowed to stay in his two-bedroom apartment with a two-bedroom subsidy as a reasonable accommodation. He brings in documentation from his physician that the move will be detrimental to his condition and his level of anxiety is such that his mental health would be much better if he did not have to deal with the pressures of finding a new place, packing, and adjusting to a new environment. Moving will take a toll on Bob's mental and physical health. His case worker says that he should rest assured, she will talk to the Section 504 Coordinator herself—after all no poor, old man with a good rental history should be forced to move given all his struggles with disabilities.
- What possible options could the PHA consider in this situation?

DIRECT THREATS

HUD/DOJ Joint Statement 5/17/04

- If, even with an accommodation, there is a "direct threat" to the health or safety of other individuals, or threat of substantial physical damage to the property of others, the accommodation is not considered reasonable.

24 CFR 100.202(d)

- The Fair Housing Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety or 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.

HUD/DOJ Joint Statement 5/17/04

- However, under the law, PHAs cannot exclude individuals from assistance or terminate assistance based upon fear, speculation, or stereotype about a particular disability or persons with disabilities. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on objective evidence.
- The assessment should consider:
  - The nature, duration, and severity of the risk of injury
  - The probability that injury will actually occur
  - Whether there are any reasonable accommodations that will eliminate the threat.
- The PHA should take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat. In such a situation, the provider may request documentation of how the circumstances have changed so that the participant or tenant no longer poses a direct threat.
- A PHA must seek out objective evidence that a person with a disability poses a direct threat.

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CASE STUDY: DIRECT THREAT

Wanda believes she has magical powers. She only wears black. She has two black cats. She hangs homemade dolls and dead insects on her door to keep people out so that she can focus on channeling her powers and cast spells on evil doers from inside her apartment. She often says cruel or scary things to her neighbors and children in the building when she comes and goes to get her mail or go to the store such as "you will burn for your evil doings" and "watch out, there is evil lurking."

Passing by Wanda's unit, there are often whiffs of strange smells from her use of incense and spell-making brews. Wanda has long scraggly hair and thick, dirty nails, and she is always found whispering under her breath when not outwardly making comments to neighbors. The PHA knows that Wanda used to have a case worker from a nonprofit association, but Wanda left the supportive services program that she was involved with months ago.

Wanda pays her rent on time every month. There have never been any loud disturbance reports about her unit or damage to her unit observed during inspections or concerns expressed about her housekeeping. However, neighbors complain regularly about her and call her "Witch Wanda." They particularly report concerns about her comments neighbors have witnessed Wanda making to children. Recently her comments to children have seemed more harsh and direct, such as "I am going to put a spell on you that is going to make you blind and make you bleed slowly until you die!" and "My cats watch everything that you do and tell me who has been good and who needs to be punished…"

- Question: What should the PHA do? Does the PHA have to "wait for something to happen" before it can act?

ALLOWING MITIGATING FACTORS TO BE PRESENTED

PH Occupancy GB, Chapter 4, 4.10, page 59

- A participant should have the opportunity at an informal hearing to present mitigating factors to show that the family violation was caused by the disability and the participant has taken steps to ensure future compliance.
  - Suppose a person (whose cognitive disability limits his ability to remember appointments) fails to submit the required documentation and show up for the annual reexamination appointment, and receives a termination notice.
    - The person requests an informal hearing and, at the hearing, submits verification that the noncompliance was caused by the disability.
    - Further, he suggests sending a copy of all his paperwork to his mother, so she can help him submit the paperwork and remember meetings, and allow him to keep appointments.
  - The hearing officer should direct the housing authority to rescind the termination notice, with directions to the housing agency to send a duplicate copy of the paperwork for that client to his mother as well. If the participant subsequently still fails to show up to meetings and send in paperwork, even with the accommodation, he may again face termination unless a better accommodation is suggested and proves successful in meeting this family obligation.
  - At a hearing, if a participant or tenant claims they have a disability and need a reasonable accommodation to mitigate the PHA's decision, the hearing officer should remand the request back to the 504 coordinator before proceeding with the hearing.

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Section 5.3 Serious or Repeated Lease Violations by People with Disabilities

- Serious or repeated violations of the lease are also a violation of a family obligation to the PHA.
- 24 CFR 982.552(b)(2) states that in the voucher program, the PHA must terminate program assistance for a participant family evicted for serious violations of the lease. The family still has the right to request an informal hearing. Mitigating issues, such as any issues of reasonable accommodation not considered by the judge, may need to be considered at the informal hearing.

PH Occupancy GB, Chapter 17, 17.8, page 206

- If the manager of a public housing or voucher program decides to terminate an assisted family, the termination letter should include notice of the right to request a hearing and request that a reasonable accommodation may be considered prior to final termination.
- If the person claims that her inability to meet the lease provisions was a result of her disability and provides written proof from a third party that her behavior and the lease violation are connected, she may be entitled to show that a reasonable accommodation will allow her to meet the lease now, and therefore she should be recertified.
- If the person, with or without a reasonable accommodation, still fails to meet her family obligations, she is no longer considered qualified for the program. However, a housing agency should always try to work with the participant to come up with a reasonable accommodation for the breach of obligations once a disability has been presented and a request for an accommodation has been made.
- If the violation is unrelated to their disability, or when attempts at accommodation are rejected or fail to remedy the violation, it is appropriate to terminate a participant with a disability.

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- The trend in disability case law is to put the burden of proof on the PHA to show that the program requirement is essential and that the PHA made meaningful attempts to accommodate the disabled person prior to a negative determination.
- If the person had presented a viable plan, and the housing agency failed to give it proper weight and consideration, courts have often ordered housing agencies to reinstate the disabled person and possibly pay other penalties for not having done enough to reasonably accommodate the person, even if the conduct was violent. The PHA is often required to give the person with a disability another chance if the first accommodation fails, as long as the second plan seems viable.

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Learning Activity 5-3: Threat to Health and Safety

- 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.
- After consulting with James X, the attorney reports that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication.
- Question: What should the PHA do? Does the PHA have to "wait for something to happen" before it can act?

Learning Activity 5-4: Health and Safety

- Daybreak Apartments served Jack Hale, an HCV participant current with his rent with a thirty-day notice to "cure or quit" for violations of failure to "maintain the apartment in clean and sanitary condition." Jack did not "cure" his violation for unsanitary conditions and poor housekeeping and eventually his case went to court with Jack's legal counsel bringing the Fair Housing Act as Jack's defense. At trial, the landlord presented evidence that the apartment had a foul odor emanating into the rest of the building; that the toilet was frequently filled with feces and urine; and that garbage, rotting food, and dirty laundry were strewn about. Further, Jack has recently refused to return calls to his social worker and stopped seeing his therapist, and it is undisputed that his unit is filthy.
- Jack's counsel showed several documents to the court, including offers by the state mental health department to send in workers to help clean Jack's unit if by performing such duties, Daybreak Apartments would halt the eviction process. Daybreak Apartments never responded to Jack's counsel's request that his client be provided a reasonable accommodation in the form of the eviction process being terminated and assistance from a third party agency provided on a regular basis in cleaning Jack's unit.
- Daybreak Apartments is able to show that it gave Jack plenty of opportunities to clean his unit or get help cleaning his unit before the eviction process formally begun. Plus, there was absolutely no guarantee that the state agency could really help Jack keep his unit clean especially since Jack had a history of turning away inspectors or visitors to his apartment.
- Who wins? Is Jack still housed or on the street? Why?

Learning Activity 5-5: Consideration of Reasonableness of the Request

- Joe, a voucher holder, requested that he be given additional medical expenses when his rent was calculated as a reasonable accommodation for his disability. He had a particular disability and it was not safe for him to use a stove or oven. His PHA did not dispute that Joe was a person with a disability or that his disability prevented him from cooking meals in the stove or on the oven, but the PHA denied the requested additional medical allowance expenses.
- Joe's advocate argued in the appeal, conducted by the 504 coordinator, that Joe's disability made it necessary for Joe to go out to eat meals which resulted in increased food costs. Those food costs, the advocate argued, should be considered medical expenses as a reasonable accommodation of his disability by the PHA. Without the requested accommodation, Joe was unable to afford his rent, along with his other normal expenses, adversely impacting his quality of life and his ability to use and enjoy his dwelling. Put another way, but for the accommodation, the advocate argued, Joe "likely" will be "denied an equal opportunity" to use and enjoy his dwelling.
- The PHA responded that the requested accommodation was neither necessary nor reasonable. It contended that to the extent the disability presented a difficulty in his daily meal preparation, Joe had alternative methods of obtaining or preparing food which required no accommodation by the PHA. In the PHA's view, Joe's disability did not prevent him from obtaining or preparing meals in other alternative methods such as eating cold food, using a microwave, or having someone else prepare his meals. In fact, the PHA got Joe enrolled on a state program that allowed for a care attendant to come in several times a week (at no cost to Joe) to make meals.
- Joe, however, preferred eating out, did not want a care attendant in his home, and had shown a nexus between the disability and the requested accommodation. Case law and HUD guidance suggests that the PHA should take into consideration the person with the disability's preferred method of accommodation since that person is best aware of his/her own needs.
- Question: Did Joe need a reasonable accommodation? If so, was Joe's request reasonable?

Section 5.4 Reasonable Accommodation Functions

PROGRAM AREAS

- This section provides practical strategies for implementing the requirements in common function areas of PHA programming. We will cover functions particular to public housing and the housing choice voucher program in later chapters.
- Per Notice PIH 2002-01, Notice PIH 2003-31 and DOJ/HUD Joint Memo 2004, Notice PIH 2010-26, and HUD regulations, PHAs are required to make reasonable adjustments to their rules, policies, practices and procedures in order to enable an applicant or assisted individual with a disability to have an equal opportunity as that afforded others to fully participate in the program and services of the PHA.

Notice PIH 2003-31

- NOTE: "The Department's Office of Fair Housing and Equal Opportunity will continue, as a matter of routine, to request copies of any self-evaluations, needs assessments or transition plans in every compliance review and complaint investigation conducted of a HUD recipient. These documents may also be reviewed by other HUD offices in conjunction with funding applications and addressing noncompliance issues that may arise."

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Notice PIH 2001-01

- Reasonable accommodation pertains to making reasonable adjustments in all functional areas of PHA programming, including:
  - Applications
  - Admissions
  - Determinations of eligibility
  - Briefings
  - Inspections and repairs
  - Leasing
  - Modifications
  - Landlord outreach
  - Mobility counseling
  - Annual re-exams
  - Transfers
  - Portability
  - Termination of tenancy
  - Hearings
- Some examples from these functions may include:

24 CFR 8.21(c)(2)(i)

  - Visiting an applicant at home for an eligibility interview
  - Allowing briefings, annual reexaminations, informal reviews, informal hearings, and grievance hearings to be conducted remotely

Notice PIH 2010-26

  - Not prohibiting an eligible disabled family from accepting a nonaccessible unit for which the family is eligible if a nonaccessible unit becomes available before an accessible unit

24 CFR 8.20

    - In fact, the PHA is required to modify such a nonaccessible unit as needed, unless the modification would result in an undue financial and administrative burden.

24 CFR 100.204(b)(2)

  - Re-assigning parking spaces

24 CFR 982.402(b)(6); Notice PIH 2010-26

  - Providing an extra bedroom for a live-in aide

24 CFR 5.303(a); 24 CFR 960.705(a)

  - Allowing service animals and assistance animals

24 CFR 982.303(b)(2)	- Extending voucher search time
24 CFR 982.306(d)	- Allowing an HCV participant to rent from a relative
Notice PIH 2010-26	- Allowing transfers to a first floor unit
Notice PIH 2014-25; 24 CFR 982.505(d)	- Providing an extra bedroom for special medical equipment
HUD/DOJ Joint Statement 5/17/04; 24 CFR 966.7	- Allowing mitigating factors to be presented in a lease termination grievance
28 CFR Part 35; 24 CFR 100.203; 100.204; 8 Subpart C	- Physically altering a unit
4350.3 REV-1, 2-29.B.	- Requests for auxiliary aids such as visual alarms, tactile signs, visual doorbells, materials in large print or Braille, and/or recordings or such information
24 CFR 945.105	- Providing accessible transportation so a tenant may participate in a PHA-sponsored activity
FHA Interpretation by Courts and Advocates	- Adjusting a rent payment schedule to accommodation when an individual receives SSA assistance. • SSA typically sends out SSDI payments on the second, third, or fourth Wednesday of each month, based on the recipient's birthday. • If a person with a disability relies solely on SSDI for income, the rent due date may not align with their benefit payment schedule. Requesting a different due date to align with SSDI receipt is a common example of a reasonable accommodation.

Notice PIH 2010-26; 24 CFR 8.33

- Essential program requirements need not be waived. A reasonable accommodation allows a person with a disability to meet essential requirements of the lease, but it does not require reducing or waiving essential requirements to rules, policies, functions, or physical space.
  - For example, waiving the requirement to pay rent would be waiving an essential program requirement. Knocking out a wall in the public housing unit that would impair the unit's structural integrity is not reasonable.

24 CFR Part 8, Subpart C

  - Further, reasonable accommodations are sometimes costly. Congress anticipated this additional financial commitment and made clear that they intended the federal programs to lay out resources where necessary to ensure equal access to persons with disabilities.

Notice PIH 2010-26, page 26 – Accessibility Funding Sources

- In determining whether a particular accommodation is an undue financial burden, the public housing budget as a whole is considered.

PROGRAM COMPLIANCE PROCEDURES AND REQUIREMENTS

- Reasonable accommodations are only one aspect of the compliance efforts required by the PHA under Section 504, the ADA, and the Fair Housing Act. Compliance can be divided into two general categories:
  - Program accessibility: General changes to PHA programs and facilities in anticipation of the needs of participants with disabilities
  - Reasonable accommodations: Request for a particular accommodation by a participant with a disability

PROGRAM ACCESSIBILITY

24 CFR 100.204;
24 CFR Part 8, Subpart C;
Notice PIH 2010-26

- The 504 regulations require "program accessibility" and list specific requirements and written plans a PHA must implement. A PHA needs to have taken inventory of structural changes required to achieve program accessibility and have removed physical barriers to their units, PHA offices, and service support centers. A PHA should have an inventory process of assuring that it is meeting HUD's percentage requirements for accessible public housing units. In addition, the PHA should have on file period reviews of its program's rules, policies, and procedures to remove procedural barriers. These reviews work together to ensure general program accessibility.
- These types of self-evaluations will become particularly relevant to PHAs as HUD implements its formal civil rights review process. In particular, a public housing program will need to know the number and size of units designated as accessible.

ACCOMMODATING PARTICIPANTS AND TENANTS

- Below are examples illustrating the type of accommodation the Fair Housing Act and Section 504 require.

HOME VISIT FOR THE ANNUAL REEXAMINATION

- It may be reasonable for individuals with disabilities to request that PHA workers travel to their homes, or conduct remote meetings, for the reexamination appointment if their disability makes it extremely difficult to get to the office. The request might be made by an individual with limited physical mobility, an individual who has a fear of going to crowded public places, or by a participant with environmental illnesses who is sickened by products used in the PHA office. Certainly with the last example, if a person is sickened by the PHA's carpet or cleaning products used, the PHA may very well ask the participant to meet somewhere close to the PHA (a public library private room for example), or conduct the meeting remotely, if that saves staff time and still meets the requester's need for her accommodation (i.e., away from the allergens in the PHA offices).

HOARDERS

- Housing authorities and owners have long dealt with problems caused by "pack rats," from overflowing boxes to the sheer volume of weight pressing down on a floor. Since hoarding was officially recognized as a mental disorder in May 2013 by the American Psychiatric Association, hoarders are now considered part of a protected class.
- The goal is to resolve these issues early, so residents and participants don't end up being terminated and the PHA isn't sued by a fair housing agency.

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First Step: Unit Recognition

- A PHA can recognize that hoarding is occurring either during tenancy, or after the resident has moved out. There's not much that a manager can do in being proactive to prevent it, but early recognition will help alleviate long-term issues.
- In most cases, not being allowed in the unit in the first place is a tell-tale sign that something is amiss. Other indicators can be a sudden bug infestation or rodent problem in a building.
- Once the problem is discovered, PHAs and landlords can ask tenants to clean up, then follow up with an inspection (with proper notice). An up-to-date lease can clarify that a tenant obligation is to keep a reasonably tidy unit that poses no fire hazard or safety threats.
    - It is reasonable to require that a resident comply with bedbug remediation efforts. For example, residents are often required to wash fabrics in hot water (between 120-140 degrees), putting fabrics in trash bags or a freezer, etc.

Second Step: Reasonable Accommodation

- Because hoarding is classified as manifestation of a disability, a PHA or landlord must consider a request for a reasonable accommodation. If an RA has been requested, it's necessary to assist them in their efforts to bring the condition of their unit up to proper safety. That can be as simple as allowing them to take the necessary steps to get help and giving them a timeline to come up to compliance with reasonable rules. Their disability should generally allow them more cleanup time after the PHA's or owner's request.
- For example, an HCV participant working with an advocate may agree to a goal of clearing a pathway with a width of at least three feet in the first month, then with a width at least five feet in the second month, etc.

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- In this case, the PHA would consider extending the deadline for bringing the unit into HQS compliance.
  - However, a life-threatening HQS violation is not subject to these extended deadlines. For example, if the city's code compliance deems the unit a public health threat or fire safety threat, these problems must be remedied within 24 hours.
- It's when the tenant or participant ultimately doesn't bring the unit up to compliance, or refuses to, that the PHA or owner has more leverage to evict after documenting all communication and evidence that they've worked with the person to no avail. Reasonable accommodation relies upon some level of cooperation.

Making Exceptions to the Administrative Plan or ACOP Requirements for Absences

- Exceptions to absence policies are often reasonable. For example, a housing agency that prohibits absences from the unit for more than 30 days in a row may grant an exception so a person with a disability can undergo a 45-day medical treatment at an out-of-town clinic.
- Remember that the PHA may reasonably have a need to know how long it's expected that the person is going to be absent and who to contact during the person's absence.

Live-in Aides and OIG Audits

24 CFR 5.403

- Who is a live-in aide?
- A *live-in aide* is a person who resides with one or more elderly persons, near-elderly persons, or persons with disabilities, and who:
  1. Is determined to be essential to the care and well-being of the persons
  2. Is not obligated for the support of the persons
  3. Would not be living in the unit except to provide the necessary supportive services

- A *live-in aide,* by HUD's definition, is one whose primary residence is in the subsidized unit of a tenant whose disability requires the presence of the aide.

Notice PIH 2014-25

  - Occasional, intermittent, multiple, or rotating care givers typically do not reside in the unit and therefore would not qualify as live-in aides. However, the latest notice suggests that exceptions could be made as a reasonable accommodation.
  - The aide does not become a permanent member of the household and has no claim to stay if the tenant dies or otherwise leaves the subsidized unit.

24 CFR 5.609(c)(5)

  - The aide's income is not counted in the calculation of the tenant's income eligibility or rent obligation.

- The PHA should develop policy and procedures for verifying the necessity of a live-in aide. Because the housing agency is not qualified to determine whether the person with a disability requires the assistance of a live-in aide, it is necessary to obtain reliable third-party verification that this accommodation is required.
  - As this may be a costly (extra bedroom subsidy) and controversial accommodation (the live-in aide may work outside the home and have a substantial income that is excluded from the rent calculation), the more standardized the process, the safer a housing agency will be against a lawsuit and program abuse by participants.

Notice PIH 2010-26

  - If a family qualifies for a live-in aide, and depending on the PHA's occupancy standards, the PHA should grant the family an additional room, or in the case of the voucher program, a larger subsidy standard, to include a bedroom for the live-in aide. A live-in aide should not be required to share a bedroom with another member of the household.

Notice PIH 2014-25

- The key issue with live-in aides is whether an assistant is a live-in aide by HUD's definition or simply a "helper" (See HUD Live-In Aide Fact Sheet 2003).

- Helpers who come and go during the day are considered guests of the participant. A participant may have one or several assistants that may come or go for medical/disability purposes through a state Medicaid or social security office program for example. Unless these support staff personnel engage in behavior that violates the lease, the presence of a non-live-in aide is not usually of interest to the PHA or landlord.
- However, if the aide lives with the participant, then a number of HUD regulations, including those regarding income exclusions, household size, and background checks become relevant.
- Critical issues regarding live-in aides include documenting the need for the live-in aide, conducting the screening process, and applying appropriate occupancy/subsidy standards.

RELATIVES

Live-In Aides and the Housing Choice Voucher Program Fact Sheet, August 2003

- Relatives are not automatically disqualified from serving as live-in aides.
- HUD does not prohibit family members from qualifying as live-in aides, but the family member must meet the three parts of the HUD definition. If individuals choose to live as a family and share resources, there is no live-in aide. In such a situation, a family member is taking care of a relative with a disability, as many unassisted families do.

Live-In Aides and the Housing Choice Voucher Program Fact Sheet, August 2003

- The housing agency may establish a policy in the administrative plan and ACOP for determining whether a relative qualifies as a live-in aide. One approach might be for the PHA to inform families that the PHA will consider the request for the addition of a relative as a PHA family member, not as a live-in aide. However, the PHA will further inform families that they may rebut this presumption by certifying that:
  - The person is capable of and essential to providing the required care

- The person has never been a member of the household while the family was receiving housing assistance, and the family member has not made regular contributions to the household's income while the family has been receiving housing assistance
- There is no reason for the person to live in the unit other than to provide care for the persons with disabilities
- The person intends to maintain separate finances and live independently from the assisted household except to provide the necessary care and will not be considered a remaining family member if the person with the disability leaves the unit or passes away

- If a current PHA-assisted family member wishes to switch to live-in aide status, it will most likely be difficult for that member to meet HUD's three-part qualifications for live-in aide status.

Johnson v Guardian Mgmt (April 2021)

- Generally, a spouse would not qualify to serve as one's live-in aide because they are already living in the unit and legally obligated for the support of their spouse. However, a court has found circumstances where a separated spouse could meet HUD's definition of a live-in aide. To prove that the separated spouse (live-in aide) is not obligated for the support of the tenant, verification could include a marital separation affidavit, divorce decree or legal separation agreement, tax returns showing that the tenant and the separated spouse file separate tax returns or other third-party income verifications that show each of them is financially independent.

LIVE-IN AIDE SCREENING

24 CFR 982.606(b)(2); 24 CFR 982.316

- The PHA must approve a live-in aide if needed as a reasonable accommodation in accordance with 24 CFR Part 8 to make the program accessible to and usable by the family member with a disability. However, at any time, the PHA may refuse to approve a particular person as a live-in aide, or may withdraw such approval if any of the following apply:
  1. The person commits fraud, bribery or any other corrupt or criminal act in connection with any federal housing program
  2. The person commits drug-related criminal activity or violent criminal activity
  3. The person currently owes rent or other amounts to the PHA or to another PHA in connection with Section 8 or public housing assistance under the 1937 Act

24 CFR 960.204, and 24 CFR 982.553

- This is not an exhaustive list. The PHA could incorporate other screening factors into its policy. However, the PHA must develop live-in aide screening criteria that at the minimum meets HUD requirements for background screening for that housing program. For example, no lifetime registered sex offenders may be admitted as household members in either PH or HCV programs. The PHA must screen live-in aides with regards to criminal background and not allow live-in aides into the program that, for additional example, do not meet HUD regulations with regards to current illegal drug use or violent criminal activity that poses a threat to the safety of others.
- If objective criteria stated in the PHA's administrative plan and ACOP is used to evaluate all live-in aides, a PHA or private owner can refuse to approve a live-in aide based on these objective screening requirements. Financial reasons (the aide has a low income or poor credit) is probably not a good reason to turn down an aide, since the aide will not be paying rent.

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24 CFR 966.4(d)(3)(i) and 24 CFR 982.551(h)(4)

- While PHAs have discretion as to how to screen live-in aides, people with disabilities should be made aware of the criteria up front in order to save the PHA and persons with disabilities an unnecessarily prolonged process for live-in aide approval.

Notice PIH 2014-25

- Since HUD regulations require that PHAs must approve a specific person identified as the live-in aide, PHAs may not approve an unidentified live-in aide, nor a larger unit than the family qualifies for under the PHA's subsidy standards, for an unidentified live-in aide.
  - Note that HUD's Office of Inspector General, has documented, in numerous audit reports over recent years circumstances where PHAs approved an extra bedroom in the HCV program (and therefore extra subsidy dollars) but did not screen the individual aide for that family. In many circumstances, OIG demanded in its audit reports that the PHA pay HUD back for these additional subsidy dollars spent on a live-in aide where there was either no documentation of need from a third party professional or the PHA had not screened the proposed aide before the aide moved in and the family was granted the additional subsidy.

SEPARATE LEASE/PROGRAM AGREEMENTS ADDENDUMS

- As a best practice, a live-in aide housing agreement may be required under PHA policy. The live-in aide is not a family member and therefore is present in the unit at the convenience of the person with the disability. The housing agency could require that the live-in aide sign an addendum, thereby making clear that the person is present pursuant to an employment agreement and has no property interest in the unit.

- The agreement could also require:
  - Signatures of the tenant, live-in aide, and owner (PHA or private landlord)
  - The live-in aide's vehicle information, where appropriate, and/or
  - That the live-in aide understands the property's or program rules
  - By when (how many days) the live in aide must vacate the unit if the person with disabilities leaves the unit or no longer has a documented need for the aide due to disability
  - If or when the PHA may reverify the need for the aide (some PHAs review need each year at annual re-exams)
  - If or when the PHA may do additional background screening on the aide (in public housing some PHAs do background checks each year at annual re-exams)
- Such documentation also assures that the family has been given notice that it is accountable for any lease violations by the live-in aide.

DOCUMENTATION

Notice PIH 2014-25

- The PHA should request documentation from a third-party professional that the live-in aide is essential to the care and well-being of the assisted family member. Verification should demonstrate that a live-in aide is necessary to...

42 U.S.C. 3604(f)(3)(B), Fair Housing Act

  - "afford...equal opportunity" to the assisted person with disabilities to use and enjoy his assisted housing.
- The key language here is that the live-in aide is necessary. Keep in mind that perhaps day or night shift home health aides will be as accommodating to the person with a disability while not causing the PHA to have to grant an additional bedroom and larger subsidy to a person with disabilities.

24 CFR 982.402(b)(6)

- PHAs should think about having a live-in aide verification form that makes it clear to the medical provider what the PHA is looking to verify. Many providers don't understand that within the definition of a *live-in aide* is this requirement of being "essential" to the person's care and that the PHA is not looking to approve a part-time caregiver but rather is expending additional subsidy dollars that may prevent the PHA from assisting other families.
- Sample language that might be considered under your PHA policy is:
  - "A live-in aide is needed because a daily in-home worker or rotating shifts are not equally effective or not available. Please note that verification may be required."
  - "If your client's request is granted, the PHA will allow the family an extra bedroom and not count the live-in aide's income in calculating rent. This affects the total number of families the housing agency can assist. Many other people on the waiting list are also deserving of housing assistance, so we ask that you give careful, reasoned thought to this matter."
- See additional language ideas included in sample live-in aide verification forms in the reference section of this book
- There are pros and cons to putting such sample language on verification forms. If additional language is used on verification forms for live-in aides, be sure that the PHA is not in danger of deterring professionals from verifying the support that individuals with disabilities may require to be able to maintain their independent living.

- HUD and the Office of Inspector General have made clear that a live-in aide takes up additional HUD resources and PHAs must have documentation to show the necessity for a live-in aide. The PHA may be able to explore other, non-subsidy-affecting accommodation efforts with the requester to provide an accommodation.

Live-in Aide's Spouse and/or Children

Notice PIH 2014-25

- With the approval of the PHA, the live-in aide may also bring their spouse and children into the unit so long as the addition will not overcrowd the unit or require a larger bedroom subsidy than the extra bedroom required for the live-in aide. No additional income or allowances for the family would be applied.

Annual Recertification of Necessity and Presence of Live-in Aide

- Once a live-in aide is approved, the housing agency can require an annual recertification that the disability still exists and that a live-in aide is still present in the unit.

Temporary Aide While Decision Is Pending

Live-In Aides and the Housing Choice Voucher Program Fact Sheet, August 2003

- The housing agency may want to consider allowing a temporary aide to live in the unit while the decision whether to grant approval for the live-in aide is pending. This could be a reasonable accommodation of the administrative plan's guest rules to allow a person necessary care while the housing agency's decision is pending and prevent harm to the participant while the request is being processed. The housing agency should include language authorizing the temporary aide only until a decision is made. If the decision is negative, the person must leave the unit, join the family, or risk being an unreported household member.

ADDITIONAL BEDROOM FOR MEDICAL EQUIPMENT

- The procedure for considering this request should be similar to the process for considering a live-in aide. First the housing agency should verify that a household member qualifies as a person with a disability. Then the housing agency should obtain third-party verification that the extra room is medically necessary. When considering the necessity of a larger bedroom size, and hence a larger subsidy size for the family, all living and sleeping rooms in the current unit must be insufficient to meet the family member's need. The housing agency may suggest an equally effective alternative.

Notice PIH 2014-25

- While PHAs may approve an additional bedroom for medical equipment if the need is documented by a health care provider, the actual equipment in the extra bedroom should be verified by the PHA during the annual inspection of the unit.
  - How do you notify your inspectors with regard to use of extra bedrooms?

Notice PIH 2014-25

- Additionally, if the extra bedroom is not being used for the intended purpose, the PHA must reduce the subsidy standard and corresponding payment standard at the family's next annual recertification. However, the PHA may take further action, if it believes any family obligations under 24 CFR Section 982.551 were violated.
  - For example, if a participant with a disability needs room for exercise equipment for his health, the housing agency might suggest that the participant enroll at the local YMCA or YWCA instead. If a competent third party verifies the medical necessity for an extra bedroom, the housing agency could require at annual recertification a renewal certification that the disability still exists and the accommodation is still necessary. Inspectors should verify how the room is being used (for exercise equipment) at least annually.

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ASSISTANCE ANIMALS

HUD/DOJ Joint Statement 5/17/04; HUD webpage on Assistance Animals at https://www.hud.gov/helping-americans/assistance-animals; DOJ, Civil Rights Division's webpage on Frequently Asked Questions about Service Animals and the ADA at https://www.ada.gov/resources/service-animals-faqs/

- Notice FHEO 2020-01, published January 28, 2020 and rescinded on September 17, 2025, provided guidance based on the DOJ online FAQs about Service Animals and the ADA to help PHAs and other housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability who simply wants to have a pet or avoid the costs and limitations imposed by the PHA's pet policies.
  - The notice states that Fair Housing Act (FHA) complaints concerning denial of reasonable accommodation and disability access comprise almost 60 percent of all FHA complaints.
- The rescinded Notice FHEO 2020-01 is no longer authoritative so it should not be relied upon directly but it is generally consistent with the information provided in HUD's regulations prohibiting discrimination under the FHA, including HUD's online webpage on assistance animals, the HUD/DOJ Joint Statement on Reasonable Accommodation, and DOJ online FAQs about service animals and the ADA.

TWO TYPES OF ASSISTANCE ANIMALS

https://www.justice.gov/servicemembers/media/1375951/dl

- There are two types of assistance animals: (1) service animals, and (2) other animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in the FHEO guidance as *support animals*).
- Assistance animals are not pets. An animal that does not qualify as a service animal or support animal is a pet for purposes of the FHA.
  - A PHA may charge a fee or deposit for pets in its policy and subject to local law, but not for service animals or other disability-related assistance animals.

- While most requests for reasonable accommodations involve one animal, requests sometimes involve more than one animal (for example, a person has a disability-related need for both animals, or two people living together each have a disability-related need for a separate assistance animal). The decision-making process the DOJ FAQs about service animals and the ADA should be used for requests for exceptions or modifications to the PHA's rules, policies, practices, and procedures so that persons with disabilities can have assistance animals in the housing where they reside.

SERVICE ANIMALS

- PHAs should initially follow the Department of Justice (DOJ) analysis to assessing whether an animal is a service animal under the Americans with Disabilities Act (ADA).
- Under the ADA, service animal means any dog (or miniature horse) that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability.

ADA FAQs, updated February 2020
https://www.ada.gov/resources/title-ii-primer/

- People with disabilities have the right to train the dog themselves and are not required to use a professional service dog training program. Housing providers may not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

- As a best practice, housing providers may use the following questions to help them determine if an animal is a service animal under the ADA:
  1. Is the animal a dog or miniature horse?
     - If "yes," proceed to the next question.
     - If "no," the animal is not a service animal but may be another type of assistance animal for which a reasonable accommodation is needed (support animal).
  2. Is it readily *apparent* that the dog/miniature horse is trained to do work or perform tasks for the benefit of an individual with a disability?
     - If "yes," further inquiries are unnecessary and inappropriate because the animal is a service animal.
     - If "no," proceed to the next question.

     It is readily apparent when the dog/horse is observed:
     - Guiding an individual who is blind or has low vision
     - Pulling a wheelchair
     - Providing assistance with stability or balance to an individual with an observable mobility disability
  3. It is advisable for the PHA to limit its inquiries to the following two questions: (1) "Is the animal required because of a disability?" and (2) "What work or task has the animal been trained to perform?"
     - Do not ask about the nature or extent of the person's disability, and do not ask for documentation.
     - If the answer to question (1) is "yes" and work or a task is identified in response to question (2), grant the requested accommodation, if otherwise reasonable. The animal qualifies as a service animal.

    - If the answer to either question is "no," the animal does not qualify as a service animal but may be a support animal (other type of assistance animal).

- Performing "work or tasks" means that the dog/horse is trained to take a specific action when needed to assist the person with a disability.
  - If the individual identifies at least one action the dog/horse is trained to take that is helpful to the disability other than emotional support, the dog/horse should be considered a service animal and permitted in housing, including public and common use areas. Housing providers should not make further inquiries.
  - If no specific work or task is identified, the dog/horse should not be considered a service animal but may be a support animal (another type of animal for which a reasonable accommodation may be required). Emotional support, comfort, wellbeing, and companionship are not considered a specific work or task for purposes of analysis under the ADA.

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ADA FAQs about Service Animals

- **What does *under control* mean? Do service animals have to be on a leash? Do they have to be quiet and not bark?**

Answer to Q 27
https://www.ada.gov/resources/service-animals-faqs/

- The ADA requires that service animals be under the control of the handler at all times. In most instances, the handler will be the individual with a disability or a third party who accompanies the individual with a disability.
- In the school (K-12) context and in similar settings, the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal. The service animal must be harnessed, leashed, or tethered while in public places unless these devices interfere with the service animal's work or the person's disability prevents use of these devices. In that case, the person must use voice, signal, or other effective means to maintain control of the animal.
  - For example, a person who uses a wheelchair may use a long, retractable leash to allow her service animal to pick up or retrieve items. She may not allow the dog to wander away from her and must maintain control of the dog, even if it is retrieving an item at a distance from her.
  - Or, a returning veteran who has PTSD and has great difficulty entering unfamiliar spaces may have a dog that is trained to enter a space, check to see that no threats are there, and come back and signal that it is safe to enter. The dog must be off leash to do its job, but may be leashed at other times.
- Under control also means that a service animal should not be allowed to bark repeatedly in a lecture hall, theater, library, or other quiet place. However, if a dog barks just once, or barks because someone has provoked it, this would not mean that the dog is out of control.

- **What can my staff do when a service animal is being disruptive?**

Answer to Q28 https://www.ada.gov/resources/service-animals-faqs/

- If a service animal is out of control and the handler does not take effective action to control it, staff may request that the animal be removed from the premises.
- **Note:** A good rule of thumb is to do what a PHA would do if a person was engaging in the disruptive behavior. Just as we would find a lease violation of the requirement not to cause serious damage to property (for peeing in the hallway, for example) or pose a direct threat to other residents, so must a service animal under the control of the person with a disability be held responsible.

DOCUMENTATION FROM THE INTERNET

- Some websites sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee.
- The DOJ FAQ Question 17 addresses this issue and states: "There are individuals and organizations that sell service animal certification or registration documents online. These documents do not convey any rights under the ADA and the Department of Justice does not recognize them as proof that the dog is a service animal."

SUPPORT ANIMALS (ASSISTANCE ANIMALS OTHER THAN SERVICE ANIMALS)

- PHAs and other housing providers may use the following questions to help them make a decision when the animal does not meet the definition of service animal.
  1. Has the individual requested a reasonable accommodation to get or keep an animal in connection with a disability?
     - If "yes," proceed with question 2 below.

- If "no," the PHA or other housing provider is not required to grant a reasonable accommodation that has not been requested. Assess under the PHA's pet rules.

2. Is the request by or on behalf of a person with disabilities (ADA/FHA/504)?
   - If "yes," proceed with the reasonable accommodation process.
     - If the disability and nexus are known or obvious, then consider the reasonableness of the request.
     - If the disability is obvious or known to the PHA but the nexus is not clear or known, the PHA may seek third-party verification of the nexus.
   - If "no," consider the request as a request for a pet.

FURTHER GUIDANCE

FHEO Enforcement Guidance Memo, 5/22/26

- HUD's Office of Fair Housing and Equal Opportunity (FHEO) issued a memorandum announcing a change in how the agency will enforce housing discrimination complaints involving emotional support animals (ESAs) under the Fair Housing Act. Specifically, the memo states that "effective immediately, for complaints related to animal-related reasonable accommodations, FHEO will find reasonable cause and recommend charges only for those cases involving animals trained to provide disability-related assistance."
- This document is an internal FHEO memo regarding enforcement-priority directives for FHEO staff. There have been no law or regulatory changes. This is not a public-facing proposed rule change. It applies only to Fair Housing Act complaints and explicitly states it does not apply to 504 or ADA complaints (so it is of limited application to PHAs).

- According to FHEO, animals that provide emotional support, well-being, comfort, or companionship do not meet the ADA's definition of a service animal because they are not trained to perform disability-related tasks. The memorandum clarifies, however, that unlike Titles II and III of the ADA, an animal-related reasonable accommodation under the Fair Housing Act could involve animals other than dogs/miniature horses, provided the animal is trained to perform a disability-related service.
- The FHEO memo states that "While requests to waive pet policies for animals trained to perform specific disability-related services are assumed reasonable, requests to waive pet policies for untrained ESAs are not. FHEO no longer expects housing providers to categorically extend accommodations for trained assistance animals to untrained ESAs."
- The memorandum also reaffirms the rescission of Notices FHEO 2013-01 and FHEO 2020-01, which provided guidance on assistance animals, including ESAs, as reasonable accommodations under the Fair Housing Act. In addition, HUD announced plans to pursue notice and comment rule-making on animal-related reasonable accommodations and explore further alignment between Fair Housing Act and ADA standards.
- The most significant practical change is that HUD is now unlikely to pursue enforcement actions on complaints involving untrained emotional support animals. What has not changed is the Fair Housing Act itself. The law continues to require housing providers to consider reasonable accommodation requests for individuals with disabilities. HUD's memorandum reflects a shift in enforcement priorities rather than a change in the statute, and individuals still retain the right to seek relief through a private action in court.

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Example 1

- A voucher client complains that their private landlord won't let them have an emotional support cat. The cat isn't trained to do anything specific but lowers anxiety. HUD won't get involved. The client can still pursue the matter in court—HUD takes no position on that. HUD simply won't use its resources to investigate this case.

Example 2

- A voucher client complains that the landlord won't let them have a support parrot. The client claims that the parrot has been trained to alert the client when they are about to experience a seizure by climbing the client's leg and squawking "call 911." The parrot isn't a "service animal" because it's not a dog or mini horse, but since this animal is trained to do a disability related task, the memo suggests that HUD may get involved in that FHA complaint.
- Both of these examples are limited to the private landlord who may house our voucher program participant (and the FHA applies to all assisted and unassisted tenants equally). Public housing and PHA-owned properties are also subject to section 504 of the Rehabilitation Act and HUD has not addressed how it will handle such complaints under that law.

GENERAL CONSIDERATIONS REGARDING ASSISTANCE ANIMALS

- The ADA does not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others.
- A PHA or other housing provider may, therefore, refuse a reasonable accommodation for an assistance animal if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal (e.g., keeping the animal in a security enclosure).

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- PHAs struggle with requests for more than one assistance animal, which may or may not be in addition to any approved pets. There is no hard and fast answer. However, many states and localities have density limitations based on square footage. Health and safety is always a primary consideration.
- A reasonable accommodation may include a reasonable accommodation to a land use and zoning law, Homeowners Association (HOA) rule, or co-op rule.
- Pet rules do not apply to disability assistance animals.
- A person with a disability is responsible for feeding, maintaining, providing veterinary care, and controlling his or her assistance animal. The individual may do this on their own or with the assistance of family, friends, volunteers, or service providers.
- Before denying a reasonable accommodation request due to lack of information confirming an individual's disability or disability-related need for an animal, the housing provider is encouraged to engage in a good-faith dialogue with the requestor called the "interactive process."

Issues in Public Housing and for Other Recipients of Federal Funding

Service Animals

Because public housing, PHA-owned PBV, and PHA-owned PBRA developments are publicly owned, under the ADA, a service animal must be permitted in all areas of the facilities where members of the public are allowed.

For example, under the developments identified above, service dogs are allowed in the development's community room and community kitchen.

On the other hand, support animals are not necessarily allowed in the community room and community kitchen in these types of developments. However, a request for the support animal to accompany the resident in these areas must be considered as a reasonable accommodation.

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Local Codes and Ordinances

- From the Department of Justice's "Frequently Asked Questions About Service Animals and the ADA" (website address: https://www.ada.gov/regs2010/service_animal_qa.html#bre):
  - **Question 24**: If a municipality has an ordinance that bans certain dog breeds, does the ban apply to service animals?
  - **Answer**: No. Municipalities that prohibit specific breeds of dogs must make an exception for a service animal of a prohibited breed, unless the dog poses a direct threat to the health or safety of others. Under the "direct threat" provisions of the ADA, local jurisdictions need to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history, but they may not exclude a service animal because of fears or generalizations about how an animal or breed might behave.
- It is important to note that breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions.

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ISSUES IN THE HCV PROGRAM

- As noted, service animal rules do not apply to private-market rental housing. Housing providers such as HCV landlords are, however, required to comply with the reasonable accommodation provisions of the Fair Housing Act unless they are exempt.
- In the voucher program, it is the landlord, rather than the PHA, who is required to approve or deny a request for an assistance animal.
- FHEO and the Department of Justice have charged many private landlords with Fair Housing Act violations due to unlawful denials of accommodation requests for assistance animals.
- The role of the PHA is limited in this situation. While the PHA can offer information on the fair housing obligations of HCV landlords, the PHA cannot force an owner to permit program participants to have an assistance animal.
- The PHA is required to assist an applicant or participant with completing a complaint form and submitting it to FHEO, at the client's request.
- If an HCV landlord will not approve a valid request, the PHA could accommodate the participant by permitting a move with continued assistance, even if such a move would not otherwise be allowed under PHA policy.

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Example 1

- A public housing property manager notices that Richard, a resident who uses a wheelchair, has a new dog in his unit. The manager lets Richard know that he will need to pay the usual pet deposit required for all residents keeping pets. She lets him know that he can pay it in installments if he talks to one of the housing specialists.
- Richard replies that he talked with an advocate at the disabilities rights center. The advocate said that since Richard was a person with disabilities, his animal was a support dog and that Richard should not have to pay the PHA's pet deposit.
  - How should the PHA manager respond to Richard? Richard is a person with disabilities. Will he have to pay the pet deposit?

CASE STUDY: UNUSUAL PETS

- Juan keeps several snakes in his public housing unit. He often carries them around his neck in the common areas of the development. After receiving complaints, the property manager discovered that Juan had such snakes and let Juan know through a conversation and a follow-up letter that snakes were not allowed under the property's pet policy. Juan informs the manager that he needs the snakes because of a disability.
- The manager responded that she needed documentation of Juan's disability from a knowledgeable professional. She explained she also needed documentation that the need for the snakes was related to his disability before she could allow the snakes as support animals. The manager asked Juan to fill out the property's reasonable accommodation request form. The manager had Juan sign a release so that she could send verification documents to Juan's knowledgeable professional 1) verifying his disability and 2) verifying the need for snakes (the nexus between the snakes and Juan's disability). Juan never completed the property's RA request form.
- Juan's doctor returned the verification form to the property office stating that Juan was indeed a person with disabilities. To the manager's surprise, Juan's doctor further verified that the snakes provided a necessary therapeutic benefit to the specific form of the disability from which Juan suffered and were a necessary accommodation to remove a barrier to his housing.
- The manager let Juan know that she could accommodate the snakes if Juan could provide documentation that the snakes were not venomous. Also, Juan needed to agree to keep the snakes in his unit and to have them restrained (for example, in a cage) outside of his apartment.

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- Juan assures the manager that the snakes are harmless and agrees to get reassurances that the snakes are not venomous (from the pet store or his veterinarian). After several days and reminders, Juan still did not produce documentation regarding the safety of the snakes. Juan continued to walk around the development with the snakes around his neck or in his hands making some residents very nervous. Juan was sent a warning notice that he was non-lease compliant for disturbance of other's peaceful enjoyment of the development and for having the snakes loose outside his unit. Eventually, the manager sent Juan an eviction notice.
  - Juan requested a grievance hearing to contest his eviction. Juan brings his Legal Aid attorney to the hearing. What should the manager do about Juan? Will Juan be able to keep his snakes? Should he have to keep them in his unit?

  - At the hearing, Juan's attorney shows the manager additional documentation that Juan's disability requires that Juan needs to be in actual physical contact with the snakes, and that the manager must not proceed with the eviction but rather must accommodate Juan's disability and allow him to stay. Question: How should the manager respond?

- Will Juan be able to keep his snakes?

- Should he have to keep them in his unit or restrained outside?

OTHER DEPOSITS/LATE FEES

HUD/DOJ Joint Statement 5/17/04

- Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

Example 1

- Ernie has a cognitive disability and often forgets to pay his rent on the first of the month. He has a standing monthly appointment with his social service coordinator on the fifteenth of each month. The PHA has sent Ernie a warning regarding his late rent. This past month, Ernie's rent was late for the third month in a row. Per PHA policy, if a resident pays rent late three months in a row, a late fee is imposed. Ernie has been paying his rent on the fifteenth of each month when his social service coordinator comes by to help him go through all his expenses and appointments for the month and mails Ernie's rent for him on his way back to the office.

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- This continues on for several more months. Ernie does not read well. He has not been showing the PHA notices of late fee payments to his social service coordinator because he does not want to get in trouble.
- Because Ernie has not responded to the PHA's request for late payment fees, Ernie soon has an eviction notice on the door.
- Ernie's social service coordinator schedules a meeting with the PHA regarding the eviction notice.
  - At the hearing with Ernie, his social service coordinator and the PHA, what should be discussed?

  - How should it be discussed?

  - Should Ernie be able to stay?

  - What about Ernie's late fees?

- Should the PHA agree to put Ernie on a repayment plan?

Example 2

- Simon is substantially limited in his ability to walk and uses a motorized scooter for mobility purposes. He applies to live with his voucher in a building that has just had the flooring replaced. The manager is sympathetic to the assisted individual's need for his motorized scooter, but lets Simon know that the weight of the scooter will wear on the floor. Plus, the manager has had past experience with a tenant whose scooter not only wore down the hallway carpet but also left marks on the corner of walls when the tenant turned corners too sharply and quickly. The manager said that he could allow the scooter but that a deposit would be necessary.
  - Because the manager has good reasons for his deposit requirement and he will require such a deposit from all users of motorized scooters in the future, will the voucher holder need to pay the deposit?

Section 5.5 Modifications

THE PUBLIC HOUSING PROGRAM

24 CFR 8.4 and
24 CFR Part 8 Subpart C

- PHAs are required to make and pay for structural modifications to dwelling units and common areas when needed as a reasonable accommodation for tenants or applicants with disabilities.
- For example, a PHA may be required to:
  - Install a ramp to allow a tenant in a wheelchair access to a dwelling unit
  - Transfer a family to an available accessible unit or one that can be modified without causing an undue financial and administrative burden
- Work orders for reasonable accommodation modifications need to be given a priority, depending on how quickly the PHA processes nonemergency work orders.
  - If a PHA's average completion of nonemergency work orders is, for example, 3-5 days, then modifications could be considered a routine work order.
  - However, if the PHA's average amount of days for nonemergency work orders is more than a couple of weeks, the PHA should give reasonable modification work orders a higher priority.

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24 CFR 100.203; Notice PIH 2002-1 (HCV); HUD/DOJ Joint Statement March 2008

MODIFICATIONS TO PROVIDE ACCESSIBILITY IN THE VOUCHER PROGRAM

- Most owners must permit a family that contains a person with a disability to make reasonable modifications to the unit at the family's expense.
  - If the owner is going to require an escrow account or otherwise require the family to restore the unit when the family moves out, HUD requires the owner and family to have a restoration agreement that is separate from the security deposit.
  - The PHA is not required to review the terms of any restoration agreement to which the family agrees, and doing so represents an additional workload for staff.
  - Even so, reviewing the document is recommended as part of the PHA's program integrity activities to ensure that the owner has presented a separate agreement and that no illegal side payments are included.

Section 5.6 Sample Reasonable Accommodation Forms

- On the pages that follow are sample forms used in the reasonable accommodation process for your reference. Sample forms are provided for the public housing programs.

HOUSING AUTHORITY

Address
Phone • TTY

HOUSING CHOICE VOUCHER (SECTION 8)

Family Request for Reasonable Accommodation

(THIS FORM IS AVAILABLE IN LARGER FONT OR ALTERNATIVE FORMAT UPON REQUEST)

PLEASE PRINT CLEARLY

Head of Household: _____ **TDD/Phone:** _____

Address: _____ **State/Zip:** _____

Currently, I am:

- ❒ **An applicant on the waiting list for the Housing Choice Voucher (Section 8) program**
- ❒ **A participant in the Housing Choice Voucher (Section 8) program**

Household member who needs accommodation: _____

The household member above has a disability because they have a physical, mental or emotional impairment that limits one or more life activities or has a record of having such an impairment.

Please fill out all the following information regarding the person who needs the accommodation(s). *Please DO NOT submit medical records or provide confidential medical information regarding the nature or extent of the disability.*

As a result of this disability, I am requesting the following reasonable accommodation(s) from the housing authority for the disabled household member listed above. Please answer the questions below.

- ❒ The household member **needs a live-in aide.** *A daily in-home worker, housekeeper, or rotating shifts are not equally effective as a reasonable accommodation.*
- ❒ Extra bedroom for medical equipment. Please indicate the square footage of all the equipment when on the floor. (Note: if necessary, a PHA inspector may view the equipment to confirm that all sleeping and living spaces are not adequate as an accommodation)
- ❒ The household member needs a change in a rule, policy or procedure. (Note that fundamental requirements must still be met). Please specify the necessary change.

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❒ Other (for example, a change in the way the housing authority communicates with you). Please specify the necessary change. Provide additional pages if necessary.

I understand that the information obtained by the housing authority will be kept completely confidential and used solely to make a determination on my reasonable accommodation request.

FRAUD AND FALSE STATEMENTS

Title 18, Section 1001 of the U.S. Code states that a person who knowingly and willingly makes false and fraudulent statements to any department of the United States Government, including the Department of Housing and Urban Development (HUD), a public housing authority (PHA), and any owner (or employee of HUD, the PHA, or the owner) may be subject to penalties that include fines and/or imprisonment.

I certify by signing below that all the information provided above is true, accurate and complete to the best of my knowledge.

Signature _____ Date _____

For PHA Use ONLY: PHA Certification

❒ I certify that this individual's disability is obvious or otherwise known to the PHA and no further verification is required.

❒ I certify that this individual's need for the accommodation is readily apparent or known to the PHA and no further verification is required.

Signature of PHA Official _____ Date _____

Approval of PHA 504 Coordinator _____ Date _____

EQUAL HOUSING OPPORTUNITY

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AUTHORIZATION

I/we authorize the Housing Authority (PHA) to verify that the above-referenced household member has a disability and that the accommodation(s) requested is necessary in order to remove or alleviate barriers to housing. To verify this information, the housing authority may contact doctor or other medical professional, a peer support group, a non-medical service agency, or reliable third-party (health care professional if the request is for a support animal) who is knowledgeable about my situation. I understand the information the housing authority obtains will be kept completely confidential and used solely to evaluate the request.

This authorization is requested because third-party verification may be needed.

Name of Professional: _____

Field of Practice: _____ Agency/Clinic/Facility: _____

Email: _____ Phone: (___) _____

Address: _____

X _____ _____
Signature of Head of Household or authorized Guardian ** Date

**** If the family member needing the accommodation(s) is under 18 years of age, are you the parent or guardian of the household member? ❒ Yes ❒ No**

X _____ _____
Signature of family member needing the accommodation
(only if 18 years of age or older) Date

Please return this form as promptly as possible so that the housing authority may make a determination on this request.

_____	_____
PHA Representative	Date
_____	_____
Phone	Email

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Housing Authority

VERIFICATION OF NEED FOR REASONABLE ACCOMMODATION
HOUSING CHOICE VOUCHER (Section 8) PROGRAM
Please do not send or attach medical records

Address

TDD 818-247-9704
Website

Individual Requesting Accommodation _____

Name of PHA Head of Household: _____

Dear Knowledgeable Professional:

Please read this form completely – the information provided here is very important. The individual listed above has identified him or herself as being disabled under the Fair Housing Act and has asked for an accommodation from the (PHA) to meet housing-related needs necessary in order to remove, alleviate, or mitigate barriers to their housing or housing programs due to their disability-related limitations.

You have been authorized to release information to us regarding the individual's need for an accommodation. That authorization is attached.

PHA grants reasonable accommodation requests based, if necessary, on verification of need from a professional who is knowledgeable about the individual's situation and competent to render an opinion. Such verification may be from a doctor or other medical professional, a peer support group, a non-medical service agency, or reliable third-party (health care professional if the request is for a support animal) who is knowledgeable about my situation. Verification could include but not be limited to:

- Verification that the person is a qualifying person with disabilities.
- Verification that there is a direct relationship ("nexus") between the nature of the person's disabilities and the accommodation requested.
- Verification that the accommodation is necessary for the person to have equal opportunity to participate in or access the PHA's programs and services.

Please complete and return this form to the PHA. ***Confidential medical records will not be accepted***.

If you are not able to verify the information requested in this form, the PHA will notify the family and they may request verification from another professional or licensed practitioner.

If you have any questions, or would like further information, please feel free to contact PHA's title, name, at phone or email.

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Section I – Verification of Disability

❒ It is NOT necessary for you to fill out this Section. Please proceed to Section II.
❒ Please complete this Section before proceeding to Section II.

An "individual with a disability" is any person who has a physical, mental or emotional impairment that substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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. The definition of an "individual with a disability" does *not* include a person whose current use of alcohol or drugs is the barrier that prevents the person from participating in PHA's housing program and services. (A more detailed definition is provided in the Code of Federal Regulations at 24 CFR 8.3, which PHA staff would be glad to provide to you.)

Does the person named above qualify as an "individual with a disability," according to this definition?

□ Yes □ No □ Unable to verify Initials _____

Section II – Verification of Need for Requested Accommodation *Please do not include medical records*	
I am knowledgeable about this individual's situation.	☐ Yes ☐ No

In my professional assessment of the disabled individual's needs, I certify that:

❒ The disabled individual **requires a live-in aide**. A daily in-home worker or rotating shifts are not adequate to provide an opportunity equal to that afforded others.

❒ The disabled individual requires an extra bedroom for medical equipment (note: if necessary, a PHA inspector may view the equipment to confirm that all sleeping and living spaces are not adequate as an accommodation)

❒ The disabled individual **requires a change in a policy or procedure as a direct result of his/her disability** in order to be afforded an equal housing opportunity. Please explain what change in policy or procedure is being requested.

CERTIFICATION

Based on your professional opinion and assessment of needs, please **check only one** of the following:

❒ **I certify** that the enclosed request for an accommodation is necessary for the disabled household member, as a result of their disability-related limitations, in order to have an equal housing opportunity.

OR

❒ **I cannot certify** that the enclosed request is necessary for the disabled household member, as a result of their disability-related limitations, in order to have an equal housing opportunity.

Please certify below:

❒ This certification is true and accurate to the best of my professional judgment.

_____ _____
Professional's Signature Date

_____ _____
Name (Please print clearly) Title of professional

_____
Agency or Clinic, if applicable

_____
Complete Address

(_____)_____ (_____)_____ _____
Phone Fax Email

Please return form to: [PHA] as soon as possible.

ATTN: _____

Title: _____

Address: _____

(_____)_____ (_____)_____ _____
Phone Fax Email

SAMPLE PH RA OR MODIFICATION REQUEST

PUBLIC HOUSING OR OTHER PHA-OWNED PROPERTY

Request for Reasonable Accommodation or Physical Modification

(THIS FORM IS AVAILABLE IN LARGER FONT OR ALTERNATIVE FORMAT UPON REQUEST)

PLEASE PRINT CLEARLY

Head of Household: _____ **TDD/Phone:** _____

Address: _____ **State/Zip:** _____

Currently, I am:

❒ **An applicant on the waiting list for**
❒ **Public Housing** ❒ **Other PHA-owned property**

❒ **Currently living in Public Housing or other PHA-owned property**

Household member who needs accommodation: _____

The household member above has a disability because they have a physical, mental or emotional impairment that limits one or more major life activities or has a record of having such an impairment.

Please fill out all the following information regarding the individual who needs the accommodation(s). *Please DO NOT submit medical records or tell us about the nature or severity of your disability.*
The purpose of an accommodation is to remove or relieve a barrier posed by the disability-related limitation. As a result of this disability, I am requesting the following reasonable accommodation(s) from the PHA for the disabled household member listed above.

Please answer the following questions.

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1. The person with a disability is requesting a **service or support animal**. Please answer the questions below.

   1.a. **Service animal**. Is the animal (a dog) required because of a disability?

   ❒ Yes. If "Yes", answer question 1.b. below.

   ❒ No. If "No, skip to question #2.

   1.b. Has the animal been trained to do work or tasks that assist or help you with the limitation(s) posed by your disability? Some examples include guiding an individual who is blind or has low vision, pulling a wheelchair, fetching items, or alerting persons to impending seizures, falls, or other medical crises.

   ❒ Yes. (If "Yes", go to question 1.c.)

   ❒ No. If "No, go to question #2.

   1.c. What work or tasks has the animal been trained to do? Note that the PHA is not asking for proof or certification of training. ***Do not provide medical information about the nature of your disability.***

   _____

2. ❒ **Support animal**. Is a result of this disability, the household member needs a support animal. *Please note that verification by a healthcare professional may be required.*

   What type of support animal do you need?_____

3. ❒ The household member **needs a live-in aide**. *A live-in aide is needed because a daily in-home worker or rotating shifts are not equally effective or not available. Please note that verification may be required.*

4. As a result of this disability, the household member needs the following reasonable accommodation(s) from the PHA. Please check one or more boxes below.

   ❒ Special unit features ❒ Physical modifications to unit ❒ Physical modifications to common areas

   ❒ Transfer to another unit that meets my disability-related needs ❒ Other_____

   ❒ Extra bedroom for medical equipment. *Please note that, if necessary, a PHA inspector may view the equipment to confirm that all sleeping and living spaces are not adequate as an accommodation.*

   If necessary, please explain what you need. ***Do not provide information about the nature of your disability.***

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5. ❒ The household member needs a change in a rule, policy or procedure. (Note that fundamental requirements must still be met). Please specify the necessary change.

I understand that the information obtained by the PHA will be kept completely confidential and used solely to make a determination on my reasonable accommodation request.

Under the lease and the PHA's Admissions & Occupancy Policy, the PHA requires that statements made and information provided by the tenant be true and accurate, to the best of the tenant's knowledge.

I certify by signing below that all the information provided above is true, accurate and complete to the best of my knowledge.

Signature _____ Date _____

For PHA Use ONLY: PHA Certification

❒ I certify that this individual's disability is obvious or otherwise known to the PHA and no further verification is required.

❒ I certify that this individual's need for the accommodation is readily apparent or known to the PHA and no further verification is required.

Signature of PHA Official _____ Date _____

Approval of PHA 504 Coordinator _____ Date _____

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AUTHORIZATION

I/we authorize the PHA to verify that the above-referenced household member has a disability and that the accommodation(s) requested is necessary in order to remove or alleviate barriers to housing. To verify this information, the housing authority may contact the below-named doctor or other medical professional, a peer support group, a non-medical service agency, or reliable third-party (health care professional if the request is for a support animal) who is knowledgeable about my situation. I understand the information the housing authority obtains will be kept completely confidential and used solely to evaluate the request.

This authorization is requested because third-party verification may be needed.

Name of Professional: _____

Field of Practice: _____ Agency/Clinic/Facility: _____

Email: _____ Phone: (___) _____

Address: _____

X _____ _____

Signature of household member needing the accommodation (only if 18 years of age or older) Date

**** If the household member needing the accommodation(s) is under 18 years of age, are you the parent or guardian of household member needing the accommodation? ❒ Yes ❒ No**

X _____ _____

Signature of head of household or authorized guardian ** Date

Please return this form as promptly as possible so that the PHA can make a determination on this request.

_____	_____
Property Manager/PHA Representative	Date
_____	_____
Phone	Email

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Address
Phone:
FAX:
TTY:
Website:

HOUSING AUTHORITY

VERIFICATION OF NEED FOR REASONABLE ACCOMMODATION

PUBLIC HOUSING PROGRAM

Please do not send or attach medical records

Individual Requesting Accommodation _____

Name of PHA Head of Household: _____

Dear Knowledgeable Professional:

Please read this form completely – the information provided here is very important. The individual listed above has identified themself as being disabled under the Fair Housing Act and has asked for an accommodation from the PHA to meet housing-related needs necessary in order to remove, alleviate, or mitigate barriers to their housing or housing programs due to their disability-related limitations.

You have been authorized to release information to us regarding the individual's need for an accommodation. That authorization is attached.

The PHA grants reasonable accommodation requests based, if necessary, on verification of need from a professional who is knowledgeable about the individual's situation and competent to render an opinion. Such verification may be from 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 person's disability. For verification of the need for a support animal, the verification is from a health care professional. Verification could include but not be limited to:

- Verification that the person is a qualifying person with disabilities.
- Verification that there is a relationship ("nexus") between the nature of the person's disabilities and the accommodation requested.
- Verification that the accommodation is necessary for the person to have equal opportunity to participate in or access the PHA's programs and services.

Please complete and return this form to the PHA. ***Confidential medical records will not be accepted***.

If you are not able to verify the information requested in this form, the PHA will notify the family and they may request verification from another professional or licensed practitioner.

If you have any questions, or would like further information, please feel free to contact me at:

PHA Representative		Date
Title	Email	Phone

Section I – Verification of Disability

❒ It is NOT necessary for you to fill out this Section. Please proceed to Section II.
❒ Please complete this Section before proceeding to Section II.

An "individual with a disability" is any person who has a physical, mental or emotional impairment that limits one or more life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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. The definition of an "individual with a disability" does *not* include a person whose current use of alcohol or drugs is the barrier that prevents the person from participating in PHA's housing program and services. (A more detailed definition is provided in the Code of Federal Regulations at 24 CFR 8.3, which PHA staff would be glad to provide to you.)

Does the person named above qualify as an "individual with a disability," according to this definition?

□ Yes □ No □ Unable to verify Initials _____

Section II – Verification of Need for Requested Accommodation *Please do not include medical records*	
I am knowledgeable about this individual's situation.	☐ Yes ☐ No

Special Unit Features Due to Disability

IMPORTANT: Please fill out this section if the disabled household member needs a unit, facilities and/or common area with specific features due to his or her disability.

The following information is requested solely for the purposes of identifying the unit (size, type, and design) that most appropriately meets the needs of the disabled household member. The PHA will make every effort to make the appropriate modifications or identify an appropriate unit based on your professional opinion and assessment.

Please check only those accommodations that are necessary due to limitations posed by the disability.

In my professional assessment of the disabled individual's needs, I certify that:

❒ The disabled household member needs a **wheelchair-accessible unit**.

❒ The disabled household member needs features for the vision-impaired and/or hearing-impaired, as specified: _____

❒ The disabled household member **DOES NOT** need a wheelchair-accessible unit but needs a unit or common area with certain physical features. The features required are checked off below with an explanation given on the following page.

Maximum number of stairs to reach the unit: _____

Maximum distance to walk between the unit and nearest elevator: _____

A first floor unit or a unit located in an elevator-equipped building is required.

Single level unit Tub grab bars Toilet grab bars Handheld shower

Other _____

Extra bedroom for medical equipment. *Note: if necessary, a PHA inspector may view the equipment to confirm that all sleeping and living spaces are not adequate as an accommodation.*

❒ The disabled household member requires a unit in a specific or alternative location due to a disability. *Please explain what the alternative location is.*

Other

❒ The disabled individual **requires a live-in aide**. A daily in-home worker or rotating shifts are not adequate to provide an opportunity equal to that afforded others.

❒ ***Health care professional only:*** The household member **needs a support animal as an assistance animal.** An assistance animal alleviates or removes a disability-related limitation. An example of an assistance animal is providing emotional support to persons with disabilities who have a disability-related need for such support.

❒ The household member **requires a change in a policy or procedure as a direct result of their disability** in order to be afforded an equal housing opportunity. Please explain what change in policy or procedure is being requested.

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CERTIFICATION

Based on your professional opinion and assessment of needs, please **check only one** of the following:

❒ **I certify** that the enclosed request for an accommodation is necessary for the disabled household member, as a result of their disability-related limitations, in order to have an equal housing opportunity.

OR

❒ **I cannot certify** that the enclosed request is necessary for the disabled household member, as a result of their disability-related limitations, in order to have an equal housing opportunity.

Please certify below:

❒ This certification is true and accurate to the best of my professional judgment.

_____ _____
Professional's Signature Date

_____ _____
Name (Please print clearly) Title of professional

_____
Agency or Clinic, if applicable

_____
Complete Address

(_____)_____ (_____)_____ _____
Phone Fax Email

Please return form to: [PHA] as soon as possible.

ATTN: _____

Title: _____

Address: _____

(_____)_____ (_____)_____ _____
Phone Fax Email

Learning Activity 5-6: Reasonable Accommodation Quiz

1. Do applicants or participants have to fill out an official PHA request for accommodation form in order to be granted the accommodation?
   a. Yes
   b. No

2. When deciding whether an accommodation poses an undue financial burden, the PHA must see what the PHA has approved in the past to make sure the cost is not excessive.
   a. True
   b. False

3. A PHA may deny the request for an extra bedroom for special medical equipment if the PHA determines that the current unit size is sufficient to accommodate the medical equipment.
   a. True
   b. False

4. If a PHA grants a request for an extra bedroom for medical equipment, the PHA should reverify the continued need for the bedroom, which could include verifying the need visually.
   a. True
   b. False

5. A reasonable accommodation does not require reducing or waiving essential program requirements, like waiving the requirement to pay rent.
   a. True
   b. False

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6. If a person with disabilities commits a serious or repeated violation of the lease, the housing provider may ask for satisfactory assurances that the violations will not continue if a reasonable accommodation is granted.
   a. True
   b. False

7. A PHA need not grant an accommodation when:
   a. The direct threat will still exist
   b. It poses a financial and administrative burden
   c. It would mean a fundamental alteration to programming
   d. Any of the above

8. Before approving an adult household member, including a live-in aide, the PHA must run a criminal background check.
   a. True
   b. False

9. A live-in aide is a person who would not be living in the unit except to provide the necessary supportive services.
   a. True
   b. False

10. Relatives may never be live-in aides.
    a. True
    b. False

11. A PHA may establish a policy that prohibits a live-in aide from holding an outside job, and/or a policy requiring that the live-in aide work a certain amount of hours in the home.
    a. True
    b. False

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12. Home visits are always reasonable when requested by a person with disabilities.
    a. True
    b. False

13. A PHA or other housing provider may refuse a reasonable accommodation for an assistance animal if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal.
    a. True
    b. False

14. If a municipality has an ordinance that bans certain dog breeds, the ban also applies to service animals.
    a. True
    b. False

15. A PHA may require documentation that a service animal has been professionally trained.
    a. True
    b. False

16. The children of live-in aides are not allowed to reside in the unit.
    a. True
    b. False

17. PHAs may choose to limit verification for reasonable accommodation to physicians.
    a. True
    b. False

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18. PHAs should always offer a specific reasonable accommodation to a person with an obvious disability even before the person asks for an accommodation.
    a. True
    b. False
19. Hoarding is a manifestation of a disability, protected under federal law.
    a. True
    b. False

CHAPTER 6 Fair Housing Issues in Assisted Housing

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Apply PHA legal mandates under the Violence against Women Act (VAWA)
- Identify liability for sexual and other harassment
- Discuss pertinent issues surrounding hate crimes, race, sexual harassment, and familial status discrimination
- Identify the status of changes following recent implementation of Executive Orders impacting PHA requirements and guidance on assisting LEP persons, the Equal Access Rule, and other "hot topics" within Fair Housing

Section 6.1 The Violence against Women Act (VAWA)

INTRODUCTION

- The purpose of VAWA is to reduce domestic violence, dating violence, sexual assault, stalking, and human trafficking; to prevent homelessness of the victims of such acts; to protect victims who reside in PH and HCV; and to ensure victims have access to the criminal justice system without jeopardizing their housing.
  - Although the VAWA 2022 statute does not specifically do so, HUD has recently begun including human trafficking as part of the list of victims protected under VAWA, as seen in Notices PIH 2022-06, PIH 2022-22, and PIH 2022-24. In the absence of a final rule implementing VAWA 2022 and to mirror HUD's recent usage, we have opted to include human trafficking in this text in addition to domestic violence, dating violence, sexual assault, and stalking anywhere such a list appears.

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- VAWA is not new legislation but rather a reauthorization of ongoing federal government priorities to have government dollars used to protect victims. Congress first passed VAWA in 1994. In the past, VAWA has applied to other federal agencies to better prevent violent crime and assist victims of sexual assault within the court, police, and shelter systems.
- On January 5, 2006, when President Bush signed into law the Violence against Women and Department of Justice Reauthorization Act of 2005, this amended the 1937 Housing Act. It placed safeguards on admissions and terminations for the public housing and Housing Choice Voucher programs, and provided procedures for certification, confidentiality, and notification.
- In recent years, many states and localities have passed local housing laws that protect victims of domestic violence in various ways. In fact, some state and local laws may provide even more protection than VAWA to victims of domestic violence. How domestic violence is defined in your locality under family violence laws also impacts your PHA's obligations under VAWA. Your PHA and your legal counsel need to be aware of domestic violence laws in your community.
  - For example, some jurisdictions require that a landlord change the locks of an apartment unit within a 24- or 48-hour time period if requested by a victim of domestic violence for purposes of safety.
- VAWA does not amend the Fair Housing Act. It is a separate piece of federal legislation that gives victims of domestic violence applying for or receiving rental assistance under a variety of HUD programs (e.g., public housing and both tenant-based and project-based Section 8 programs) special protections under federal law regarding their housing rights.

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- VAWA, despite its title, is gender-neutral; the law applies regardless of sex, gender identity, sexual orientation or marital status. Women, men, people who identify as transgender or nonbinary, and children can claim victim status. Keep this in mind as your PHA develops policy and looks to enforce VAWA.
- In addition to the usual obstacles to leaving a violent relationship facing any victim, VAWA places a special emphasis on issues battered immigrant women face including fears about being deported, loss of legal immigration status, and cultural barriers to leaving their spouses. PHAs should keep in mind cultural differences and special immigrant populations in their community when developing VAWA practices and creating partnerships around domestic violence issues.
- On March 7, 2013, President Obama signed into law the Violence against Women Reauthorization Act of 2013 (VAWA 2013), which implemented several key changes related to housing protections for victims of domestic violence, dating violence, sexual assault, and stalking.

24 CFR Part 5, Subpart L

- On November 16, 2016, HUD published a final rule, with an effective date of December 16, 2016, implementing VAWA 2013 and notifying PHAs of modifications to program regulations as required by the VAWA legislation.
- On May 19, 2017, HUD issued Notice PIH 2017-08, providing detailed guidance on implementing the requirements set forth in the final rule implementing VAWA 2013, and also offering useful examples and clarifications for certain aspects of the rule.
- On March 15, 2022, Congress signed into law the 2022 Omnibus Appropriations Bill, which included the 2022 reauthorization of VAWA.

- On January 4, 2023, HUD issued initial implementation guidance of VAWA 2022, "The Violence Against Women Act of 2022: Overview and Applicability to HUD Programs."
- PHAs are strongly urged to consult with legal counsel, victim advocacy groups/service providers, and tenants before adopting final policy changes required by VAWA. This is to be sure these policies are developed within the spirit of VAWA—providing victims of domestic violence an opportunity for housing security and bringing communities together to create best-practice strategies to confront domestic violence.
- Notice PIH 2017-08 also encourages PHA partnerships with victim service providers to ensure victims receive the supportive services that they need.

STATE AND LOCAL LAW

- PHAs must comply with state and local laws that have additional protections.

SUMMARY OF KEY CHANGES IN VAWA 2022

- VAWA 2022 revises the definition of domestic violence and adds definitions for economic abuse and technological abuse for purposes of VAWA grants.
- It revises the McKinney-Vento Homeless Assistance Act definition of *homeless*.
- It establishes provisions prohibiting PHAs and owners from coercion or retaliation against those who exercise their VAWA rights.

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- It adds a statutory requirement for regular VAWA compliance reviews, including compliance with the following six areas:
  - Requirements prohibiting denial of assistance, tenancy, or occupancy rights
  - Confidentiality
  - Notification requirements
  - Documentation requirements
  - Emergency transfer plans
- VAWA 2022 also adds protections against actual or threatened penalties for persons requesting law enforcement assistance and stops landlords or owners and local jurisdictions from using local nuisance or crime-free ordinances against VAWA victims.

DEFINITIONS

224 CFR 5.2003;
FR Notice 8/6/13;
FR Notice 1/4/23
Form HUD-5380

- ***Affiliated person*** **–** The tenant's spouse, parent, sibling, or child; or any individual, tenant, or lawful occupant living in the tenant's household; or anyone for whom the tenant acts as parent/guardian of a victim of domestic violence, dating violence, sexual assault, or stalking.
- ***Domestic violence*** – felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding, and in the case of victim services, includes the user or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who is:
  - The current or former spouse or intimate partner of the victim, or person similarly situated to a spouse or intimate partner of the victim

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  - A person who is cohabitating or has cohabitated with the victim as a spouse or intimate partner
  - A person with whom the victim shares a child in common
  - A person who commits acts against a youth or adult victim who is protected from those acts under the domestic or family violence laws of the jurisdiction

- ***Dating violence*** – violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, based on length of relationship, type of relationship, and frequency of interaction between the persons.
- ***Economic abuse*** – behavior that is coercive, deceptive, or unreasonably controls or restrains a person's ability to acquire, use, or maintain economic resources to which they are entitle, including using coercion, fraud, and manipulation to:
  - Restrict a person's access to money, assets, credit, or financial information
  - Unfairly use a person's personal economic resources, including money, assets, and credit, for one's own advantage
  - Exert undue influence over a person's financial and economic behavior or decisions, including forcing default on joint or other financial obligations, exploiting powers of attorney, guardianship, or conservatorship, or to whom one has a fiduciary duty
- ***Sexual assault*** – any nonconsensual sexual act proscribed by federal, tribal, or state law, including when the victim lacks the capacity to consent.
- ***Stalking*** – engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's individual safety or the safety of others; or
  - Suffer substantial emotional distress.

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- ***Technological abuse*** - an act or pattern of behavior that occurs within domestic violence, dating violence, sexual assault, or stalking and is intended to harm, threaten, intimidate, control, stalk, harass, impersonate, exploit, extort, or monitor another person, except as otherwise permitted by law, that occurs using any form of technology, including but not limited to:
  - Internet enabled devices
  - Online spaces and platforms
  - Computers
  - Mobile devices
  - Cameras and imaging programs
  - Apps
  - Location tracking devices
  - Communication technologies
  - Any other emergency technologies
- ***Victim*** – Any victim of VAWA violence/abuse, regardless of actual or perceived sexual orientation, gender identity, sex, or marital status.
- Note: PHAs need to be aware that violence is not defined in VAWA. HUD uses the term *abuse* when referring to domestic violence (DV) in its *Federal Register* notice on March 16, 2007. The PHA should consider that "violence" and "abuse" may encompass more than physical acts of harm. Domestic violence advocates might urge that emotional, psychological, and financial abuse be included as part of the definition.
- Also, this is not an exhaustive list of definitions included in the law. PHA policy makers should review VAWA legislation for a complete list of definitions.

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ANNUAL AND FIVE-YEAR PLANS

24 CFR 903.6(a)(3)

- VAWA requires PHAs to include in their five-year plans a statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, stalking, or human trafficking.
- The specific information required by VAWA is included in HUD's most recently revised PHA plan templates.

CONSOLIDATED PLANS

- In addition to the five-year and annual PHA plan processes, VAWA also amends jurisdictions' consolidated planning processes to require that victims of domestic violence, dating violence, sexual assault, stalking and human trafficking are included among the estimated housing needs of the jurisdiction.

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NOTIFICATION AND CERTIFICATIONS

24 CFR 5.2005(a)

- PHAs are required to provide the Notice of Occupancy Rights form (HUD-5380) and VAWA certification form (HUD-5382) with any notice of denial, at admission, and with any notice of termination or eviction.
  - These forms were updated in April, 2025, with a new expiration date of January 31, 2028.
  - The Notice of Occupancy Rights (HUD-5380) is the official HUD informing notice.
    - Although the notice states that "If you speak or read in a language other than English, your covered housing provider must give you language assistance regarding your VAWA protections" (for example, oral interpretation and/or written translation) and includes language offering translated versions of the form via a HUD link, the forms have been removed by HUD following Executive Order 14224 declaring English to be the official language of the U.S. and revoking Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency (LEP).
    - The PHA must edit the sample form to include PHA-specific information and contact information for local domestic violence service providers.
- The VAWA certification form (HUD-5382), explained more fully later in this section, may be used as a self-certification form.
- The PHA may also accept the individual's statement alone.

Notice PIH 2017-08

- HUD recommends documenting in a confidential manner when a verbal statement or other evidence is accepted.

Notice PIH 2017-08

- If the PHA does request documentation, the applicant or participant may submit one of the following:
  - A signed HUD-5382
  - A document signed by a "professional" and the applicant or participant that specifies that the professional believes that the occurrence is grounds for VAWA protections
  - A "professional" can be an employee, agent, or volunteer of a victim service provider, an attorney, a medical professional, or a mental health professional.
  - Federal, state, tribal, territorial, or police or court records
  - A statement or other evidence provided by the individual, at the PHA's discretion
- Individuals requesting protection cannot be required to provide additional third-party documentation, although the PHA may require third-party documentation if more than one applicant or tenant provides documentation (e.g., two household members each claiming to be the victim and the other the perpetrator) or the submitted documentation contains information that conflicts with existing information already available to the PHA.
  - Notice PIH 2017-08 provides several clarifications and considerations with respect to requesting third-party documentation in cases where information conflicts.
- In such cases, the applicant has 30 calendar days to submit third-party documentation.

Notice PIH 2017-08

- In addition, PHAs and owners may not conduct further "fact finding" to verify the validity of victim status, although, as noted above, if the PHA or owner already has or receives reliable conflicting information, they may require additional third-party documentation.

- Form HUD-5382 states that victims are not expected and cannot be asked or required to claim, document, or prove victim status or VAWA violence or abuse other than as stated in the Notice of Occupancy Rights, Form HUD-5380.

FORM HUD-5382

- Form HUD-5382 is the Certification of Domestic Violence, Dating Violence, Sexual Assault or Stalking.
- The HUD-5382 makes clear that:
  - Victims of sexual assault are protected by VAWA as well as victims of domestic violence, dating violence, and stalking.
  - The form applies not only to family members but also to affiliated persons of tenant, participant, and applicant families. See definition of affiliated person under “Definitions”.
- Form HUD-5382 may also be filled out and submitted on behalf of a victim.
  - Notice PIH 2017-08 encourages PHAs and owners to advise applicants, tenants, and participants that forms submitted on their behalf will take the place of the victim’s own statement.
- The form specifically states that whenever a victim asks for or about VAWA protections, any information provided will be kept confidential.
- HUD’s form leaves space for the family to provide the name of the perpetrator, if it is known to the victim and safe to provide.
- The form contains space for the victim to specify the safest contact method as to not place the victim at risk (the abuser may monitor the mail, email, or phone).
- The PHA must give the individual at least 14 business days to respond to their written request for documentation.
  - The PHA or owner may extend the 14-day deadline at its discretion.

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- The VAWA certification requirements do not supersede any provision of any federal, state, or local law that provides greater protection for victims of domestic violence, dating violence, sexual assault, stalking, or human trafficking.

24 CFR 5.2007(d)

- Ultimately, certification is a policy issue that must be addressed by the PHA. In fact, VAWA makes very clear that PHAs, owners, and management agents may, at their discretion, provide benefits under VAWA based solely on the statement of the individual.

NOTIFICATION TO HCV OWNERS

- Notice PIH 2017-08 encourages PHAs to also provide notification and/or training to HCV owners of their rights and obligations under VAWA. This leads to greater owner compliance and increased victim safety.
  - PHAs are encouraged to attach the PHA's Emergency Transfer Plan (ETP) and form HUD-5382 to the notice they provide to owners.
  - An optional template for this purpose that can be revised to reflect local needs is attached to Notice PIH 2017-08.
- Notice PIH 2017-08 also provides a list of all mandatory owner obligations under VAWA.

DENIAL OF ADMISSION

24 CFR 5.2005(b)

- VAWA prohibits PHAs from denying admission to otherwise qualified applicants on the basis of or as a direct result of the fact that they are, or have been, victims of domestic violence, dating violence, sexual assault, stalking, or human trafficking.
- When an applicant appears unsuitable due to bad credit, poor landlord references, or a history of evictions or crime, the PHA usually denies admission.
- What if the reason for the bad history is that they are a victim? How would a PHA know?

- Notice PIH 2017-08 states that the PHA is prohibited from denying assistance or admission, terminating participation, or evicting a tenant based on adverse factors, if the adverse factor is determined to be a direct result of the fact that the applicant is or has been a victim of domestic violence, dating violence, sexual assault, stalking, or human trafficking.
- *Adverse factors* refer to any factor that can be used as a basis for denying admission, terminating assistance, or evicting a tenant.
- Nothing specific in the law or in HUD's guidance suggests how a PHA should screen applicants for tenancy while not discriminating based on domestic violence status.
  - Some PHAs include information about VAWA as part of the waiting list application process, regardless of whether they offer a preference for victims of domestic violence.
  - VAWA 2013 requires PHAs include the VAWA Notice of Occupancy Rights (HUD-5380in denial letters sent out to applicants who have been determined ineligible for the housing program as part of the denial and grievance (or hearing) notification process, together with form HUD-5382.
- How does the PHA create a screening process for applicants whereby victims have an opportunity to assert their status and a causal connection between the abuse experienced and their bad tenant history?

24 CFR 5.2005(c)(2)

- Remember: Criminal activity directly relating to domestic violence is not a basis for denial of admission or termination of tenancy.
- Poor credit history, poor rental history, criminal records, and a history of failure to pay rent may be due to the underlying experience of domestic violence, dating violence, sexual assault, stalking, or human trafficking.

TERMINATIONS

24 CFR 5.2005(c)(1)

- VAWA states that an incident or incidents of actual or threatened domestic violence, dating violence, sexual assault, stalking, or human trafficking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim. This includes property damage and noise complaints due to abuse.

24 CFR 5.2005(c)(2)

- VAWA also states that criminal activity directly relating to domestic violence, dating violence, sexual assault, stalking, or human trafficking, engaged in by a member of the tenant's household, guest, or other person under the tenant's control shall not be cause for termination of tenancy or assistance if the tenant or affiliated person is a victim of that violence stalking, or human trafficking.

24 CFR 966.4(a)(1)(vi)
24 CFR 966.4(e)(9)

- The public housing lease must include bifurcation language as well as VAWA definitions under Part 5, VAWA protections, information on documentation, and remedies available to victims.

24 CFR 5.2003

- To *bifurcate* a lease means to split it into two leases.

24 CFR 5.2009(a)(2)

- Lease bifurcations must be carried out in accordance with requirements and procedures prescribed by federal, state, and local law for termination of assistance or leases, and in accordance with program requirements.

Notice PIH 2017-08

- In lease bifurcations for mixed families where the eligible individual is the perpetrator, the PHA must provide any remaining tenant or tenants that were not already eligible a period of 30 calendar days from the date of bifurcation of the lease to establish eligibility in the same or another housing program or find alternative housing. The 90-day time period established in the VAWA Final Rule does not apply to HCV or public housing.

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24 CFR 5.2009(c)

- PHAs are encouraged to undertake any permissible and feasible actions under the program to assist individuals that are victims to remain in their units or other units under the same or other program, and to bear the costs of any transfer, if permissible.

Notice PIH 2017-08

- In HUD-Veterans Affairs Supportive Housing (HUD-VASH), when a veteran's family member is the victim and the veteran is the perpetrator, the victim must continue to be assisted. Upon termination of the perpetrator's VASH voucher, the victim should be given a regular HCV voucher if one is available. If no regular HCV is available, the perpetrator's HUD-VASH voucher should be used to assist the victim.
- As part of the PHA's Emergency Transfer Plan (ETP), the PHA may choose to provide a voucher to facilitate an emergency transfer without having terminated assistance to the perpetrator.

24 CFR 5.2005(d)

- VAWA does not limit the authority of the PHA to honor court orders, including civil protection orders issued to protect victims issued to protect victims, or addressing the distribution or possession of property among members of a household.

FR Notice 1/4/23

- PHAs and owners may not coerce, intimidate, threaten, interfere with, or retaliate against any person who exercises or assists or encourages a person to exercise any rights or protections under VAWA.

24 CFR 5.2005(d)

- However, the law does not limit the PHA's authority to terminate tenancy or assistance when the PHA is able to demonstrate there is an actual and imminent threat to other tenants, employees, or others providing services to the property. Termination should only be undertaken as a last resort when there are no other actions that could be taken to reduce or eliminate the threat.
- Notice PIH 2017-08 provides several considerations for reducing "actual and imminent" threats.

MOVES

24 CFR 982.353(b)

- Prior to VAWA, a PHA was prohibited from providing portability to a family that moved out of its assisted unit in violation of the lease.
- VAWA creates an exception to this prohibition for families who are otherwise in compliance with all other program obligations but have moved out of their assisted unit:
  - To protect the health or safety of an individual who is a victim
  - Or, if any family member has been the victim of a sexual assault that occurred on the premises during the 90-calendar-day period preceding the family's request to move
- This also applies to moves within the PHA's jurisdiction in both the public housing and HCV programs.

EMERGENCY TRANSFER PLAN

- VAWA regulations require PHAs to establish an emergency transfer plan (ETP) as part of their administrative plan or ACOP.
  - The ETP must provide for immediate transfer to a safe unit if one is available, and the client would not have to apply for a different program.
  - The ETP must describe policies for emergency transfers of HCV participants, and the priority of VAWA transfers in relation to other transfers.
  - The ETP must also include policies for transfers when a safe unit is not immediately available, including whether the client would or would not have to apply for a different program.
- Since HCV and PBV owners are not required to establish ETPs, Notice PIH 2017-08 reiterates that it is the PHA's responsibility to do so.

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- Notice PIH 2017-08 also provides a detailed description of requirements for ETPs and other considerations when establishing ETPs, including examples.
- HUD has issued two documents related to ETPs:
  - The sample Model Emergency Transfer Plan for Victim of Domestic Violence, Dating Violence, Sexual Assault or Stalking, HUD-5381
    - The PHA must revise the sample form to reflect PHA-specific information based on housing types administered by the specific agency, updated April 2025.
  - The Emergency Transfer Request for Certain Victims of Domestic Violence, Dating Violence, Sexual Assault or Stalking, HUD-5383, updated April 2025 with an exception date of 2028
- The ETP must be made available upon request, or made publicly available.
- The ETP must state that victims of sexual assault qualify for emergency transfers if:
  - The tenant (or their household member) is a victim of VAWA violence/abuse;
  - The tenant expressly requests the emergency transfer; AND
  - EITHER
    - The tenant reasonably believes that there is a threat of imminent harm from further violence, including trauma, if they or (their household member) stays in the same dwelling unit; OR
    - If the tenant (or their household member) is a victim of sexual assault, either the tenant reasonably believes that there is a threat of imminent harm from further violence, including trauma, if the tenant (or their household member)

were to stay in the unit, or the sexual assault occurred on the premises and the tenant requested an emergency transfer within 90 days (including holidays and weekend days) of when that assault occurred.

CONFIDENTIALITY

24 CFR 5.2007(b)(4)

- If a tenant inquires or requests any VAWA protections, or represents that they or a household member is a victim, all information provided to the PHA or HCV owner/manager:
  - Must be retained in confidence
  - Must not be entered into a shared database or provided to any related entity unless:
    - The individual consents or requests it in writing;
    - It is required for use in eviction proceedings; or
    - It is otherwise required by law.
- For safety and legal reasons surrounding liability to the PHA and harm to a victim, a PHA may want to consider having all VAWA situations handled by a single staff member to limit access and knowledge with regards to the certification process and details regarding the abusive situation.
  - Notice PIH 2017-08 offers guidance and best practices for proper communication with victims, specifically for avoiding inadvertent disclosure of information and ensuring the safety of the victim.

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CERTIFICATION OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING

Confidentiality Note: Any personal information you share in this form will be maintained by your covered housing provider according to the confidentiality provisions below.

Purpose of Form: If you are a tenant of or applicant for housing assisted under a covered housing program, or if you are applying for or receiving transitional housing or rental assistance under a covered housing program, and ask for protection under the Violence Against Women Act ("VAWA"), you may use this form to comply with a covered housing provider's request for written documentation of your status as a "victim". This form is accompanied by a "Notice of Occupancy Rights Under the Violence Against Women Act," Form HUD-5380.

VAWA protects individuals and families regardless of a victim's age or actual or perceived sexual orientation, gender identity, sex, or marital status.

You are not expected **and cannot be asked or required** to claim, document, or prove victim status or VAWA violence/abuse other than as stated in "Notice of Occupancy Rights Under the Violence Against Women Act," Form HUD-5380.

This form is **one of your available options** for responding to a covered housing provider's written request for documentation of victim status or the incident(s) of VAWA violence/abuse. If you choose, you may submit one of the types of third-party documentation described in Form HUD-5380, in the section titled, "What do I need to document that I am a victim?". Your covered housing provider must give you at least 14 business days (weekends and holidays do not count) to respond to their written request for this documentation.

Will my information be kept confidential? Whenever you ask for or about VAWA protections, your covered housing provider must keep any information you provide about the VAWA violence/abuse or the fact you (or a household member) are a victim, including the information on this form, strictly confidential. This information should be securely and separately kept from your other tenant files. This information can only be accessed by an employee/agent of your covered housing provider if (1) access is required for a specific reason, (2) your covered housing provider explicitly authorizes that person's access for that reason, **and** (3) the authorization complies with applicable law. This information will not be given to anyone else or put in a database shared with anyone else, unless your covered housing provider (1) gets your written permission to do so for a limited time, (2) is required to do so as part of an eviction or termination hearing, **or** (3) is required to do so by law.

In addition, your covered housing provider must keep your address strictly confidential to ensure that it is not disclosed to a person who committed or threatened to commit VAWA violence/abuse against you (or a household member).

What if I require this information in a language other than English? To read this in Spanish or another language, please contact [; FOR HOPWA PROVIDERS – or go to . You can read translated VAWA forms at https://www.hud.gov/program_offices/administration/hudclips/forms/hud5a#4. If you speak or read in a language other than English, your covered housing provider must give you language assistance regarding your VAWA protections (for example, oral interpretation and/or written translation).

Can I request a reasonable accommodation? If you have a disability, your covered housing provider must provide reasonable accommodations to rules, policies, practices, or services that may be necessary to allow you to equally benefit from VAWA protections (for example, giving you more time to submit documents or assistance with filling out forms). You may request a reasonable accommodation at any time, even for the first time during an eviction. If a provider is denying a specific reasonable accommodation because it is not reasonable, your

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covered housing provider must first engage in the interactive process with you to identify possible alternative accommodations. Your covered housing provider must also ensure effective communication with individuals with disabilities.

Need further help? For additional information on VAWA and to find help in your area, visit https://www.hud.gov/vawa. To speak with a housing advocate, contact

TO BE COMPLETED BY OR ON BEHALF OF THE VICTIM OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING

1. **Name(s) of victim(s):** _____

2. **Your name** (*if different from victim's*): _____

3. **Name(s) of other member(s) of the household:** _____

   _____

4. **Name of the perpetrator** *(if known and can be safely disclosed):*_____

5. **What is the safest and most secure way to contact you? (You may choose more than one.)**

   If any contact information changes or is no longer a safe contact method, notify your covered housing provider.

   ☐ Phone Phone Number: _____

   Safe to receive a voicemail: ☐ Yes ☐ No

   ☐ E-mail E-mail Address:_____

   Safe to receive an email: ☐ Yes ☐ No

   ☐ Mail Mailing Address:_____

   Safe to receive mail from your housing provider: ☐ Yes ☐ No

   ☐ Other Please List:_____

6. **Anything else your housing provider should know to safely communicate with you?**

   _____
   _____
   _____
   _____
   _____

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NOTICE PIH 2017-08

- Issued May 19, 2017, the notice provides detailed guidance on VAWA, and offers useful examples, scenarios, and clarifications on certain aspects of the requirements.
- The notice:
  - Clarifies that as a reasonable accommodation, a tenant/participant can request VAWA protections if live-in aide is a victim
  - Encourages PHAs and owners to advise applicants, tenants, and participants that forms submitted on their behalf will take place of own statement
  - Recommends documenting in a confidential manner when verbal statement or other evidence is accepted
  - Provides various clarifications and considerations with respect to requesting third-party documentation in cases where information conflicts
  - Clarifies that PHAs and owners may not conduct further "fact finding" to verify the "validity" of victim status, although if PHA or owner already has or receives reliable conflicting information, they may require additional third-party documentation
  - Offers guidance and best practices for proper communication with victims, specifically in avoiding inadvertent disclosure of information and keeping the victim safe
  - Provides a detailed description of requirements for emergency transfer plans (ETPs) and things to consider when establishing ETPs, including examples
  - Clarifies that since HCV and PBV owners are not required to establish ETPs, it is the PHA's responsibility to do so for HCV and PBV participants
  - Clarifies that when the perpetrator is a VASH participant, the victim must still be able to be eligible for assistance
  - Encourages partnerships with victim service providers

- Reiterates that in lease bifurcations for mixed families where the eligible individual was the perpetrator, assistance is limited to 30 days if the remaining family member has not submitted documentation of eligible immigration status or pending appeal of immigration status
- Provides considerations for reducing an "actual and imminent" threat
- Provides guidance on establishing a discretionary waiting list preference for victims
- Lists mandatory HCV owner obligations under VAWA and encourages providing notice to owners
- Provides that PHAs may encourage HCV owners to let tenants out of their leases if family member is or has been a victim
- Summarizes policy requirements and lists in appendix all required PHA policies and procedures

SELF-PETITIONER PROCEDURES

Notice PIH 2017-02

- On January 19, 2017, HUD issued Notice PIH 2017-02, Violence Against Women Act (VAWA) Self-Petitioner Verification Procedures.
- The notice explains the procedures PHAs must follow when an applicant or resident requests admission or continued residency as a result of being a self-petitioner. VAWA self-petitioners are those who claim to be victims of "battery or extreme cruelty" covered under VAWA. These are victims of domestic violence, dating violence, sexual assault, stalking, and human trafficking.
  - Since financial assistance is prohibited to ineligible noncitizens, but assistance must not be denied while verifying immigration status, VAWA self-petitioners can indicate they are in "satisfactory immigration status."

- *Satisfactory immigration status* is defined as immigration status that does not make the individual ineligible for financial assistance. To qualify, the noncitizen victim must have been battered or subjected to extreme cruelty by their spouse or parent, who is a U.S. citizen or legal permanent resident (LPR).
- Once the PHA receives a self-petition (INS Form I-360 or I-130, or INS Form 797), it is prohibited from requesting additional verification information other than through the three-step procedure for verification using the Department of Homeland Security (DHS) Systematic Alien Verification for Entitlements (SAVE), as described in the notice. After verifying status, PHAs will make a final determination as to the self-petitioner's eligibility for assistance. Housing assistance and all other VAWA protections will be granted to the self-petitioner throughout the verification process until a final determination of LPR status is made.
- If the final determination is to deny the VAWA self-petition or LPR petition, the PHA must alert the petitioner and take actions to terminate voucher assistance or evict the petitioner from public housing in accordance with the existing public housing requirements.

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CASE STUDIES SCENARIOS

- How will your PHA handle the following situations?

1. What if both partners in an assisted family point fingers at each other?

- Domestic abuse situations are not always black and white. The PHA must be prepared to support the victim, but how will the PHA determine who the victim is during the "blame game"?
- Discussion Points:

2. What about a scenario where … "He's been living with me (I did not tell the housing authority—he threatened to harm me and my kids if I told) and giving me money that I have not been reporting, but then he stole money out of my account and now I can't pay my rent…but I am a victim of domestic violence."

- What does the PHA do?
- Discussion Points:

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3. Is there a limit to the number of times that you can assist a victim?

4. An HCV participant's abusive partner is on the voucher and living in the home. The PHA is getting reports from neighbors and other eyewitnesses that the partner has threatened neighbors with physical violence if they reported to the PHA. The participant invokes her VAWA protections. What does the PHA do in this case?

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5. There is a family where the wife has taken the children and fled an abusive husband. The PHA, based on the wife's statement and the statement of her neighbors, decides to give her the voucher subsidy under VAWA even though the husband was the head of household. The PHA now needs to send a letter to the husband stating that his housing assistance dollars (HAP) will be terminated on his unit.

- What should the PHA tell the husband? How do we explain why he is no longer being subsidized? Any suggestions?

_____

_____

_____

_____

_____

6. A woman applies to the PHA for housing. She is otherwise eligible except that she owes the PHA $300 on a lease where she was the "spouse" three years ago. She reports that her husband controlled the finances, she has since left him, and she has documentation from a domestic violence agency that she was a victim of domestic violence and sought assistance.

   a. Do we accept her application? _____
   b. May we deny her housing? _____
   c. Can we require she pay back the $300? _____

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7. The PHA issues a voucher to move a participant with an abusive partner. She enters into another relationship, which is abusive. The PHA issues another voucher. The participant begins another abusive relationship. Now she wants to port out of the jurisdiction.

   - Can the PHA share any of the VAWA history with receiving housing authority? In other words, if this woman has a history of lease violations, breaking leases, etc. because she is a victim, and they have helped her several times and were about to draw the line in the sand but now she is porting, can they "warn" the next PHA?
   - Answer (From the VAWA Legislation): "CONFIDENTIALITY.- All information provided to any housing agency, assisted housing provider, tribally designated housing entity, owner, or manager pursuant to paragraph (1), including the fact that an individual is a victim of domestic violence, dating violence, sexual assault, or stalking, shall be retained in confidence by such agency, and shall neither be entered into any shared database, *nor provided to any related housing agency*, assisted housing provider, tribally designated housing entity, owner, or manager…"
   - **NOTE:** PHAs should remember that VAWA's application in the HCV program here creates an exception to the prohibition for families who move in violation of their lease, provided they are otherwise in compliance with program obligations and have moved to protect their health or safety.

NUISANCE AND CRIME-FREE HOUSING RULES AND ORDINANCES

OGC Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, 9/13/16

- On September 13, 2016, HUD's Office of General Counsel (OGC) issued guidance regarding the use and effects of housing provider and local government nuisance and crime-free housing ordinances and lease addenda.
- Of 59 nuisance ordinances the guidance identified throughout the country, 39 of them defined domestic violence, assault, sexual abuse, or battery as nuisance activities. In some jurisdictions, an incident of domestic violence is defined as a nuisance without regard to whether the resident is a victim or the perpetrator. Nuisance ordinances are becoming an additional factor that discourages victims from reporting domestic violence and obtaining needed police and medical assistance.
- Many local governments enforce crime-free lease ordinances or promote crime-free housing programs that incorporate the use of crime-free addenda. Crime-free lease addenda often do not provide exceptions for cases where a resident or tenant is the victim of domestic violence or another crime.

FR Notice 1/4/22

- However, VAWA 2022 added protections against actual or threatened penalties for persons requesting law enforcement or emergency assistance and preventing landlords or owners and local jurisdictions from using local nuisance or crime-free ordinances against VAWA victims.

- Further, the OGC guidance provides three steps used to analyze whether a local government's enforcement of such ordinances results in a Fair Housing Act violation.
  - Evaluating whether the challenged nuisance ordinance or crime-free housing ordinance policy or practice has a discriminatory effect.
  - Evaluating whether the challenged nuisance ordinance or crime-free housing ordinance is necessary to achieve a substantial, legitimate, nondiscriminatory interest.
  - Evaluating whether there is a less discriminatory alternative.
- The OGC guidance also looks at intentional discrimination regarding nuisance and crime-free housing ordinances, outlining types of intentional discrimination and the factors involved in making such a determination.
- Further details involved in each of these issues can be found in the guidance document.

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Section 6.2 Waiting List Management and Preferences

24 CFR 982.202(b)(3)

- The PHA preference system may provide a preference for admission of families with certain characteristics from the PHA waiting list. According to the regulations, admission to the HCV program may not be based on discrimination because members of the family are unwed parents, recipients of public assistance, or children born out of wedlock. This HCV regulation, prohibiting denial of admission because of marital status, serves as guidance for the public housing program.
- The waiting list will most likely contain the following information for each applicant:
  - Name and social security number of head of household
  - Unit size required (number of family members)
  - Amount and source of annual income
  - Accessibility requirement, if any
  - Date and time of application or application number
  - Household type (family, elderly, disabled)
  - Admission preference, if any
  - Race and ethnicity of the head of household
  - The specific sites selected (if the PHA offers site-based waiting lists.)
- Most PHAs use a community-wide list with one master waiting list, divided into sublists by the type and size of unit. Applicants are not asked their preference of location, although they may refuse an offer for "good cause," which includes various location-related elements. If a PHA adopts a community-wide waiting list, it should keep applications in sequence, based upon type and size of unit, preferences, and date and time or application number (if using a lottery system).

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- A site-based list (for public housing) is a separate list for a specific site or sites. Although it may be centrally administered, a system of site-based lists allows applicants to select the developments where they will accept unit offers. Site-based waiting lists are discussed in more detail in Chapter 8.

PREFERENCES FOR THE PHA TO CONSIDER

24 CFR 960.206(a)

- PHAs are permitted to establish local preferences and to give priority to serving families that meet those criteria. HUD specifically authorizes and places restrictions on certain types of local preferences. HUD also permits the PHA to establish other local preferences, at its discretion. Any local preferences established must be consistent with the PHA plan and the consolidated plan, and must be based on local housing needs and priorities that can be documented by generally accepted data sources.
- Does your PHA offer a preference to victims of domestic violence?
  - What kind of certification of victim status must be produced to claim this preference under your PHA policy?
  - Notice PIH 2017-08 provides guidance on establishing preferences for victims.

Former Federal Preferences 24 CFR 982.211-213 (now removed)

- Does your PHA offer a preference to victims of hate crimes?
  - A hate crime is actual or threatened physical violence or intimidation that is directed against a person or his property and is based on the person's race, color, religion, sex, national origin, disability or familial status [other local protected classes] that occurred within a specified period of time of application or is of a continuing nature.

- What about a preference for applicants who have been displaced due to non-accessibility to their current unit?

Former Federal Preferences
24 CFR 982.211-213 (now removed)

  - *Displacement by non-suitability* of the unit is when a member of the family has a mobility or other impairment that makes the person unable to use critical elements of the unit and the owner is not legally obligated to make changes to the unit.
    - The PHA could choose to offer this preference with verification from the owner of the building that the accommodations required will not be made; and/or
    - If the owner permits the tenant to make the modifications, verification that the family cannot afford the expense

24 CFR 960.206
24 CFR 982.207

- Does your PHA offer a preference for "working" families?
  - Remember if your PHA offers a "working" families preference, it must also give the preference to a family where the head and spouse, or sole member, is age 62 or older, or is a person with disabilities.
  - PHAs have been charged by HUD with fair housing discrimination for not following this regulation.

PROHIBITED PREFERENCES

24 CFR 960.203(a)
24 CFR 982.202(b)(3)

- Tenant selection criteria must be reasonably related to the individual attributes and behavior of applicants and not be related to criteria that may be imputed to a particular group or category or persons of which an applicant may be a member.

PH Handbook 7465.1, Chapter 5

- PHAs may not give either elderly families or non-elderly families a preference for admission to general occupancy projects. An elderly family that wants to or needs to be admitted to a general occupancy project must be considered on the same basis as any other family.
  - Likewise, it is prohibited to give families with children preference over disabled families or elderly families in general occupancy projects.

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24 CFR 960.206(b)(1)(i)
24 CFR 982.207(b)(1)(i)

- The PHA may not establish a residency *requirement*.

24 CFR 960.206(b)(3)
24 CFR 982.207(b)(3)

- The PHA may not establish a preference for a particular disability, although it may establish a preference for families with a disabled family member.

SELECTION WITHIN THE SYSTEM OF PREFERENCES

24 CFR 960.206(e)
24 CFR 982.207(c)

- The PHA system of preferences may select families either according to the date and time of application or by a random selection process.

24 CFR 960.202
24 CFR 982.201

- When selecting applicants from the waiting list, the PHA will match the characteristics of the available unit (unit size, accessibility features, unit type) to the applicants on the waiting lists. The PHA will offer the unit to the highest ranking applicant who qualifies for that unit size or type, or that requires the accessibility features.
- By matching unit and family characteristics, it is possible that families who are lower on the waiting list may receive an offer of housing ahead of families with an earlier date and time of application or higher preference status.
- Factors such as income targeting and deconcentration or income mixing will also be considered in accordance with HUD requirements and PHA policy.
- The HCV waiting list is straightforward; families are pulled in order of preference and date and time, or by lottery, depending on PHA policy.
- The PHA's system of public housing unit offers is more complex and is discussed in Chapter 8.

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PURGING OF THE WAIT LIST

- The PHA will set policy as to how and when their wait lists will be updated to reflect the current need for housing assistance by families who have applied for housing assistance at some point with the PHA.
  - For example, a PHA might send out notices via the US Postal Mail to the last known addresses on file to wait list families. At application, families are informed that families need to respond to any PHA update notice or appointment notice within a specified period of time in order to remain on the waiting list. The mailed purge notice repeats the obligation of the family to respond to the PHA within a specified period of time.

THINGS TO CONSIDER

- How much time does the family have to respond to the PHA's contact request and what will happen if the family doesn't respond within the specified time frame?
  - HUD leaves it up to the PHA to determine the amount of time families will be given to respond to an update request, and the number of contact attempts that will be made.
- Will the PHA permit the family to dispute their removal through an informal hearing?
- Under what circumstances will the PHA allow families who do not respond to the update request within the required time frame to be reinstated to the waiting list?
  - HUD regulations do not address disputes concerning the removal of a family due to failure to respond to an update. However, the *Public Housing Occupancy Guidebook* makes the distinction between removal due to ineligibility and removal for failure to respond.
    - The guidebook indicates that informal hearings are not required when removing a family due to failure to respond to an update.

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- It allows a PHA to reinstate someone to the waiting list, but limits the reinstatement to cases of PHA error and circumstances beyond the family's control. This could be a reasonable accommodation. To ensure consistency, authority for reinstatement might be limited to one PHA staff member.

Section 6.3 Deconcentration of Poverty and Income Mixing

24 CFR 903.1 & 903.2

- Since at least 1970, under legal pressure, HUD and PHAs have been called on to adopt some kind of "institutionalized method" for considering the "relevant racial and socioeconomic information" before approving sites for federally subsidized housing. HUD eventually issued a set of regulations for public housing and the voucher program designed to comply with this directive.
  - Requirements and strategies will be discussed in more detail in Chapter 7 for HCV and Chapter 8 for public housing.

Section 6.4 Fair Housing: Familial Status Issues

- The Fair Housing Act makes it unlawful for a housing provider to refuse to rent to families because they have children or impose different terms or conditions on families with children.
- Except in special developments that meet HUD's specific qualification for housing for older persons in the private market, it is illegal for PHAs or HCV private landlords to discriminate against families with children.
- *Familial status* means that a landlord may not discriminate against families in which one or more children under 18 live with:
  - A parent
  - A person who has legal custody of the child or children, or
  - The designee of the parent or legal custodian, with the parent or custodian's written permission

24 CFR 100.20

- Familial status protection also applies to pregnant women and anyone securing legal custody of a child under 18.
- For more information about how private market landlords can meet the Housing for Older Persons familial status exception in the private market (and be able to legally exclude children), see FHEO's website or the Fair Housing Act.

24 CFR 100.20
24 CFR 5.403

- ***IMPORTANT PUBLIC HOUSING NOTE***: In the public housing program, discriminatory conduct also includes forbidding children to reside with grandparents or older adults in a designated elderly, disabled, or mixed-family development.
  - See the definitions of *elderly family* and *disabled family* at 24 CFR 5.403.
  - HUD has brought Fair Housing Act charges against federally assisted housing providers for not allowing children in rural development programs and public housing programs that simply require that the head, spouse, or co-head be elderly—not the entire family that will reside in the unit.
  - However, elderly or mixed population public housing projects often consist solely of zero- or one-bedroom units. PHAs may apply their occupancy policies or local building codes (i.e., the PHA most likely could not allow grandma and her six grandchildren to occupy a one-bedroom unit). By default, either because elderly adults in public housing often do not have custody of children or because they do, they often have to transfer to a general occupancy (or family) development to be able to live in the unit size appropriate for the family size (units with two, three or four bedrooms).
  - What a PHA cannot forbid, is grandma having custody of her grandson and bringing him to live with her in her one-bedroom public housing elderly designated unit if the PHA would otherwise allow another person to live with grandma under occupancy policy or codes. That additional person may be a child.

24 CFR 100 Subpart B

- To be clear, discriminatory activities also include:
  - Refusing to rent or sell because of the presence of a child or children.
  - Steering or restricting families with children to certain floors, buildings, or parts of a community.

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- Forbidding children from any access to development's swimming pool or common courtyard or garden space. Reasonable requirements for health and safety such as adult supervision at pool are acceptable.
- Discouraging the rental or purchase of housing by families with children by exaggerating the drawbacks of a dwelling.
- Imposing higher deposits and/or rents based upon the presence of children.
    - HUD has brought charges against landlords who charge additional fees to families with children (i.e., an extra $30/mo. per child).
- Stating or otherwise indicating that certain property would not be appropriate because of the presence of children.
    - Landlords that say or infer statements of this sort, "We want to make sure we have a quiet environment; no children, no smoking, and no pets," are violating the familial status provision of the Fair Housing Act.
    - HUD has charged landlords who profess such statements (as one landlord charged with familial status discrimination did to HUD fair housing testers): "If you have too many children, you have too many problems."
- Implementing unduly restrictive occupancy policies such as only allowing one child per bedroom.
    - For example, a single mother and her son are not permitted to rent a one-bedroom apartment by a building manager. The manager, however, permits two adults to rent a one-bedroom apartment. This apartment's occupancy policies or practices violate the familial status provisions of the Fair Housing Act.

- ***NOTE***: In the housing choice voucher program, private landlords have been known to discriminate against families who had teenage boys in their households. Voucher families should pay close attention if landlords inquire about the age of absent children during an initial meeting with a landlord or a viewing of an apartment.

Section 6.5 Fair Housing: Advertising

24 CFR 100.75

- The Fair Housing Marketing Plan, covered in Chapter 3, should examine advertising.
- The Fair Housing Act covers the advertising of housing. It makes it illegal to make, print, or publish, or cause to be made, printed, or published, any statement, notice, or advertisement which indicates any preference or limitation on the basis of a protected class. Further, advertising which denies certain segments of the housing market information may also be deemed illegal.
  - This applies to all written or oral notices used in the selling or rental process including applications, flyers, brochures, signs, banners, posters, and billboards.
- Fair housing laws also prohibit using words, phrases, photographs, illustrations, or symbols which convey that dwellings are not available to a particular protected class.
  - Pictures and depictions of tenants or applicants could be considered in an advertising fair housing complaint. If a PHA houses or there exists in the PHA's community a diverse group of people (different skin colors, ages, disabilities, etc.), this should be reflected in the way the PHA portrays its image through advertising efforts.
  - This also includes refusing to publish advertising for sale or rental of housing or requiring different charges or terms for such advertising because of protected class.
    - In *Ragin v. The New York Times Co.*, a U.S. District Federal Court ruled that "newspaper advertisements depicting human models of a particular race and not others will be read by the "ordinary reader" as an indication of racial preference, in violation of the Fair Housing Act.

- Even if a private owner is outside the Fair Housing Act, the owner still may not advertise using discriminatory language. Federal fair housing laws prohibit discriminatory advertising in all housing (unless expressing a preference in a roommate situation for sex/gender or the property meets the Housing for Older Persons Act or religious exemption clauses).
- HUD has published guidance on advertising that should be reviewed for more information.
- Examples of discriminatory ads could include the following:
  - Great bachelor pad
  - Perfect for “empty nesters”
  - Jewish family seeks roommate
  - Units are not accessible
  - Ideal for single persons
  - Predominately Latino neighborhood
  - Adults only
  - Mature persons
  - Active adult living
  - Ideal for active retirees
  - One child only
  - Roommate wanted: Christian preferred
  - No immigrants

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Section 6.6 Sexual and Other Forms of Harassment

HUD Final Rule on Harassment and Liability for Discriminatory Practices

FR Notice 9/14/16

- HUD published a final rule in the Federal Register on September 14, 2016, amending regulations in 24 CFR Part 100, effective October 14, 2016, to formalize standards for use in investigations and judicial proceedings involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability.
- This rule clarifies that harassment can be not only a form of discrimination based on sex, but also can be discrimination based on other protected classes under the Fair Housing Act, and that the same discriminatory conduct could violate more than one provision of the Act.
- The rule clarifies the operation of traditional principles of direct and vicarious liability in the act without creating new liabilities or requiring housing providers to take actions beyond the scope of their power to act.
- Through this rule, HUD encourages housing providers to create and maintain safe, welcoming, and responsive housing environments by regularly training staff, developing and publicizing anti-discrimination policies, and acting quickly to resolve complaints once sufficient information exists that would lead a reasonable person to conclude harassment was occurring.
- The rule creates a new Subpart H of 24 CFR Part 100 to define the two types of harassment-quid pro quo harassment and hostile environment harassment.

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1. Quid Pro Quo Harassment ("Something for Something")

24 CFR 100.600(a)(1)

- Quid pro quo (something for something) harassment is an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to housing activities such as the sale, rental, or availability of a dwelling, or the provision of housing-related services or facilities. An unwelcome request or demand may constitute quid pro quo harassment even if a person accepts without protest the unwelcome request or demand.

2. Hostile Environment Harassment

24 CFR 100.600(a)(2)

- Hostile environment harassment is unwelcome conduct that is sufficiently severe or pervasive as to interfere with housing activities such as the sale, rental, or availability of a dwelling, or the provision or enjoyment of housing-related services or facilities. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the housing-related activities.
- Whether hostile environment harassment exists depends upon the totality of the circumstances.
  - Factors to be considered include, but are not limited to, the nature of the conduct, the context in which the incidents occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.
  - Neither psychological nor physical harm must be demonstrated. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment existed and, if so, the amount of damages to which an aggrieved person may be entitled.
  - Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position.

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- HUD states that the laws concerning an affirmative defense under Title VII of the Civil Rights Act of 1964 regarding employment-related harassment do not apply to cases regarding the Fair Housing Act.
- Harassment can be written, verbal, or other conduct, and does not require physical contact.
- A single incident of harassment because of race, color, religion, sex, familial status, national origin, or disability may constitute a discriminatory housing practice, where the incident is severe enough to create a hostile environment, or reveals a quid pro quo.

THE FINAL RULE AND DIRECT LIABILITY

24 CFR 100.7

- The final rule provides that a person is directly liable for:
  - The person's own conduct that results in a discriminatory housing practice.
  - Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct.
  - Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. This depends on the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of the third-party.
- Prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person. The final rule also prohibits retaliation against anyone because they reported a discriminatory housing practice to a housing provider or other authority.

STATE LAW

Most states have their own sexual and other harassment laws. As do most employers. Some states require some employers to have annual or biannual training on sexual harassment for their managers or company supervisors. State, local, or employment harassment laws may be broader and provide more protection than federal housing law. Know your state and local laws.

FEDERAL LAW AND SEXUAL HARASSMENT

42 U.S.C. 3601-3619

- Sexual harassment claims are protected under the Fair Housing Act and are included under civil rights protections since "sex" is a protected class. Fair housing claims of sexual harassment are filed just like any other fair housing complaint.
- Retaliation by a landlord or PHA against a tenant or applicant for complaining of sexual harassment is illegal under the Fair Housing Act.

"Questions and Answers on Sexual Harassment under the Fair Housing Act," Memorandum for FHEO Directors from Kim Kendrick, Asst. Sec. for FHEO, Nov. 17, 2008

- In November 2008, HUD issued guidance on sexual harassment and housing.
  - The guidance explains what constitutes sexual harassment and the legal remedies available to victims of sexual harassment in housing. It also clarifies that as long as a person demonstrates that the harassment was unwelcome, a claim may be filed whether or not there was a lost housing opportunity or tangible economic loss for the victim.

- It makes explicit that property owners and property managers have a duty to prevent or stop sexual harassment committed by employees, agents, or contractors or they may be held liable for the illegal acts of others. HUD gives the example, if an apartment manager authorizes a maintenance worker to enter a tenant's home to make a repair, and the maintenance worker sexually harasses the tenant, the management company may be held liable for the maintenance worker's actions.

  • What's your PHA's policy for staff relationships with tenants/program participants? Inspectors and maintenance workers may be solicited for sexual activity during required visits to program units. To whom do these staff report such incidents? How is it documented? Who addresses such solicitations with program participants?

SEXUAL HARASSMENT CLAIMS

FHEO Memorandum, Nov. 17, 2008

- As noted above, the two types of claims are quid pro quo and hostile environment.
- An example under quid pro quo would be where an employer/landlord (a person in a position of power) demands sexual favors in exchange for raises and promotions, perks, to live in an apartment or fix the sink, or threatens eviction or firing if sexual favors are not performed.
  - This sort of harassment may be prosecuted even if the demands were given into (Even if sexual favors were given, a person may still have a sexual harassment claim if the sexual advances were unwanted and the person gave in to save a job or an apartment).
  - Under this sort of harassment, for example, a person believes that if she does not give into the request she will lose her housing, an emergency repair will not be made, or her rent will go up.

- Under hostile housing environment sexual harassment, an example would be where photos, comments, and physical touching of a sexual nature and/or unwelcome and unsolicited requests for sex have made tenancy or the housing search less desirable.
  - Courts will examine the frequency of the unwanted sexual behavior, its severity, whether it was physically threatening or humiliating, and whether there was psychological harm.

SAME-SEX SEXUAL HARASSMENT

- In *Oncale v. Sundowner Offshore Services*, the Supreme Court held that same-sex sexual harassment is a form of discrimination.
- In June 2008, HUD charged a Mississippi landlord with same sex sexual harassment under the fair housing act.
  - In 2005, 15 percent of the sexual harassment charges filed at the Equal Employment Opportunity Commission were for same-sex harassment.
  - Male harassment of other males most often occurs between heterosexual men. There is a demand that other men live up to abrasive codes of masculinity or one male may use feminine pronouns, sexual taunts, or simulate sex acts or threats to intimidate or make another male's work environment intimidating or hostile.

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PHAs Should Protect Themselves

- What is your sexual or other harassment policy for employees?
- What is the sexual or other harassment claim process for participants?
- Is there an investigative process?
- The Fair Housing Act (24 CFR 100) amendment, to include direct liability if a person fails to end a discriminatory conduct if they knew or should have known that harassment was occurring, adds a serious obligation of the PHA to develop adequate policies and ensure they are being enforced by all managers and supervisors.
- If voucher holders report sexual or other harassment, encourage them to report and document (time, date, location, what happened, what was said, witnesses) and get assistance from a fair housing agency.

Case Law

- Losing or settling a sexual or other harassment case can lead to a large monetary loss. In the last few years, the Department of Justice has filed and tried sexual harassment housing cases against landlords and management companies resulting in individual settlements or verdicts of over a million dollars. DOJ is aggressively prosecuting harassment claims based on the other protected classes. For more information and monetary costs, see sexual harassment charges filed by HUD and DOJ posted on their websites.

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- In *United States v. Wones* (D. Minn. 2006), a landlord engaged in unwelcome sexual touching of and/or intercourse with female tenants, made unwelcome sexual advances, conditioned the terms of women's tenancy on the granting of sexual favors, and took adverse actions against female tenants who refused or objected to his sexual advances.
  - The defendant was required to hire an independent management company to take over daily management of each property, and pay a total of $352,500 to 20 identified aggrieved persons, as well as a $35,000 civil penalty.
- In September of 2020, HUD approved three settlements with the owners and property management company of an Arkansas community, resolving allegations that they harassed several residents because of their national origin (who moved out because of the harassment) and retaliated against an employee living on site who sought to inform the residents of their fair housing rights.
  - Under the settlements, the community agreed to pay the former residents a total of $51,000, revise and distribute its nondiscrimination policy, undergo fair housing training, and market housing opportunities to immigrant communities in the local area.
  - "Having a place to call home shouldn't depend on where you come from," HUD's Assistant Secretary for Fair Housing and Equal Opportunity, Anna María Farías, said in a statement.

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Section 6.7 Race and National Origin Discrimination

24 CFR 903.15(d)(2)

- Under 24 CFR 903.15(d)(2), which covers public housing and the voucher program, a PHA's policies should be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability in conformity with any applicable assessment of fair housing and the PHA's fair housing needs. Further, PHAs must take steps to affirmatively further fair housing, and PHA policies should include meaningful steps to overcome the effects of discrimination and the effects of conditions that resulted in limiting participation of persons because of their race, national origin, disability, or other protected class.
- For example:
  - A Hispanic family porting into the community meets with a housing specialist to ask about what neighborhoods they should visit and ask for information on landlords that accept vouchers in the community.
  - The family explains that they will only have a couple of days to view apartments, because of their schedule.
  - The housing specialist, wanting the family to feel welcome and knowing that they do not have much time to look around, assumes that they might feel most comfortable in one of the community's neighborhoods that are predominantly Hispanic.
  - The specialist gives the families a list of landlords involved with the program who have units in the Hispanic neighborhoods.

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24 CFR 100.70

- Remember: It is illegal to restrict a family's housing search to neighborhoods of a certain racial or ethnic composition.
  - This type of behavior, typically called "steering," involves systematically showing or giving information to minority renters about neighborhoods different from what is shown or recommended to comparable non-minority renters.
  - Systematically steering minorities away from predominantly white neighborhoods—and vice versa—is a form of discrimination that limits housing and neighborhood choice and may play a role in perpetuating patterns of residential segregation.
  - The fact that the housing specialist was trying to be helpful does not change the fact that the specialist is guilty of steering a Hispanic family towards Hispanic neighborhoods, as opposed to giving the family more information about neighborhood choices.

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Section 6.8 Discrimination Based on Religion — Case Law

- Religious freedom is one of the United States' founding principles, protected by the First Amendment and other federal laws. The right against religious discrimination is likewise one of our basic civil rights.

EXAMPLE 1

- An apartment building owner learns that an applicant for a vacant apartment has a different religion than all the other tenants in the building. Believing the other tenants will object, the owner does not rent to the otherwise qualified individual.
  - It is illegal for a landlord to reject or otherwise discriminate against an applicant based on religion.
    - What if the landlord is looking out for the applicant's safety and well-being?
    - What if the landlord knows that the other tenants will be hostile towards the applicant? The landlord has many older, disabled tenants who he knows sometimes are hostile towards this religious group because of their older age and their irrational fear of people of this religion because of the current "state of the world."
    - The landlord is trying to keep the peace and keep stress low for his tenants.
  - Answer the following questions:
    - Did discrimination occur?
    - If so, was it illegal discrimination or was the landlord's decision reasonable given this set of facts?

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EXAMPLE 2

U.S. Court of Appeals, Lynne Bloch, et al., vs. Shoreline Towers Condominium Association

- A condominium association repeatedly confiscated a mezuzah the Bloch family (plaintiffs) hung on their doorpost in observance of their Jewish faith. The Blochs sued the association under the Fair Housing Act and state law.
- The family presented evidence to support their claims that the condominium association's removal of the mezuzah discriminated on the bases of race and religion. Plaintiffs also stated that banning mezuzot would prevent the Blochs and other observant Jews from living at Shoreline Towers.

Section 6.9 Hate Crime and PHA Liability

24 CFR 100.400

- From the *Department of Justice Hate Crimes Bulletin*:
  - Hate crime is the violence of intolerance and bigotry, intended to hurt and intimidate someone because of their race, ethnicity, national origin, religion, sexual orientation, or disability. The purveyors of hate use explosives, arson, weapons, vandalism, physical violence, and verbal threats of violence to instill fear in their victims, leaving them vulnerable to more attacks and feeling alienated, helpless, suspicious, and fearful. Others may become frustrated and angry if they believe the local government and other groups in the community will not protect them. When perpetrators of hate are not prosecuted as criminals and their acts not publicly condemned, their crimes can weaken even those communities with the healthiest race relations.
  - Of all crimes, hate crimes are most likely to create or exacerbate tensions, which can trigger larger community-wide racial conflict, civil disturbances, and even riots. Hate crimes put cities and towns at risk of serious social and economic consequences. The immediate costs of racial conflicts and civil disturbances are police, fire, and medical personnel overtime, injury or death, business and residential property loss, and damage to vehicles and equipment. Long-term recovery may be hindered by a decline in property values, which results in lower tax revenues, scarcity of funds for rebuilding, and increased insurance rates.
- The Fair Housing Act makes it unlawful for an individual to use force or threaten to use force to injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with any person's housing because of that person's race, color, religion, sex, handicap, familial status, or national origin, and because that person is exercising his or her housing rights.

- Hate crime under the Fair Housing Act could include any of the following if such actions or speech occurs because of someone's protected class status (i.e., because the tenant is black, Muslim, or disabled):
  - Racist graffiti on apartment doors, hallways
    - Ex., Swastikas, letters "KKK", pictures of nooses
  - Threats or acts of physical violence
  - Destruction of property
  - Racist name calling or other verbal harassment
  - Physical intimidation such as threatening notes or phone calls
  - Racially motivated crimes (cars stolen, burglary)
- In recent years, the Department of Justice has held PHAs accountable for their lack of action regarding hate crime occurring on their properties. If a PHA knows, tolerates, or fails to protect tenants from harassment at their housing developments, the PHA may face legal consequences under the Fair Housing Act. The DOJ has published a hate crimes bulletin available on its website to help educate communities and housing providers.
- Examples of situations that might lead to liability:
  - If a PHA failed to adequately document, investigate, or otherwise respond to or address hate crimes the PHA knew were occurring on property.
  - If a PHA failed to take effective steps to alert tenants that harassment of other tenants due to their protected class status (race, national origin, etc.) would not be tolerated on PHA property, or to inform tenants of the procedures for reporting harassment.
  - If a PHA failed to terminate the tenancy of any tenant who engages in conduct that threatens the health, safety, or peaceful enjoyment of another tenant.
  - If a PHA with the authority to issue and enforce "no trespass" orders to non-tenant wrongdoers fails to do so.
  - If a PHA fails to remove racist graffiti promptly.

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- PHAs should look at taking proactive efforts to identify and reduce hate crimes in their communities. This is usually not done alone. A PHA first needs to identify its community needs, looking to sources such as:
  - Media reports
  - FBI, DOJ, and state and local crime reports
  - Previous years' Analysis of Impediment reports
  - The assessment of fair housing (AFH), if previously submitted, or the analysis of impediments (AI)
- PHAs should identify collaborative partners (police, state agencies, nonprofits). The idea is that if hate crime is occurring on PHA property and the PHA does nothing, it's a sure loser. The PHA needs to show proactive efforts to reduce and eliminate such activity if it becomes present in your community.

EXAMPLE 1

- In Anchorage, Alaska, after white youths videotaped themselves shooting Native Alaskans with paint balls, the Department of Justice worked with community agencies and groups, citizens, and state and local officials to calm community concerns. In response to the incident, DOJ trained police academy recruits to increase their abilities when interacting with people of color, providing officers with additional tools and conflict resolution skills. Participants were given an overview of services offered by community organizations and shared strategies for strengthening police-minority community relations and methods for prevention and reduction of racial tensions.

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EXAMPLE 2

- San Francisco PHA: In 2004, the Civil Rights Division of the Department of Justice entered a consent order resolving its housing discrimination complaint against the San Francisco Housing Authority. The complaint alleged that residents of public housing in San Francisco were victims of racial, ethnic, and religious harassment including verbal abuse, racial slurs, threats, assaults, vandalism, and robbery, and that the housing authority had failed to take reasonable steps to protect its tenants from this harassment. The complaint identified some of the victims of harassment as Iraqi and Muslim public housing residents, and alleged that the harassment had increased following the terrorist attacks of September 11, 2001.
  - The PHA had to pay out $180,000 to tenants who brought suit.
  - The PHA had to provide extensive staff training.
  - The PHA had to provide extensive tenant workshops and outreach.
  - The PHA had to modify and amend its LEP plan and take immediate action.
  - The PHA had to create publicity materials about civil rights violations and set up a civil rights complaint hotline that could receive complaints in various languages.
  - The PHA had to hire a new employee as an independent monitor of compliance at a rate of $60,000/year.
  - The PHA had to implement a fair housing complaint computer tracking system.
  - The PHA had to be closely monitored by HUD
- Source: http://www.usdoj.gov/crt/housing/documents/sanfransettle.htm
  - Answer the following questions:
  - Is it the PHA's job to mediate participant disputes?
  - How could the PHA have been more proactive?

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Learning Activity 6-1: Other FH Issues Quiz

1. Protections under the Violence Against Women Act (VAWA) are afforded to women only.
   a. True
   b. False

2. Under VAWA, if the perpetrator of domestic violence is the head of household, PHAs are obligated to continue to assist the individual.
   a. True
   b. False

3. If a PHA is in compliance with VAWA, it does not need to worry about obligations to domestic violence victims under state and local laws.
   a. True
   b. False

4. The PHA must send the Notice of Occupancy Rights under VAWA and the VAWA certification form only when requested by an applicant or participant.
   a. True
   b. False

5. If a PHA receives conflicting information from two members of the household under VAWA, the PHA may require additional third-party documentation.
   a. True
   b. False

6. Both PHAs and HCV owners have obligations under VAWA.
   a. True
   b. False

7. A landlord must not charge a family with children a higher security deposit than families without children.
   a. True
   b. False

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8. Kids must be excluded from all "designated elderly" developments.
   a. True
   b. False

9. PHAs may be found liable for not holding program participants who are known perpetrators of hate crimes accountable.
   a. True
   b. False

10. Property owners and property managers have a duty to prevent or stop sexual harassment committed by employees, agents, or contractors or they may be held liable for the illegal acts of others.
    a. True
    b. False

11. Claims regarding sexual harassment can be brought under the federal Fair Housing Act against an HCV landlord.
    a. True
    b. False

12. A PHA can be held liable if an individual supervisor commits or allows sexual or other harassment in the workplace even if the PHA has adequate policies regarding sexual and other harassment.
    a. True
    b. False

13. Harassment can be written, verbal, or other conduct, and does not require physical contact.
    a. True
    b. False

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CHAPTER 7 Fair Housing Issues in the Housing Choice Voucher Program

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Discuss fair housing issues as they relate specifically to the HCV program including: mobility counseling, exception payment standards, and renting from a relative

Section 7.1 Leasing Issues That Involve the Owner

NONDISCRIMINATION CLAUSE IN THE HAP CONTRACT AND PRIVATE LANDLORD CONDUCT

- Landlords in the private market are obligated under the federal Fair Housing Act, local fair housing laws, and the Civil Rights Act of 1866 (which prohibits discrimination based on color). In addition, real estate companies, construction companies and apartment management companies may have obligations under the ADA. Voucher holders who believe that they have faced discrimination should be encouraged to file a fair housing complaint.

24 CFR 982.452(b)(3)

- Private landlords who rent to voucher participants are also bound by housing assistance payment contracts not to discriminate against protected groups of people. If a particular landlord is not in compliance with fair housing laws, the PHA should evaluate whether the landlord has taken adequate steps to ensure future compliance. If there is evidence of egregious or repeated violations, the PHA should terminate its relationship with the landlord or face liability itself for contracting with a known discriminatory entity.

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24 CFR 982.306(b)

- PHAs must be aware that once a landlord has been found to have violated fair housing laws, HUD regulations prohibit the housing agency from dealing with that landlord unless there has been proof of the landlord's present and future compliance with all fair housing laws.
  - Review HUD's required housing assistance payment contract (HAPC) for more information.
- This mandatory disapproval of an owner occurs both while the case is pending and after, but only if directed by HUD.
- 24 CFR 982.306(b)1&2 states:
  - "(b) When directed by HUD, the PHA must not approve an assisted tenancy if: (1) The federal government has instituted an administrative or judicial action against the owner for violation of the Fair Housing Act or other federal equal opportunity requirements, and such action is pending; or (2) A court or administrative agency has determined that the owner violated the Fair Housing Act or other federal equal opportunity requirements…"

FAMILY MEMBERS AS LANDLORDS IN THE HCV PROGRAM

24 CFR 982.306(d),
24 CFR 982.61 (b)(3)

- While the "relatives rule" states that a PHA must not approve a unit if the owner is the parent, child, grandparent, grandchild, sister, or brother of any member of the family, the regulation also makes an exception if the PHA determines that approving the unit will provide a reasonable accommodation for a family member who is a person with a disabilities.

CASE STUDY: RENTING FROM A RELATIVE

Alphonso, an applicant for the HCV program, is a person with disabilities. Alphonso is able to document his need for a first-floor unit and further document that this need for a first-floor unit is related to his disability. The PHA does not dispute that Alphonso needs an accommodation in the form of a first floor unit (or elevator building) to accommodate his inability to walk up stairs due to his conditions.

Alphonso requests to use his voucher towards the rent at his current apartment, which is in a condominium complex. The owner of his current unit is his daughter. The housing specialist explains to Alphonso that HUD's program regulations do not allow voucher holders to rent from relatives.

Alphonso asks if an exception can be made. The PHA denies Al's request but is sure to provide him with lists of other first-floor units or units in elevator buildings in the jurisdiction where his voucher will be accepted. As the PHA explains to Alphonso, his current unit has no other special features that Al needs except that it is on the first floor and the PHA will help him locate other first-floor units.

- Question: What should the PHA consider?

FAMILY EVICTED FOR SERIOUS VIOLATION OF THE LEASE

24 CFR 982.552(b)(2)

- The PHA must terminate program assistance for a family evicted from housing assisted under the program for serious violations of the lease.
- Note that *eviction* means a legal eviction order issued by the court.
  - The PHA must determine whether the eviction was for serious violations of the lease.

24 CFR 982.552(c)(2)

CONSIDERATION OF CIRCUMSTANCES

- The participant always has a right to request an informal hearing with the PHA.
- Any issues of reasonable accommodation or other relevant mitigating factors not considered by the judge should be considered at the informal hearing.
- HCV families may be evicted for reasons other than for serious violations of the lease, in which case 24 CFR 982.552(b)(2) wouldn't apply and termination is not mandatory. For example, a landlord might evict a family who can't find a place to move to when the landlord wants to sell the unit or rent to someone else.
- If a family moves after the owner has given the family an eviction notice for serious or repeated lease violations but before a legal eviction order has been issued, termination of assistance is not mandatory. In such cases the PHA will consider the circumstances.

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Section 7.2 Issues Before and During Lease-Up

BRIEFINGS

Notice PIH 2024-19; HOTMA HCV and PBV Final Rule

- On June 5, 2024, HUD published Notice PIH 2024-19, effective June 6, 2024. The notice contains provisions with a compliance date of September 4, 2024, including the requirement for PHAs to update briefing procedures and materials, and new requirements for payment standards.

ORAL BRIEFINGS

- The old regulation required, for any family that includes any disabled person, that the PHA take appropriate steps to ensure effective communication.
- Under the HOTMA HCV and PBV final rule, the PHA now must also provide information on the reasonable accommodation process to all families.

BRIEFING PACKET

- The old regulation required that the briefing packet contain PHA subsidy standards, including when the PHA will consider granting exception payment standards.
- The final rule now requires that the briefing packet add language when exceptions are required as a reasonable accommodation under Section 504, the Fair Housing Act, or the Americans with Disabilities Act.
- The old regulations required that the briefing packet inform families about federal, state, and local equal opportunity laws and contain a copy of the housing discrimination complaint form.
- The final rule now requires that the PHA add contact information for the 504 coordinator and information on how to request a reasonable accommodation or modification.

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- The briefing packet must notify families that include a person with disabilities that such families may request a current listing of accessible units known to the PHA that may be available, and the PHA must now add that, if necessary, the PHA will offer assistance in locating an available accessible dwelling unit.

HCV Mobility Counseling

- A HUD-funded report in 2001 documented the alarmingly low success rates of mobility (the ability to move from a high-crime, high-poverty part of the community) and voucher use in tight rental markets. Further research has shown that the only measure that has been demonstrated to substantially improve success rates and further residential mobility is intensive housing counseling and placement support services.
- PHA voucher housing specialists often have to combat two fronts of apprehension, frustration, demoralization, disgust with the system, and prejudice: One from current or potential landlords and one from voucher holders seeking apartments. Day-to-day work for a housing specialist doing mobility counseling can be more about mitigating apprehension and mediating emotions than pushing forward with ideals of using vouchers in a more even disbursement throughout the PHA's jurisdiction.

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HCV Mandatory Mobility Support for People with Disabilities

24 CFR 8.28(a)(3);
24 CFR 982.302(b)(12)

- When issuing a voucher to a family that includes an individual with disabilities, the HCV program must include a current listing of available and accessible units known to the housing specialist, and if necessary, otherwise assist the family in locating an available accessible unit.

24 CFR 8.28(a)(4)

- The more general requirements of reasonable accommodation expand the scope of consideration to the difficulty a person with disabilities may have in searching for housing. A person with a mental impairment may need more time to look for a unit. A housing choice voucher manager should apply a consistent policy as to whether third-party verification of the particular reason for the extension is necessary or whether a simple certification of a disability and need for the extension is necessary.

24 CFR 8.28(a)(2)

- The *PHA has an affirmative duty to help the family find an accessible unit*. Section 504 and HUD regulations require housing agencies to assist in finding accessible units for disabled voucher holders. This duty includes recruiting landlords with accessible units. The duty may even include helping to remove barriers for anyone whose particular disability makes the search more difficult, including assisting in the lease negotiation process with the landlord if requested.

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VOUCHER EXTENSIONS

24 CFR 982.303

- In the voucher program, once the family is determined eligible, and a voucher is available, the typical family is issued a voucher good for an initial 60 days. At its discretion, a PHA may grant one or more extensions based on PHA policy as described in the administrative plan. In addition, if a family requests an extension of the voucher term as a reasonable accommodation, the PHA must extend the voucher term for the amount of time reasonably required for that purpose. HUD has made very clear that voucher time extension is an ideal, easy way for PHAs to accommodate families with disabilities in their programming.

MOVES AND PORTABILITY

Cite Notice PIH 2016-09(HA)

- The need for a reasonable accommodation may arise when a request to move is due to a disability of a family member. This provision applies even if a family might otherwise be restricted from moving (e.g., under a "one move per year" policy or because of insufficient funding).
- The reasonable accommodation is made on a case-by-case basis.

Cite Notice PIH 2016-09(HA)

- In cases where the limitation on portability is a discretionary policy of the PHA, the PHA must grant the accommodation unless doing so would impose an undue financial and administrative burden to the PHA. In cases where the limitation on portability is compelled by regulation, the PHA must first assess whether the requested accommodation would impose an undue financial and administrative burden to the PHA; if so, the PHA must request a waiver of the regulatory provision from HUD.

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EXCEPTION PAYMENT STANDARDS

Notice PIH 2010-26; Notice PIH 2025-12; 24 CFR 982.503(d)(5)

- If a family includes a person with disabilities, the PHA may approve a higher payment standard for the family if necessary as a reasonable accommodation.
- The PHA sets its general payment standards between 90 and 110 percent of the fair market rent (FMR) in its jurisdiction. If the PHA's payment standard is less than 110 percent, it may go up to 110 percent to accommodate a person with a disability without any special approval from HUD.

24 CFR 982.503(b)(iii)

- The PHA may establish an exception payment standard of not more than 120 percent of the FMR without HUD approval if requested as a reasonable accommodation for a family that includes a person with disabilities. Any unit approved under an exception payment standard must still be rent reasonable, taking into considerations the special features of the unit.
- When a family requires a unit with specific features or for other disability-related reasons to accommodate a family member with a disability, and the family is unable to find a unit with those features or that otherwise meets the disability-related need within the established payment standard, the family may request an exception to the established payment standard as a reasonable accommodation. This type of exception does not affect the PHA's payment standard schedule.

- Examples of circumstances that may qualify for an exception payment standard include, but are not limited to:
  - Accessibility features such as accessible bathrooms or larger doorways
  - Access to ground-level units or elevators for wheelchair/mobility devices
  - Units with features to benefit individuals with hearing or visual impairments
  - Proximity to medical providers or other services/supports
  - Accessible parking on the premises
  - Accessible to essential services or daily life activities
  - Proximity to public transit or to other accessible transportation
  - Location with sidewalks for individuals who use wheelchairs/mobility devices
- The PHA must evaluate each request on a case-by-case basis. If required as a reasonable accommodation, the PHA may make an exception to the payment standard without HUD approval if the exception amount does not exceed 120 percent of the applicable FMR/SAFMR for the unit size (or in the case of VASH, up to 140 percent of the FMR/SAFMR).
- The PHA may request HUD approval in accordance with Notice PIH 2025-12 for an exception to the payment standard for a particular family if the required amount exceeds 120 percent of the FMR/SAFMR.

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- The exception payment standard for the specific dollar amount approved by the PHA or HUD remains effective as long as the family has a disability-related need for the features of the approved unit, and the rent remains reasonable. Requests for a higher exception payment standard for the same unit due to rent increases or changes in the family's income should only be submitted to HUD when the rent is no longer affordable to the family, typically (though not exclusively) when the family share exceeds 40 percent of adjusted monthly income, and if the higher payment standard is above 120 percent of the FMR/SAFMR in effect at the time the PHA determines that the higher payment standard is necessary.
- Notice PIH 2025-12 clarifies that HOTMA Section 102(d)(1) prohibits HUD from establishing additional requirements regarding the amount of adjusted income a family requesting a reasonable accommodation for exception payment standards must pay toward rent.
- The notice removes the requirement that a family receiving a reasonable accommodation for exception payment standards must pay 40 percent of their adjusted income toward gross rent at initial approval.

HUD's Process for Granting Reasonable Accommodation Exception Payment Standards (RA-EPS)

Notice PIH 2025-12

- There is a specific process that has been set out by HUD's Public and Indian Housing Office (PIH) in Notice 2025-12, issued in May 2025, that needs to be followed when HUD approval is required for an exception payment standard request as a reasonable accommodation.

- Notice PIH 2025-12 clarifies the calculation of the payment standard and the type of supporting documentation that should be included in the waiver request. It is very important that HCV staff review this notice to be sure that all requests sent to HUD for approval are not delayed or denied because PHA staff have not gathered proper documentation or sent documentation to HUD as explicitly outlined and in the format expected in the notice. Below is a section of the notice dealing with documentation that should be sent to HUD for approval of requests:
  - "**4. Requirements for Submission of Exception Payment Standard Requests to HUD**.
    The PHA must provide the following information in the request:
    A. The head of household's first and last name.
    B. Whether the family is an applicant or participant family.
    C. The address of the unit requested for the RA EPS. The family must have submitted a Request for Tenancy Approval (RTA) for a specific unit to the PHA; however, the RTA does not need to be included in the request to HUD.
    D. Number of household members including a live-in aide(s).
    E. Family unit size (voucher size) the family is issued under the PHA's subsidy standards or any exception to those standards granted through a reasonable accommodation request. Note: HUD will not approve an RA EPS request where the voucher size is smaller than the unit size. PHAs must provide a larger subsidy standard that may be necessary as a reasonable accommodation. PHAs do not need HUD approval to grant an exception to their subsidy standards and must make that determination prior to submitting an RA EPS request to HUD.

F. The FMR or SAFMR (whichever the PHA is using in the area where the unit is located) for the actual unit size.
G. Rent to owner and utility allowance for the unit.
H. The family's monthly adjusted income.
I. A description of the nexus between the disability-related needs of the family and the features of the unit, which can include accessibility, proximity to medical providers or support services, proximity to a caregiver or other support networks, etc. If the disability-related need is known, obvious, or readily apparent, the PHA must include a statement to that effect and therefore third-party documentation is not required. When either the disability or the need for the requested accommodation is not known or readily apparent, a statement from a qualified third party who is in a position to know about the individual's disability regarding the need for the reasonable accommodation. Statements from a qualified third party should assist in identifying a nexus between the family's disability-related need for a specific unit or location, etc.
J. A statement from the PHA that the unit meets the needs of the person with disabilities as noted in the statement from the qualified third party in cases where such statement is necessary.
K. A statement from the PHA that there is a lack of more affordable units that meet the family's disability-related needs.
L. The calculation for the exception payment standard request (see Appendix A for examples).
M. A statement from the PHA that it has determined that the rent for the unit is reasonable in accordance with 24 CFR 982.507.

SPECIAL HOUSING TYPES

- Special housing types include homeownership, single room occupancy (SRO) housing, congregate housing, shared housing, group homes, cooperative housing, and space rentals for owners of manufactured homes.

24 CFR 982.601(b)

- While the PHA may offer any or all of these special housing types, the PHA is not required to use any special housing types, and may limit the number of families using any of the options.

24 CFR 982.54(d)(16)

- The administrative plan must include PHA policies covering special housing types.

24 CFR 982.601(b)(3)

- *The PHA must permit* use of any special housing type if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8.

24 CFR 982.625(d)(2)

- In the case of the homeownership option, it is the sole responsibility of the PHA to determine whether it is reasonable to implement a homeownership program as a reasonable accommodation. The PHA may determine that it is not reasonable to offer homeownership assistance as a reasonable accommodation in cases where the PHA has otherwise opted not to implement a homeownership program.

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HCV Owner Recruitment and Retention

- A critical element in fulfilling the responsibility to deconcentrate poverty is for the PHA to ensure that a sufficient number of owners, representing all types and ranges of housing in the PHA's jurisdiction, are willing to participate in the HCV program.
- How will the PHA conduct owner outreach, particularly to owners of units in areas outside of poverty or minority concentration?
- Outreach strategies could include:
  - Distributing printed material about the program to property owners and managers
  - Contacting property owners and managers by phone or in person
  - Holding owner recruitment/information meetings at least once a year
  - Participating in community-based organizations comprised of property and apartment owners and managers
  - Developing working relationships with real estate broker associations and tenant organizations

Section 7.3 Denial of a Reasonable Accommodation Request

INFORMAL HEARING

- HUD regulations do not specify that the PHA must give a participant family an opportunity for an informal hearing regarding a denial of a reasonable accommodation request.

24 CFR 982.555

- A PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:
  1. A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.
  2. A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.
  3. A determination of the family unit size under the PHA subsidy standards.
  4. A determination to terminate assistance for a participant family because of the family's action or failure to act (see 24 CFR 982.552).
  5. A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the maximum period permitted under PHA policy and HUD rules.

24 CFR 982.555(c)

- In the cases of numbers 4 and 5 above, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.

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- In the cases under of number 1, 2, and 3 above, the PHA must notify the family that the family may ask for an explanation of the basis of the PHA determination (or may require under PHA policy that the family must first ask for an explanation), and that if the family does not agree with the determination, the family may request an informal hearing on the decision.

Title II of the Americans with Disabilities Act; 28 CFR 35.107(b)

- The ADA requires some form of review or "hearing" for applicants and participants denied a reasonable accommodation.

Industry Practice

- The appeal process for PHA denial of a reasonable accommodation request should be addressed in the administrative plan, either through the informal hearing process or conducted by the PHA's 504 coordinator or other PHA official.

Learning Activity 7-1: HCV Specific Quiz

1. A listing of accessible units is recommended as an element of mobility counseling for the HCV program.
   a. True
   b. False

2. A PHA has an affirmative duty to take meaningful actions to try to assure that housing choice vouchers are being used throughout its jurisdiction rather than just in a few neighborhoods.
   a. True
   b. False

3. HUD regulations require that PHAs assist people with disabilities in the HCV program with finding units. This includes recruiting landlords with accessible units.
   a. True
   b. False

4. If a family requests an extension of the voucher term as a reasonable accommodation, the PHA must extend the voucher term for the amount of time reasonably required for that purpose.
   a. True
   b. False

5. A PHA may make an exception to the "relatives rule" if the PHA determines that approving the unit will provide a reasonable accommodation for a family member who is a person with a disabilities.
   a. True
   b. False

6. HCV landlords must pay for all reasonable accommodations for tenants with disabilities under the Fair Housing Act.
   a. True
   b. False
7. The PHA must terminate a family evicted for serious violation of the lease, with no exceptions.
   a. True
   b. False

Notes

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CHAPTER 8 Fair Housing Issues in Public Housing

LEARNING OUTCOMES

Upon completion of this chapter, you should be able to:

- Discuss fair housing issues as they relate specifically to the public housing program including: transfer policies, site-based waiting lists, and physical accessibility

Section 8.1 Site-Based Waiting Lists

- A site-based waiting list system is a set of PHA policies and practices that allows applicants to select the developments where they will accept unit offers. Although it may be centrally administered, there is a separate list for a specific site or sites.

24 CFR 903.2(d);903.7(a) and (b)

- If a PHA wishes to operate a site-based waiting list system, it must obtain approval from HUD as part of the PHA's annual plan approval process.

24 CFR 903.7(b)(2)

- Site-based lists must be consistent with all applicable civil rights and fair housing laws and regulations.

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WHO MAY ADOPT SITE-BASED WAITING LISTS?

24 CFR 903.7(b)(2)

- A PHA may adopt site-based waiting lists where:
  - The PHA regularly submits required PIC data in an accurate, complete, and timely manner.
  - The system of site-based waiting lists provides for full disclosure to each applicant of any option available to the applicant in the selection of the development in which to reside.
  - The PHA includes basic information about available sites (location, occupancy, number and size of accessible units, amenities such as day care, security, transportation, and training programs) and an estimate of time the applicant would likely have to wait to be admitted to units of different sizes and types (e.g., regular or accessible) at each site.
  - Adoption of site-based waiting lists would not violate any court order settlement agreement, or be inconsistent with a pending complaint brought by HUD.
  - The PHA includes reasonable measures to assure that adoption of site-based waiting lists is consistent with affirmatively furthering fair housing, such as reasonable marketing activities, to attract applicants regardless of race or ethnicity.

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REVIEW OF SITE-BASED WAITING LISTS

24 CFR 903.7(b)(2)(v)

- The PHA provides for review of its site-based waiting list policy to determine if the policy is consistent with civil rights laws and certifications through the following steps:
  - As part of the annual plan submission, the PHA must assess changes in racial, ethnic, or disability-related tenant composition at each site that may have occurred during the implementation of the site-based waiting list (based on PIC data confirmed by an independent audit)
  - At least every three years, the PHA uses independent testers or other means satisfactory to HUD to assure that the site-based waiting list isn't being implemented in a discriminatory manner and that no patterns or practices of discrimination exist, and providing the results to HUD
  - Taking any steps necessary to remedy the problems that surface during the review
  - Taking the steps necessary to affirmatively further fair housing

ADDITIONAL GUIDANCE AND INFORMATION

24 CFR 982.205(a)(2)

- Applicants must have an opportunity to apply and be considered for the PHA's housing choice voucher waiting list if that waiting list is open.
- Property managers and site staff must be acquainted with nondiscrimination requirements.
  - The PHA must also further civil rights regarding fair supervision and management of staff
- Public housing regulations do not specify procedures for opening and closing the list.
  - The PHA must develop policies in its admissions and continued occupancy policy (ACOP) and inform the public.

24 CFR 903.2(d);
24 CFR 1.4(b)(2)

- The PHA must have a fair housing marketing plan, which includes notifying minority populations.
  - Such outreach efforts should overcome the effects of conditions which have resulted in, or may result in, limiting participation of persons because of their race, color, religion, sex, disability, familial status, or national origin.

24 CFR 1.4(b)(2)
PH Occupancy GB, Chapter 8

- The PHA needs to maintain a clear record of units offered, including location, date, and circumstances of each offer, as well as each acceptance or rejection.
  - The PHA needs to have a policy concerning "good cause" for rejecting an applicant. This policy needs to be consistent for all projects and consistently applied by all projects.

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Dept.of HUD Stop-Loss Program, "Demonstration of a Successful Conversion to Asset Management," Year 5 Certification, September 10, 2010

- Quality control is an essential function with site-based waiting lists. For compliance with HUD's asset management model, each site team submits a weekly report.
  - This report should contain any applicant inquiries, waiting list activity, vacate progress, move-out notices, lease enforcement actions, requests for reasonable accommodation (if handled at the site), and the number of walk-ins.
  - It will also be important to monitor file security.

Section 8.2 Occupancy and Turnover of Accessible Dwelling Units

24 CFR 8.27 Notice PIH 2010-26 4350.3 REV-1 2-32.C

- PHAs and owners in HUD's multifamily programs need to adopt suitable means to assure that information regarding the availability of accessible units reaches people with disabilities. This may include providing information in its application packets, refresher information to each tenant during annual re-exams, and posting notices in its offices to ensure that information regarding the availability of accessible dwelling units reaches people with disabilities.
- PHAs must give preference to families that include persons with disabilities for units with special accessibility features. When an accessible unit becomes vacant, before offering such a unit to an applicant who does not have a disability, the PHA must:
  a. First, offer the unit to a current occupant with disabilities in the same development who requires the accessibility features of the vacant accessible unit.
  b. Second, if there is no current resident in the same development needing the accessibility features, the PHA will offer the unit to a resident with disabilities in another development who requires the accessibility features.
  c. Third, if there is no current resident who requires the accessibility features, then the PHA will offer the unit to an eligible, qualified applicant with disabilities on the PHA's waiting list who can benefit from the accessible features.

- The PHA could also "overhouse" a family, either a current resident or applicant, by providing them with a larger unit that has needed accessibility features.
- If there is not an eligible qualified resident or applicant with disabilities needing the accessibility features, the PHA could offer the accessible unit to a family who does not need the features.

24 CFR 8.27

- However, the PHA may require the applicant to execute a lease that requires the resident to relocate, at the PHA's expense, to a non-accessible unit within 30 days of notice by the PHA, in the event that an eligible applicant or existing resident with disabilities requires the accessibility features of the unit.
- Although the regulation does not mandate the use of the lease provision requiring the nondisabled family to move, as a best practice, HUD strongly encourages recipients to incorporate it into the lease.
- If a family needs accessibility features and no suitable units are available, the PHA should consider modifying the existing unit unless this would pose an undue administrative or financial burden.

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TRANSFERS TO AN ACCESSIBLE UNIT

- Remember that a transfer is not always required in order to provide a reasonable accommodation. If the required features can be provided in the current unit without undue financial and administrative burden to the PHA, the PHA can opt to provide those features.
- A PHA may not prohibit an eligible disabled family from accepting a nonaccessible unit that becomes available before an accessible unit. The PHA is required to modify such a non-accessible unit as needed, unless the modification would result in an undue financial and administrative burden.
- Question: If a resident in the public housing program needs a transfer due to a verified medical condition or for a reasonable accommodation, what priority does that person have on your transfer list?

COSTS ASSOCIATED WITH TRANSFERS TO AN ACCESSIBLE UNIT

Notice PIH 2010-26

- The PHA must pay moving expenses to transfer a resident with a disability to an accessible unit as an accommodation for the resident's disability.

PH GB p.150

- "PHAs must bear the reasonable costs of … all transfers needed as a reasonable accommodation for residents with disabilities. The reasonable cost of transfers includes not just the cost of packing, moving, and unloading, but also the cost of disconnecting and reconnecting any existing resident-paid services such as telephone and cable television."

Learning Activity 8-1: Transfers

Howard Thomas and his wife have lived in their third floor public housing unit for several years. Recently, however, their health has begun to deteriorate. Mr. Thomas now uses a wheelchair.

Howard and his wife live in an elevator building. However, the elevator is an older model and often goes out of service for an hour or more. This has caused some strain on the Thomas family's ability to come and go from their unit.

The PHA puts them on the transfer list. However, over the next few months, the Thomas family observes two newly admitted families move into first floor units while they remain on the third floor.

The Thomas family again requests the accommodation and ask if they can do anything or provide the PHA with additional verification to support their need to move as soon as practically possible. The PHA responds that it only has so many units and the they must be patient. New families have rights too.

- What needs to be considered here?

Section 8.3 Smoke-Free Public Housing

FR Notice 12/5/16

- On December 5, 2016 HUD issued the Instituting Smoke-Free Public Housing Final Rule that requires PHAs that operate public housing to amend their PHA plans and tenant leases to implement smoke-free policies no later than July 30, 2018.

24 CFR 966.53(a)

- Smoke-free policies must ban the use of prohibited tobacco products in all public housing living areas and interior areas, in addition to administrative offices and all outdoor areas up to 25 feet from public housing and administrative office buildings.

24 CFR 966.53(c)

  - *Prohibited tobacco products* are defined as items that involve the ignition of tobacco leaves such as (but not limited to) cigarettes, cigars, pipes and waterpipes (hookahs).
    - Electronic Nicotine Delivery Systems (ENDS), also called e-cigarettes, are not prohibited under the rule but PHAs have the discretion to prohibit them as part of their smoke-free policies.

- PHAs may limit smoking to designated smoking areas outside of restricted areas, may create additional smoke-free areas, or may make their entire grounds smoke-free.
  - Restricted areas include hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures.
- The rules does not prohibit individual residents from smoking.
  - PHAs should continue to lease to individuals who smoke.
- The rule does not apply to mixed-finance developments or properties that have converted under RAD.

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- HUD states in the final rule that reasonable accommodation requests must be evaluated on a case-by-case basis. Residents may be offered alternatives such as:
  - Offering cessation treatment;
  - Allowing e-cigarette use; or
  - Transferring to a unit closer to the exit.

Section 8.4 Accessibility of PHA Structures and Program

REQUIREMENTS FOR ACCESSIBLE UNITS (UFAS)

- Section 504 has the following set-aside requirements in new construction and substantial rehabilitation:
  - Five percent of the units (or at least one unit) must be accessible for people with mobility impairments (UFAS standards for accessibility)
  - Two percent of the units (or at least one unit) must be accessible for people with hearing or vision impairments (UFAS standards for accessibility). (Examples of accessibility features for a person who is blind might include elevator buttons that pop out when the right floor is reached, stoves with raised markings indicating the burner or oven temperature, and bathrooms with guard rails. For a person who is deaf, accessibility adaptations might include a smoke alarm or doorbell that flashes.)
- Notice PIH 2010-26 specifies that PHAs must always round up when calculating unit percentages to meet the requirement. For example, five percent of 41 units is 2.05 units. Therefore, in order to meet the five percent requirement, a PHA with 41 units must have at least three accessible units.

24 CFR 8.23(a)
Notice PIH 2002-01

- Substantial rehabilitation involves alterations taken to a project with 15 or more units and where the cost of the rehabilitation is 75 percent or more of the replacement costs of the completed facility. However, whenever alterations are undertaken, such alterations are required to be accessible to the maximum extent feasible. See 24 CFR 8.23(b)(1) for circumstances of undue financial and administrative burden exceptions.

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24 CFR 8.26

- In addition, accessible dwelling units shall be distributed throughout the development and be available in a range of sizes and amenities so that families with disabilities have choices of living arrangements comparable to that of other families eligible for assistance under the same program.

HEALTH AND SAFETY AND ACCESSIBILITY

https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq

- **Question**: How are recipients supposed to deal with the following fire emergency issues in a high-rise building: (1) If a HUD recipient cannot control where persons with disabilities live, during a fire, how do these tenants escape from a 14th floor unit? (2) If a HUD recipient cannot give out a list of where persons with disabilities live, how do rescue teams know where to go?
- **Answer**: The recipient must permit the applicant to take responsibility for his or her own safety. Thus, an applicant with a disability may choose not to live above the ground floor because of possible inability to escape a fire. On the other hand, the applicant must be allowed to decide whether the opportunity to live in a 14th floor dwelling unit outweighs whatever safety concerns may exist.
  - Every HUD recipient should have an emergency evacuation plan for each of its buildings. In the preparation and updating of this plan, the HUD recipient should inform residents that with the resident's consent, they will provide information to the fire department that identifies residents with special needs in case of an emergency evacuation. Applicants should be given the opportunity to decide whether they want the recipient to provide this information to the fire department. The HUD recipient may share this information with the local fire and police departments provided consent is given.

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VISITABILITY

Notice PIH 2010-26

- HUD recommends that all design, construction, and alterations incorporate, whenever practical and economical, the concept of visitability in addition to the physical requirements under Section 504, the Architectural Barriers Act, Title II of the Americans with Disabilities Act, and the Fair Housing Act.
- Visitability is a design concept, for very little or no additional cost, that enhances the ability of persons with disabilities to interact with their neighbors, friends, and associates in the community.
  - See www.huduser.gov/portal/publications/pubasst/strategies.html
- Below are a few examples of what visitability design will incorporate in all new construction or alterations, in addition to other requirements, whenever practical and possible:
  - Provide a 32" clear opening in all bathroom and interior doorways
  - Provide at least one accessible means of entering/exiting a unit or building
  - Provide a first floor accessible restroom
- Visitability also expands the availability of housing options for individuals who may not require full accessibility. It will assist PHAs in making reasonable accommodations and reduce, in some cases, the need for transfers when individuals become disabled in place. Visitability will also improve the marketability of units.

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PHYSICAL ACCESSIBILITY REGULATIONS AND LAWS

- The Fair Housing Act, Section 504, the ADA, the Architectural Barriers Act, and state and local building codes include physical accessibility requirements under which a PHA must be in compliance. Which laws apply may depend on whether buildings and developments have been recently constructed, rehabilitated, or are part of older stock housing or facilities.

AMERICANS WITH DISABILITIES ACT OF 1990 TITLE II/28 CFR 35

28 CFR 35.150

- A public entity shall operate each service, program or activity so that when viewed in its entirety, each service, program or activity is readily accessible to and usable by individuals with disabilities.

28 CFR 35.133

- A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities.

28 CFR 35.151(b)

- Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that effects or could effect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable for people with disabilities.

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FAIR HOUSING ACT OF 1988/24 CFR 100

- The Fair Housing Act's physical accessibility requirements apply to the public housing program and developments or units that voucher landlords construct or rehabilitate in the community.

24 CFR 100.205

- All multifamily dwelling units available for first occupancy on or after March 13, 1991 (applies to PHA property and private market units), shall be designed and constructed such that:
  - A building must have an entrance on an accessible route, except where compliance is impractical due to terrain or unusual characteristics of the site.
  - If a building has a building entrance on an accessible route, then the building's public and common use areas must be readily accessible to and usable by handicapped persons. HUD has explained this to mean that persons with disabilities must have access to at least one of each type of public/common facility offered
  - Doors in accessible units must be usable by mobility-impaired persons
  - There must be an accessible route into and through an accessible unit
  - Light switches, electrical outlets, thermostats, and other environmental controls must be placed in accessible locations
  - Bathroom walls in accessible units must be reinforced to allow installation of grab bars
  - Kitchens and bathrooms in accessible units must have sufficient space to allow people in wheelchairs to maneuver about
- For purposes of the act, the accessibility requirements apply to multifamily dwelling units that are buildings with four or more units served by at least one elevator, and the ground floor units in non-elevator buildings with four or more units.

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- On March 6, 1991, HUD published the Fair Housing and Accessibility Guidelines to provide the construction industry with a safe harbor for compliance with the FHA. HUD followed up to these guidelines with a *Federal Register* notice on June 28, 1994 "Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines."

http://www.fairhousingfirst.org
FR Notice, Oct. 24, 2008, Vol. 73, No. 207

- Currently HUD recognizes ten documents as providing a safe harbor for meeting accessibility requirements of the FHA, including the specific standards put forth by the American National Standards Institute (ANSI).

SECTION 504/ADA NEEDS ASSESSMENTS AND ACCESSIBILITY PLANS

- With the initial issuance of regulations implementing Section 504 at 24 CFR Part 8 in 1988, PHAs were required to conduct needs assessments, transition plans, and implementation strategies regarding meeting the needs of applicants and residents with disabilities.

24 CFR 8.21

- PHA offices and any other facilities need to be, to the maximum extent feasible, readily accessible to and usable by people with disabilities.
- The requirements for the transition plan focus on physical access. This plan was to have been completed by January 1989. The essential requirements were similar to the self-evaluation. The plan was to be developed with the assistance of interested parties, including people with disabilities or organizations representing people with disabilities.

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- A copy of the transition plan was to be made available for public inspection and should, at minimum:
  - Identify physical obstacles in PHA offices that limit program access to people with disabilities.
  - Complete a needs assessment for accessible units on a PHA-wide basis including wait list applicants.
  - Compare the need for accessible units to the number of units a public housing program can or does offer.
  - Describe in detail the methods that will be used to make the office space accessible and create more accessible public housing units if necessary.
  - Specify the schedule for taking the steps necessary to achieve compliance, and if the transition is to be longer than one year, identify steps that will be taken during each year of the transition period.
  - Indicate the official responsible for implementing the plan.
  - Identify the people or groups whose assistance was used to prepare the plan. 504 does not require that every facility be made structurally accessible, so long as the program, when viewed in its entirety, is readily accessible to, and usable by, people with disabilities. However, other action must be taken to ensure equal opportunity for participation.
- Similarly, a PHA self-evaluation was required after the passage of the Americans with Disabilities Act/28 CFR 35.105-35.107 and effective as of January 1992. Program accessibility is achieved through the 504 requirements of self-evaluation and transition plans, which are part of a comprehensive approach to accessibility. They are critical to developing an organizational culture that makes standard operating procedures sensitive to the access and communication issues that people with disabilities confront.

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- While many PHAs followed through with their implementation plans in the 1990s, some did not. Some PHAs continue to be in noncompliance with fair housing accessibility laws by having non-accessible administrative offices, PHA office properties, and too few public housing units that are accessible to individuals with disabilities.

Notice PIH 2010-26

- FHEO will continue to request copies of self-evaluations, needs assessments, and transition plans in every compliance review and complaint investigation conducted of a HUD recipient. To ensure compliance, PHAs are encouraged to conduct self-evaluations yearly by working with local advocacy groups for people with disabilities. Transition plans should be updated as a result of advocacy feedback and self-assessment discoveries.

UNIFORM FEDERAL ACCESSIBILITY STANDARDS (UFAS)

24 CFR 8.32

- The applicable accessibility standards for compliance under Section 504 are the Uniform Federal Accessibility Standards (UFAS). The Federal Access Board promulgates the UFAS.
  - See http://www.Access-Board.gov
- Note that just because a unit meets the requirements of the FHA Design and Construction requirements does NOT mean the unit is an accessible unit as defined by UFAS and Section 504.

Notice PIH 2010-26

- Federally funded properties must meet both the Section 504 construction requirements at 24 CFR 8.22 and the FHA design requirements. Below are two examples from Notice PIH 2010-26:

(1) An elevator building constructed with Federal financial assistance is required to have 100% of the dwelling units meet the Fair Housing Act design and construction requirements [24 CFR 100.205], and of this 100%, 5% will also need to comply with the stricter accessibility requirements of Section 504 and 24 CFR 8.22. In addition, Section 504 requires that an additional 2% of the units must be accessible for persons with vision or hearing impairments [24 CFR 8.22 (b)].

(2) Section 504 requires that a newly constructed 100-unit two-story walk-up apartment building with no elevator constructed with federal dollars to have a total of five accessible units for persons with mobility disabilities (5% of 100 units = 5 accessible units). If half of the 100 units are on the ground floor and half on the second floor, all 5 units will need to be on the ground floor and built to comply with the Section 504 accessibility requirements at 24 CFR 8.22 and 8.32. In addition, since all of the ground floor units are subject to the Fair Housing Act's design and construction requirements, all of the units on the ground floor would need to meet these requirements. For the most part, the 5% units designed to comply with Section 504 will meet the Fair Housing Act requirements, however, there are a few Fair Housing Act requirements that are not required under Section 504.

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ARCHITECTURAL BARRIERS ACT OF 1968/24 CFR 40

Notice PIH 2010-26

- Buildings constructed with federal dollars are subject to the ABA. All residential structures designed, constructed, or altered that are covered by the ABA must comply with the accessibility requirements of the UFAS.

COMPLIANCE

24 CFR 40

- Finally, when it comes to physical building construction and modification, the expansive ADA accessibility requirements must be well-understood by builders, architects and the construction business to be sure that your PHA properties are in compliance with all federal laws. State and local building codes must also be taken into account. Noncompliance with accessibility laws can be very costly. Here are two examples:
  - In MCIL and United States v. Grant (W.D. Tenn.), the defendants were required to retrofit unit interiors and the public and common use areas at the apartment complexes, including pedestrian walkways, driveways and the approach walks of the covered dwellings, create a community retrofit fund of $320,000, and pay a civil penalty of $110,000.
  - In United States v. Edward Rose & Sons (E.D. Mich.), a case alleging that a major housing developer and several architectural firms in Michigan, Indiana, Illinois, Ohio, Wisconsin, Virginia, and Nebraska, engaged in a pattern or practice of discrimination against persons with disabilities by failing to include accessibility features required the Fair Housing Act and the Americans with Disabilities Act in apartment complexes, the developer and architectural firms agreed to retrofit 49 apartment complexes and pay $1,060,000.

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PHA PLAN

24 CFR 903

- The PHA's policies concerning physical accessibility must be readily available to applicants and resident families.
- The PHA Plan should provide information about self-evaluation, needs assessment, and transition plans. The design, construction, or alteration of PHA facilities must conform to the Uniform Federal Accessibility Standards (UFAS). Newly constructed facilities must be designed to be readily accessible to and usable by persons with disabilities. Alterations to existing facilities must be accessible to the *maximum extent feasible,* defined as not imposing an undue financial and administrative burden on the operations of the public housing program.
- An important resource for physical accessibility compliance is a HUD-sponsored website:
  - http://www.fairhousingfirst.org

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Section 8.5 Deconcentration of Poverty and Income Mixing

PURPOSE

24 CFR 903.7(b)

- A statement of the PHA's deconcentration policies must be included in its annual plan.
- The purpose of this required policy is to encourage a healthy mix of incomes in public housing developments.

24 CFR 903.2(c)(5)

- However, the PHA's deconcentration policy does not supersede its obligation to meet the income targeting requirement.

METHODS TO ACHIEVE DECONCENTRATION

- The PHA's admission policy must be designed to provide for deconcentration of poverty and income-mixing by bringing higher income tenants into lower income projects and lower income tenants into higher income projects.
- HUD published a *Federal Register* notice on December 22, 2000, detailing the five step implementation process public housing programs must follow to be in compliance.

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DEVELOPMENTS NOT SUBJECT TO DECONCENTRATION REQUIREMENTS

24 CFR 903.2(b)

- The following developments are not subject to deconcentration and income mixing requirements:
  - Developments operated by a PHA with fewer than 100 public housing units
  - Mixed population or developments designated specifically for elderly or disabled families
  - Developments operated by a PHA with only one general occupancy development
  - Developments approved for demolition or for conversion to tenant-based public housing
  - Developments approved for a mixed-finance plan using HOPE VI or public housing funds

FAIR HOUSING ISSUES

- To accomplish the goals of deconcentration and income-mixing, the PHA could establish incentives to attract lower income families to higher income developments, and higher income families to lower income developments.

Section 8.6 Unit Offers to Elderly Or Disabled Families

- The decision of any disabled family or elderly family not to occupy or accept occupancy in designated housing shall not have an adverse affect on their admission or continued occupancy in public housing or their position or placement on the waiting list.

24 CFR 945.303(d)(1) and (2)

- However, this protection does not apply to any family who refuses to occupy or accept occupancy in designated housing because of the race, color, religion, sex, disability, familial status, or national origin of the occupants of the designated housing or the surrounding area.

24 CFR 945.303(d)(3)

- This protection does apply to an elderly family or disabled family that declines to accept occupancy, respectively, in a designated project for elderly families or for disabled families, and requests occupancy in a general occupancy project or in a mixed-population project.

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Learning Activity 8-2: PH-Specific Quiz

1. Put the following into the proper order for filling a vacant accessible unit.
   a. Current tenant at another PHA property site who needs the accessibility feature
   b. Other applicants without disabilities who agree to move with reasonable notice
   c. Applicants on the wait list needing the features of the accessible unit
   d. Current tenants at that property site who need the accessibility feature

   1. _____
   2. _____
   3. _____
   4. _____

2. A PHA may not ask a resident to pay fees associated with a motorized scooter as reasonable accommodation, but if the individual's use of the scooter causes excessive damage to the unit or common areas, the PHA may later charge the resident the cost of repairing the damages.
   a. True
   b. False

3. What percent of newly constructed PH units must be accessible to people with mobility impairments?
   a. 10 percent
   b. 2 percent
   c. 5 percent
   d. 30 percent

4. What percent of newly constructed PH units must be accessible to people with hearing/vision impairments?
   a. 10 percent
   b. 2 percent
   c. 5 percent
   d. 30 percent

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5. For federally assisted new construction and substantial rehabilitation housing, Section 504 requires owners round up when calculating the number of units that require accessibility features.
   a. True
   b. False

6. Just because a unit meets the FHA design and construction requirements does NOT mean the unit is an accessible unit as defined by UFAS and Section 504.
   a. True
   b. False

7. Site-based waiting list requirements include utilizing independent testers every five years to assure there is no discrimination taking place.
   a. True
   b. False

8. The PHA must pay moving expenses for any transfer.
   a. True
   b. False

9. The PHA must pay moving expenses to transfer a resident to an accessible unit if the accessible unit is needed as a reasonable accommodation for a person's disability.
   a. True
   b. False

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Notes

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Table of Contents

CHAPTER 9 References

SECTION 1 24 CFR References 9-1

PART 1 NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

§1.1 Purpose. 9-1
§1.2 Definitions. 9-1
§1.3 Application of Part 1. 9-1
§1.4 Discrimination prohibited. 9-1
§1.5 Assurances required. 9-2
§1.6 Compliance information. 9-3
§1.7 Conduct of investigations. 9-3
§1.8 Procedure for effecting compliance. 9-3
§1.9 Hearings. 9-4

PART 8 NONDISCRIMINATION BASED ON HANDICAP IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SUBPART A GENERAL PROVISIONS

§8.1 Purpose. 9-4
§8.2 Applicability. 9-4
§8.3 Definitions. 9-4
§8.4 Discrimination prohibited. 9-6
§8.5 [Reserved] 9-7
§8.6 Communications. 9-7

SUBPART B EMPLOYMENT

§8.10 General prohibitions against employment discrimination. 9-7
§8.11 Reasonable accommodation. 9-7
§8.12 Employment criteria. 9-7
§8.13 Preemployment inquiries. 9-7

SUBPART C PROGRAM ACCESSIBILITY

§8.20 General requirement concerning program accessibility. 9-8
§8.21 Non-housing facilities. 9-8
§8.22 New Construction housing facilities. 9-8
§8.23 Alterations of existing housing facilities. 9-9
§8.24 Existing housing programs. 9-9
§8.25 Public housing and multi-family Indian housing. 9-9
§8.26 Distribution of accessible dwelling units. 9-10
§8.27 Occupancy of accessible dwelling units. 9-10
§8.28 Housing certificate and housing voucher programs. 9-10
§8.29 Homeownership programs (Sections 235(i) and 235(j), Turnkey III and Indian Housing Mutual Self-Help programs). 9-10
§8.30 Rental rehabilitation program. 9-10
§8.31 Historic properties. 9-10
§8.32 Accessibility standards. 9-11
§8.33 Housing adjustments. 9-11

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SUBPART D ENFORCEMENT
§8.50 Assurances required. . . . 9-11
§8.51 Self-evaluation. . . . 9-11
§8.52 Remedial and affirmative action. . . . 9-11
§8.53 Designation of responsible employee and adoption of grievance procedures. . . . 9-12
§8.54 Notice. . . . 9-12
§8.55 Compliance information. . . . 9-12
§8.56 Conduct of investigations. . . . 9-12
§8.57 Procedure for effecting compliance. . . . 9-13
§8.58 Hearings. . . . 9-14

PART 40 ACCESSIBILITY STANDARDS FOR DESIGN, CONSTRUCTION, AND ALTERATION OF PUBLICLY OWNED RESIDENTIAL STRUCTURES
§40.1 Purpose. . . . 9-14
§40.2 Definition of "residential structure". . . . 9-14
§40.3 Applicability. . . . 9-14
§40.4 Standards. . . . 9-14
§40.5 [Reserved] . . . 9-14
§40.6 Records. . . . 9-14
§40.7 Availability of Accessibility Standards. . . . 9-14

PART 41 POLICIES AND PROCEDURES FOR THE ENFORCEMENT OF STANDARDS AND REQUIREMENTS FOR ACCESSIBILITY BY THE PHYSICALLY HANDICAPPED
§41.1 Applicability. . . . 9-15
§41.2 Definitions. . . . 9-15
§41.3 Assurance and declaration required. . . . 9-15
§41.4 Waiver or modification of standards. . . . 9-15
§41.5 Achieving compliance. . . . 9-15
§41.6 Matters involving the Architectural and Transportation Barriers Compliance Board. . . . 9-16

PART 100 DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT
SUBPART A GENERAL
§100.1 Authority. . . . 9-16
§100.5 Scope. . . . 9-16
§100.10 Exemptions. . . . 9-16
§100.20 Definitions. . . . 9-16
SUBPART B DISCRIMINATORY HOUSING PRACTICES
§100.50 Real estate practices prohibited. . . . 9-17
§100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental. . . . 9-17
§100.65 Discrimination in terms, conditions and privileges and in services and facilities. . . . 9-17
§100.70 Other prohibited sale and rental conduct. . . . 9-17
§100.75 Discriminatory advertisements, statements and notices. . . . 9-18
§100.80 Discriminatory representations on the availability of dwellings. . . . 9-18
§100.85 Blockbusting. . . . 9-18
§100.90 Discrimination in the provision of brokerage services. . . . 9-18
SUBPART C DISCRIMINATION IN RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS
§100.110 Discriminatory practices in residential real estate-related transactions. . . . 9-19
§100.115 Residential real estate-related transactions. . . . 9-19
§100.120 Discrimination in the making of loans and in the provision of other financial assistance. . . . 9-19
§100.125 Discrimination in the purchasing of loans. . . . 9-19
§100.130 Discrimination in the terms and conditions for making available loans or other financial assistance. . . . 9-19
§100.135 Unlawful practices in the selling, brokering, or appraising of residential real property. . . . 9-19
§100.140 General rules. . . . 9-19
§100.141 Definitions. . . . 9-19

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§100.142 Types of information. . . . 9-20
§100.143 Appropriate corrective action. . . . 9-20
§100.144 Scope of privilege. . . . 9-20
§100.145 Loss of privilege. . . . 9-20
§100.146 Limited use of privileged information. . . . 9-20
§100.147 Adjudication. . . . 9-20
§100.148 Effective date. . . . 9-20

SUBPART D PROHIBITION AGAINST DISCRIMINATION BECAUSE OF HANDICAP

§100.200 Purpose. . . . 9-21
§100.201 Definitions. . . . 9-21
§100.201a Incorporation by reference. . . . 9-21
§100.202 General prohibitions against discrimination because of handicap. . . . 9-22
§100.203 Reasonable modifications of existing premises. . . . 9-22
§100.204 Reasonable accommodations. . . . 9-22
§100.205 Design and construction requirements. . . . 9-23

SUBPART E HOUSING FOR OLDER PERSONS

§100.300 Purpose. . . . 9-24
§100.301 Exemption. . . . 9-24
§100.302 State and Federal elderly housing programs. . . . 9-24
§100.303 62 or over housing. . . . 9-24
§100.304 Housing for persons who are 55 years of age or older. . . . 9-24
§100.305 80 percent occupancy. . . . 9-24
§100.306 Intent to operate as housing designed for persons who are 55 years of age or older. . . . 9-25
§100.307 Verification of occupancy. . . . 9-25
§100.308 Good faith defense against civil money damages. . . . 9-25

SUBPART F INTERFERENCE, COERCION OR INTIMIDATION

§100.400 Prohibited interference, coercion or intimidation. . . . 9-25

PART 103 FAIR HOUSING COMPLAINT PROCESSING

SUBPART A PURPOSE AND DEFINITIONS

§103.1 Purpose and applicability. . . . 9-26
§103.5 Other civil rights authorities. . . . 9-26
§103.9 Definitions. . . . 9-26

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? . . . 9-26
§103.15 Can I file a claim if the discrimination has not yet occurred? . . . 9-26
§103.20 Can someone help me with filing a claim? . . . 9-26
§103.25 What information should I provide to HUD? . . . 9-26
§103.30 How should I bring a claim that I am the victim of discrimination? . . . 9-27
§103.35 Is there a time limit on when I can file? . . . 9-27
§103.40 Can I change my complaint after it is filed? . . . 9-27

SUBPART C REFERRAL OF COMPLAINTS TO STATE AND LOCAL AGENCIES

§103.100 Notification and referral to substantially equivalent State or local agencies. . . . 9-27
§103.105 Cessation of action on referred complaints. . . . 9-27
§103.110 Reactivation of referred complaints. . . . 9-27
§103.115 Notification upon reactivation. . . . 9-27

SUBPART D INVESTIGATION PROCEDURES

§103.200 Investigations. . . . 9-27
§103.201 Service of notice on aggrieved person. . . . 9-27
§103.202 Notification of respondent; joinder of additional or substitute respondents. . . . 9-28
§103.203 Answer to complaint. . . . 9-28
§103.204 HUD complaints and compliance reviews. . . . 9-28

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§103.205 Systemic processing. . . . 9-28
§103.215 Conduct of investigation. . . . 9-28
§103.220 Cooperation of Federal, State and local agencies. . . . 9-28
§103.225 Completion of investigation. . . . 9-28
§103.230 Final investigative report. . . . 9-28
SUBPART E CONCILIATION PROCEDURES
§103.300 Conciliation. . . . 9-28
§103.310 Conciliation agreement. . . . 9-29
§103.315 Relief sought for aggrieved persons. . . . 9-29
§103.320 Provisions sought for the public interest. . . . 9-29
§103.325 Termination of conciliation efforts. . . . 9-29
§103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation. . . . 9-29
§103.335 Review of compliance with conciliation agreements. . . . 9-29
SUBPART F ISSUANCE OF CHARGE
§103.400 Reasonable cause determination. . . . 9-29
§103.405 Issuance of charge. . . . 9-30
§103.410 Election of civil action or provision of administrative proceeding. . . . 9-30
SUBPART G PROMPT JUDICIAL ACTION
§103.500 Prompt judicial action. . . . 9-30
SUBPART H OTHER ACTION
§103.510 Other action by HUD. . . . 9-30
§103.515 Action by other agencies. . . . 9-31

SECTION 2 HUD Notices and Letters . . . 9-33
5/17/04 HUD and DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act . . . 9-33
7/26/10 Notice PIH 2010-26 (HA); Non-Discrimination and Accessibility for Persons with Disabilities . . . 9-49
4/16/16 Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions . . . 9-77
9/13/16 Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims . . . 9-87
9/14/16 Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act . . . 9-101
9/15/16 Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency . . . 9-123
1/28/20 Notice FHEO 2020-01; Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act . . . 9-133

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Section 1 24 CFR References

PART 1 NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

1.1 Purpose.

The purpose of this part 1 is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the Act) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Housing and Urban Development.

1.2 Definitions.

As used in this part 1

(a) The term *Department* means the Department of Housing and Urban Development.

(b) The term *Secretary* means the Secretary of Housing and Urban Development.

(c) The term *responsible Department official* means the Secretary or, to the extent of any delegation of authority by the Secretary to act under this part 1, any other Department official to whom the Secretary may hereafter delegate such authority.

(d) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term State means any one of the foregoing.

(e) The term *Federal financial assistance* includes: (1) Grants, loans, and advances of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. The term Federal financial assistance does not include a contract of insurance or guaranty.

(f) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program or activity, or who otherwise participates in carrying out such program or activity (such as a redeveloper in the Urban Renewal Program), including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program or activity.

(g) The term *applicant* means one who submits an application, contract, request, or plan requiring Department approval as a condition to eligibility for Federal financial assistance, and the term application means such an application, contract, request, or plan.

1.3 Application of Part 1.

This Part 1 applies to any program or activity for which Federal financial assistance is authorized under a law administered by the Department, including any program or activity assisted under the statutes listed in Appendix A of this Part 1. It applies to money paid, property transferred, or other Federal financial assistance extended to any such program or activity on or after January 3, 1965. This Part 1 does not apply to: (a) Any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended to any such program or activity before January 3, 1965, (c) any assistance to any person who is the ultimate beneficiary under any such program or activity, or (d) any employment practice, under any such program or activity, of any employer, employment agency, or labor organization, except to the extent described in 1.4(c). The fact that certain financial assistance is not listed in Appendix A shall not mean, if title VI of the Act is otherwise applicable, that such financial assistance is not covered. Other financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the Federal Register.

1.4 Discrimination prohibited.

(a) *General*. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity to which this Part 1 applies.

(b) *Specific discriminatory actions prohibited*.

(1) A recipient under any program or activity to which this Part 1 applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny a person any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity;

(ii) Provide any housing, accommodations, facilities, services, financial aid, or other benefits to a person which are different, or are provided in a different manner, from those provided to others under the program or activity;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity;

(iv) Restrict a person in any way in access to such housing, accommodations, facilities, services, financial aid, or other benefits, or in the enjoyment of any advantage or privilege enjoyed by others in connection with such housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity;

(v) Treat a person differently from others in determining whether he satisfies any occupancy, admission, enrollment, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity;

(vi) Deny a person opportunity to participate in the program or activity through the provision of services or otherwise, or afford him an opportunity to do so which is different from that afforded others under the program or activity (including the opportunity to participate in the program or activity as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2)(i) A recipient, in determining the types of housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any such program or activity, or the class of persons to whom, or the situations in which, such housing, accommodations, facilities, services, financial aid, or other benefits will be provided under any such program or activity, or the class of persons to be afforded an opportunity to participate in any such program or activity, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect to persons of a particular race, color, or national origin.

(ii) A recipient, in operating low-rent housing with Federal financial assistance under the United States Housing Act of 1937, as amended (42 U.S.C. 1401 et seq.), shall assign eligible applicants to dwelling units in accordance with a plan, duly adopted by the recipient and approved by the responsible Department official, providing for assignment on a community-wide basis in sequence based upon the date and time the application is received, the size or type of unit suitable, and factors affecting preference or priority established by the recipient's regulations, which are not inconsistent with the objectives of title VI of the Civil Rights Act of 1964 and this Part 1. The plan may

allow an applicant to refuse a tendered vacancy for good cause without losing his standing on the list but shall limit the number of refusals without cause as prescribed by the responsible Department official.

(iii) The responsible Department official is authorized to prescribe and promulgate plans, exceptions, procedures, and requirements for the assignment and reassignment of eligible applicants and tenants consistent with the purpose of paragraph (b)(2)(ii) of this section, this Part 1, and title VI of the Civil Rights Act of 1964, in order to effectuate and insure compliance with the requirements imposed thereunder.

(3) In determining the site or location of housing, accommodations, or facilities, an applicant or recipient may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part 1 applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this Part 1.

(4) As used in this Part 1 the housing, accommodations, facilities, services, financial aid, or other benefits provided under a program or activity receiving Federal financial assistance shall be deemed to include any housing, accommodations, facilities, services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in paragraphs (b) and (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program should take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Where previous discriminatory practice or usage tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this Part 1 applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purpose of the Act.

(c) *Employment practices*.

(1) Where a primary objective of the Federal financial assistance to a program or activity to which this Part 1 applies is to provide employment, a recipient may not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program or activity (including recruitment or recruitment advertising, employment, layoff, termination, upgrading, demotion, transfer, rates of pay or other forms of compensation and use of facilities). The requirements applicable to construction employment under such program or activity shall be those specified in or pursuant to Part III of Executive Order 11246 or any executive order which supersedes or amends it.

(2) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to this Part 1 tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this Part 1 applies, the provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to this Part 1 to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

1.5 Assurances required.

(a) *General*.

(1) Every contract for Federal financial assistance to carry out a program or activity to which this Part 1 applies, executed on or after January 3, 1965, and every application for such Federal financial assistance submitted on or after January 3, 1965, shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to such contract or application, contain or be accompanied by an assurance that the program or activity will be conducted and the housing, accommodations, facilities, services, financial aid, or other benefits to be provided will be operated and administered in compliance with all requirements imposed by or pursuant to this Part 1. In the case of a contract or application where the Federal financial assistance is to provide or is in the form of personal property or real property or interest therein or structures thereon, the assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the contract or application. The responsible Department official shall specify the form of the foregoing assurance for such program or activity, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program or activity. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) In the case of real property, structures or improvements thereon, or interests therein, acquired through a program of Federal financial assistance the instrument effecting any disposition by the recipient of such real property, structures or improvements thereon, or interests therein, shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case where Federal financial assistance is provided in the form of a transfer of real property or interests therein from the Federal Government, the instrument effecting or recording the transfer shall contain such a covenant.

(3) In program receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving such assistance, the nondiscrimination requirements of this Part 1 shall extend to any facility located wholly or in part in such space.

(b) *Preexisting contracts—funds not disbursed*. In any case where a contract for Federal financial assistance, to carry out a program or activity to which this Part 1 applies, has been executed prior to January 3, 1965, and the funds have not been fully disbursed by the Department, the responsible Department official shall, where necessary to effectuate the purposes of this Part 1, require an assurance similar to that provided in paragraph (a) of this section as a condition to the disbursement of further funds.

(c) *Preexisting contracts—periodic payments*. In any case where a contract for Federal financial assistance, to carry out a program or activity to which this Part 1 applies, has been executed prior to January 3, 1965, and provides for periodic payments for the continuation of the program or activity, the recipient shall, in connection with the first application for such periodic payments on or after January 3, 1965: (1) Submit a statement that the program or activity is being conducted in compliance with all requirements imposed by or pursuant to this Part 1 and (2) provide such methods of administration for the program or activity as are found by the responsible Department official to give reasonable assurance that the recipient will comply with all requirements imposed by or pursuant to this Part 1.

(d) *Assurances from institutions*.

(1) In the case of any application for Federal financial assistance to an institution of higher education, the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of persons as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such persons, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(e) *Elementary and secondary schools*. The requirements of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible official of the Department of Health and Human Services determines is adequate to accomplish the purposes of the Act and this Part 1 within the earliest practicable time, and provides reasonable assurance that it will carry out such plan.

1.6 Compliance information.

(a) *Cooperation and assistance*. The responsible Department official and each Department official who by law or delegation has the principal responsibility within the Department for the administration of any law extending financial assistance subject to this Part 1 shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this Part 1 and shall provide assistance and guidance to recipients to help them comply voluntarily with this Part 1.

(b) *Compliance reports*. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this Part 1. In general, recipients should have available for the department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs.

(c) *Access to sources of information*. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this Part 1. Where any information required of a recipient is in the exclusive possession of any other agency, institution, or person and this agency, institution, or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants*. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this Part 1 and its applicability to the program or activity under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this Part 1.

1.7 Conduct of investigations.

(a) *Periodic compliance reviews*. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this Part 1.

(b) *Complaints*. Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this Part 1 may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations*. The responsible Department official or his designee shall make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this Part 1. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this Part 1 occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters*.

(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this Part 1, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in 1.8.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited*. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any person for the purpose of interfering with any right or privilege secured by title VI of the Act or this Part 1, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

1.8 Procedure for effecting compliance.

(a) *General*. If there appears to be a failure or threatened failure to comply with this Part 1, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this Part 1 may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law. Such other means may include, but are not limited to: (1) A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with 1.5*. If an applicant fails or refuses to furnish an assurance required under 1.5 or otherwise fails or refuses to comply with the requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph, except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to a contract therefor approved prior to January 3, 1965.

(c) *Termination of or refusal to grant or to continue Federal financial assistance*. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been

an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this Part 1, (3) the action has been approved by the Secretary, and (4) the expiration of 30 days after the Secretary has filed with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law*. No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the applicant or recipient. During this period of at least 10 days additional efforts shall be made to persuade the applicant or recipient to comply with this Part 1 and to take such corrective action as may be appropriate.

1.9 Hearings.

(a) *Opportunity for hearing*. Whenever an opportunity for a hearing is required by 1.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either:

(1) Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing, or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated time and place. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph (a) or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and 1.8(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Hearing procedures*. Hearings shall be conducted in accordance with 24 CFR part 180.

PART 8 NONDISCRIMINATION BASED ON HANDICAP IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SUBPART A GENERAL PROVISIONS

8.1 Purpose.

(a) The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C 794), to the end that no otherwise qualified individual with handicaps in the United States 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 from the Department of Housing and Urban Development. This part also implements section 109 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5309). This part does not effectuate section 504 as it applies to any program or activity conducted by the Department. Compliance with this part does not assure compliance with requirements for accessibility by physically-handicapped persons imposed under the Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157; 24 CFR Part 40).

(b) The policies and standards for compliance established by this part are established in contemplation of, and with a view to enforcement through, the Department's administration of programs or activities receiving Federal financial assistance and the administrative procedures described in Subparts D and E (including, without limitation, judicial enforcement under 8.57(a)).

8.2 Applicability.

This part applies to all applicants for, and recipients of, HUD assistance in the operation of programs or activities receiving such assistance. Such assistance includes, but is not limited to, that which is listed in Appendix A of this part.

8.3 Definitions.

As used in this part:

Accessible, when used with respect to the design, construction, or alteration of a facility or a portion of a facility other than an individual dwelling unit, means that the facility or portion of the facility when designed, constructed or altered, can be approached, entered, and used by individuals with physical handicaps. The phrase accessible to and usable by is synonymous with accessible.

Accessible, when used with respect to the design, construction, or alteration of an individual dwelling unit, means that the unit is located on an accessible route and when designed, constructed, altered or adapted can be approached, entered, and used by individuals with physical handicaps. A unit that is on an accessible route and is adaptable and otherwise in compliance with the standards set forth in 8.32 is accessible within the meaning of this paragraph. When a unit in an existing facility which is being made accessible as a result of alterations is intended for use by a specific qualified individual with handicaps (e.g., a current occupant of such unit or of another unit under the control of the same recipient, or an applicant on a waiting list), the unit will be deemed accessible if it meets the requirements of applicable standards that address the particular disability or impairment of such person.

Accessible route means a continuous unobstructed path connecting accessible elements and spaces in a building or facility that complies with the space and reach requirements of applicable standards prescribed by 8.32. An accessible route that serves only accessible units occupied by persons with hearing or vision impairments need not comply with those requirements intended to effect accessibility for persons with mobility impairments.

Adaptability means the ability of certain elements of a dwelling unit, such as kitchen counters, sinks, and grab bars, to be added to, raised, lowered, or otherwise altered, to accommodate the needs of persons with or without handicaps, or to accommodate the needs of persons with different types or degrees of disability. For example, in a unit adaptable for a hearing-impaired person, the wiring for visible emergency alarms may be installed but the alarms need not be installed until such time as the unit is made ready for occupancy by a hearing-impaired person.

Alteration means any change in a facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangements in structural parts and extraordinary repairs. It does not include normal maintenance or repairs, reroofing, interior decoration, or changes to mechanical systems.

Applicant for assistance means one who submits an application, request, plan, or statement required to be approved by a Department official or by a primary recipient as a condition of eligibility for Federal financial assistance. An application means such a request, plan or statement.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities receiving Federal financial assistance. For example, auxiliary aids for persons with impaired vision may include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids for persons with impaired hearing may include

telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Department or *HUD* means the Department of Housing and Urban Development.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other real or personal property or interest in the property.

Federal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real or personal property or any interest in or use of such property, including:

(1) Transfers or leases of the property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of the property if the Federal share of its fair market value is not returned to the Federal Government.

*Federal financial assistanc*e includes community development funds in the form of proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended, but does not include assistance made available through direct Federal procurement contracts or payments made under these contracts or any other contract of insurance or guaranty.

Handicap means any condition or characteristic that renders a person an individual with handicaps.

Historic preservation programs or activities means programs or activities receiving Federal financial assistance that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a statute of the appropriate State or local government body.

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; 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.

Multifamily housing project means a project containing five or more dwelling units.

Primary recipient means a person, group, organization, State or local unit of government that is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program or activity.

Program or activity means all of the operations of:

(a)(1) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(2) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(b)(1) A college, university, or other post-secondary institution, or a public system of higher education; or

(2) A local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(c)(1) An entire corporation, partnership, or other private organization, or an entire sole proprietorship

(i) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(2) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(d) Any other entity which is established by two or more of the entities described in paragraphs (a), (b), or (c) of this section; any part of which is extended Federal financial assistance.

Project means the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single contract for Federal financial assistance or application for assistance, or are treated as a whole for processing purposes, whether or not located on a common site.

Qualified individual with handicaps means:

(a) With respect to employment, an individual with handicaps who, with reasonable accommodation, can perform the essential functions of the job in question; and

(b) With respect to any non-employment program or activity which requires a person to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the recipient can demonstrate would result in a fundamental alteration in its nature; or

(c) With respect to any other non-employment program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that

program or activity. Essential eligibility requirements include stated eligibility requirements such as income as well as other explicit or implicit requirements inherent in the nature of the program or activity, such as requirements that an occupant of multifamily housing be capable of meeting the recipient's selection criteria and be capable of complying with all obligations of occupancy with or without supportive services provided by persons other than the recipient. For example, a chronically mentally ill person whose particular condition poses a significant risk of substantial interference with the safety or enjoyment of others or with his or her own health or safety in the absence of necessary supportive services may be qualified for occupancy in a project where such supportive services are provided by the recipient as part of the assisted program. The person may not be qualified for a project lacking such services.

Recipient means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. An entity or person receiving housing assistance payments from a recipient on behalf of eligible families under a housing assistance payments program or a voucher program is not a recipient or subrecipient merely by virtue of receipt of such payments.

Replacement cost of the completed facility means the current cost of construction and equipment for a newly constructed housing facility of the size and type being altered. Construction and equipment costs do not include the cost of land, demolition, site improvements, non-dwelling facilities and administrative costs for project development activities.

Secretary means the Secretary of Housing and Urban Development.

Section 504 means section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, as it applies to programs or activities receiving Federal financial assistance.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

8.4 Discrimination prohibited.

(a) No qualified individual with handicaps shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance from the Department.

(b)(1) A recipient, in providing any housing, aid, benefit, or service in a program or activity that receives Federal financial assistance from the Department may not, directly or through contractual, licensing, or other arrangements, solely on the basis of handicap:

(i) Deny a qualified individual with handicaps the opportunity to participate in, or benefit from, the housing, aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in, or benefit from, the housing, aid, benefit, or service that is not equal to that afforded to others;

(iii) Provide a qualified individual with handicaps with any housing, aid, benefit, or service that is not as effective in affording the individual an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate housing, aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps from that provided to others unless such action is necessary to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to others.

(v) Aid or perpetuate discrimination against a qualified individual with handicaps by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any housing, aid, benefit, or service to beneficiaries in the recipient's federally assisted program or activity;

(vi) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vii) Deny a dwelling to an otherwise qualified buyer or renter because of a handicap of that buyer or renter or a person residing in or intending and eligible to reside in that dwelling after it is sold, rented or made available; or

(viii) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by other qualified individuals receiving the housing, aid, benefit, or service.

(2) For purposes of this part, housing, aids, benefits, and services, to be equally effective, 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.

(3) A recipient may not deny a qualified individual with handicaps the opportunity to participate in any federally assisted program or activity that is not separate or different despite the existence of permissibly separate or different programs or activities.

(4) In any program or activity receiving Federal financial assistance from the Department, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would:

(i) Subject qualified individuals with handicaps to discrimination solely on the basis of handicap;

(ii) Defeat or substantially impair the accomplishment of the objectives of the recipient's federally assisted program or activity for qualified individuals with a particular handicap involved in the program or activity, unless the recipient can demonstrate that the criteria or methods of administration are manifestly related to the accomplishment of an objective of a program or activity; or

(iii) Perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a federally assisted facility, an applicant for assistance or a recipient may not make selections the purpose or effect of which would:

(i) Exclude qualified individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity that receives Federal financial assistance from the Department, or

(ii) Defeat or substantially impair the accomplishment of the objectives of the program or activity with respect to qualified individuals with handicaps.

(6) As used in this section, the housing, aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any housing, aid, benefit, or service provided in or through a facility that has been constructed, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c)(1) Non-handicapped persons may be excluded from the benefits of a program if the program is limited by Federal statute or executive order to individuals with handicaps. A specific class of individuals with handicaps may be excluded from a program if the program is limited by Federal statute or Executive order to a different class of individuals.

(2) Certain Department programs operate under statutory definitions of handicapped person that are more restrictive than the definition of individual with handicaps contained in 8.3 (see appendix B). Those definitions are not superseded or otherwise affected by this regulation.

(d) Recipients shall administer programs and activities receiving Federal financial assistance in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

(e) The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement that, based on handicap, imposes inconsistent or contradictory prohibitions or limits upon the eligibility of qualified individuals with handicaps to receive services or to practice any occupation or profession.

(f) The enumeration of specific forms of prohibited discrimination in paragraphs (b) through (e) of this section does not limit the general prohibition in paragraph (a) of this section.

8.5 [Reserved]

8.6 Communications.

(a) The recipient shall take appropriate steps to ensure effective communication with applicants, beneficiaries, and members of the public.

(1) The recipient shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity receiving Federal financial assistance.

(i) In determining what auxiliary aids are necessary, the recipient shall give primary consideration to the requests of the individual with handicaps.

(ii) The recipient is not required to provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where a recipient communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective communication systems shall be used.

(b) The recipient shall adopt and implement procedures to ensure that interested persons (including persons with impaired vision or hearing) can obtain information concerning the existence and location of accessible services, activities, and facilities.

(c) This section does not require a recipient to take any action that the recipient can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity receiving HUD assistance.

SUBPART B EMPLOYMENT

8.10 General prohibitions against employment discrimination.

(a) No qualified individual with handicaps shall, solely on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives Federal financial assistance from the Department.

(b) A recipient may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, injury or illness, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence for training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified applicants with handicaps or employees with handicaps to discrimination prohibited by this subpart. The relationships referred to in this paragraph (d) include relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

8.11 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant with handicaps or employee with handicaps, unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees accessible to and usable by individuals with handicaps and

(2) Job restructuring, job relocation, part-time or modified work schedules, acquisitions or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining, under paragraph (a) of this section, whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

8.12 Employment criteria.

(a) A recipient may not use any employment test or other selection criterion that screens out or tends to screen out individuals with handicaps or any class of individuals with handicaps unless:

(1) The recipient demonstrates that the test score or other selection criterion, as used by the recipient, is job-related for the position in question; and

(2) The appropriate HUD official demonstrates that alternative job-related tests or criteria that tend to screen out fewer individuals with handicaps are unavailable.

(b) A recipient shall select and administer tests concerning employment to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

8.13 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not make a preemployment inquiry or conduct a preemployment medical examination of an applicant to determine whether the applicant is an individual with handicaps or the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is undertaking affirmative action efforts, voluntary or otherwise, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, if the following conditions are met:

(1) The recipient states clearly on any written questionnaire used for this purpose, or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations, or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential (as provided in paragraph (d) of this section), that refusal to provide the

information will not subject the applicant or employee to any adverse treatment, and that the information will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted before the employee's entrance on duty if all entering employees in that category of job classification must take such an examination regardless of handicap, and the results of such examination are used only in accordance with the requirements of this part.

(d) Information obtained under this section concerning the medical condition or history of the applicant is to be collected and maintained on separate forms that are accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed of restrictions on the work or duties of individuals with handicaps and informed of necessary accommodations;

(2) First aid and safety personnel may be informed if the condition might require emergency treatment; and

(3) Government officials investigating compliance with section 504 shall be provided relevant information upon request.

SUBPART C PROGRAM ACCESSIBILITY

8.20 General requirement concerning program accessibility.

Except as otherwise provided in §8.21(c)(1), 8.24(a), 8.25, and 8.31, no qualified individual with handicaps shall, because a recipient's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance.

8.21 Non-housing facilities.

(a) *New construction*. New non-housing facilities shall be designed and constructed to be readily accessible to and usable by individuals with handicaps.

(b) *Alterations to facilities*. Alterations to existing non-housing facilities shall, to the maximum extent feasible, be made to be readily accessible to and usable by individuals with handicaps. For purposes of this paragraph, the phrase to the maximum extent feasible shall not be interpreted as requiring that a recipient make a non-housing facility, or element thereof, accessible if doing so would impose undue financial and administrative burdens on the operation of the recipient's program or activity.

(c) *Existing non-housing facilities.*

(1) General. A recipient shall operate each non-housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not

(i) Necessarily require a recipient to make each of its existing non-housing facilities accessible to and usable by individuals with handicaps;

(ii) In the case of historic preservation programs or activities, require the recipient to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(iii) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the recipient shall take any action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(2) *Methods.*

(i) *General*. A recipient may comply with the requirements of this section in its programs and activities receiving Federal financial assistance through such means as location of programs or services to accessible facilities or accessible portions of facilities, assignment of aides to beneficiaries, home visits, the addition or redesign of equipment (e.g., appliances or furnishings) changes in management policies or procedures, acquisition or construction of additional facilities, or alterations to existing facilities on a selective basis, or any other methods that result in making its program or activity accessible to individuals with handicaps. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, the recipient shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(ii) *Historic preservation programs or activities*. In meeting the requirements of 8.21(c) in historic preservation programs or activities, a recipient shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of 8.21(c)(1)(ii) or (iii), alternative methods of achieving program accessibility include using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible; assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or adopting other innovative methods.

(3) *Time period for compliance*. The recipient shall comply with the obligations established under this section within sixty days of July 11, 1988, except that where structural changes in facilities are undertaken, such changes shall be made within three years of July 11, 1988, but in any event as expeditiously as possible.

(4) *Transition plan*. If structural changes to non-housing facilities will be undertaken to achieve program accessibility, a recipient shall develop, within six months of July 11, 1988, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including individuals with handicaps or organizations representing individuals with handicaps. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum

(i) Identify physical obstacles in the recipient's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(ii) Describe in details the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(iv) Indicate the official responsible for implementation of the plan; and

(v) Identify the persons or groups with whose assistance the plan was prepared.

8.22 New Construction housing facilities.

(a) New multifamily housing projects (including public housing and Indian housing projects as required by 8.25) shall be designed and constructed to be readily accessible to and usable by individuals with handicaps.

(b) Subject to paragraph (c) of this section, a minimum of five percent of the total dwelling units or at least one unit in a multifamily housing project, whichever is greater, shall be made accessible for persons with mobility impairments. A unit that is on an accessible route and is adaptable and otherwise in compliance with the standards set forth in 8.32 is accessible for purposes of this section. An additional two percent of the units (but not less than one unit) in such a project shall be accessible for persons with hearing or vision impairments.

(c) HUD may prescribe a higher percentage or number than that prescribed in paragraph (b) of this section for any area upon request therefor by any affected recipient or by any State or local government or agency thereof based upon demonstration to the reasonable satisfaction of HUD of a need for a higher percentage or number, based on census data or other available current data (including a currently effective Housing Assistance Plan or Comprehensive Homeless Assistance Plan), or in response to evidence of a need for a higher percentage or number received in any other manner. In reviewing such

request or otherwise assessing the existence of such needs, HUD shall take into account the expected needs of eligible persons with and without handicaps.

8.23 Alterations of existing housing facilities.

(a) *Substantial alteration*. If alterations are undertaken to a project (including a public housing project as required by 8.25(a)(2)) that has 15 or more units and the cost of the alterations is 75 percent or more of the replacement cost of the completed facility, then the provisions of 8.22 shall apply.

(b) *Other alterations*.

(1) Subject to paragraph (b)(2) of this section, alterations to dwelling units in a multifamily housing project (including public housing) shall, to the maximum extent feasible, be made to be readily accessible to and usable by individuals with handicaps. If alterations of single elements or spaces of a dwelling unit, when considered together, amount to an alteration of a dwelling unit, the entire dwelling unit shall be made accessible. Once five percent of the dwelling units in a project are readily accessible to and usable by individuals with mobility impairments, then no additional elements of dwelling units, or entire dwelling units, are required to be accessible under this paragraph. Alterations to common areas or parts of facilities that affect accessibility of existing housing facilities shall, to the maximum extent feasible, be made to be accessible to and usable by individuals with handicaps. For purposes of this paragraph, the phrase to the maximum extent feasible shall not be interpreted as requiring that a recipient (including a PHA) make a dwelling unit, common area, facility or element thereof accessible if doing so would impose undue financial and administrative burdens on the operation of the multifamily housing project.

(2) HUD may prescribe a higher percentage or number than that prescribed in paragraph (b)(1) of this section for any area upon request therefor by any affected recipient or by any State or local government or agency thereof based upon demonstration to the reasonable satisfaction of HUD of a need for a higher percentage or number, based on census data or other available current data (including a currently effective Housing Assistance Plan or Comprehensive Homeless Assistance Plan), or in response to evidence of a need for a higher percentage or number received in any other manner. In reviewing such request or otherwise assessing the existence of such needs, HUD shall take into account the expected needs of eligible persons with and without handicaps.

8.24 Existing housing programs.

(a) *General*. A recipient shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not

(1) Necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the recipient shall take any action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*. A recipient may comply with the requirements of this section through such means as reassignment of services to accessible buildings, assignment of aides to beneficiaries, provision of housing or related services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. A recipient is not required to make structural changes in existing housing facilities where other methods are effective in achieving compliance with this section or to provide supportive services that are not part of the program. In choosing among available methods for meeting the requirements of this section, the recipient shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance*. The recipient shall comply with the obligations established under this section within sixty days of July 11, 1988 except that

(1) In a public housing program where structural changes in facilities are undertaken, such changes shall be made within the timeframes established in 8.25(c).

(2) In other housing programs, where structural changes in facilities are undertaken, such changes shall be made within three years of July 11, 1988, but in any event as expeditiously as possible.

(d) *Transition plan and time period for structural changes*. Except as provided in 8.25(c), in the event that structural changes to facilities will be undertaken to achieve program accessibility, a recipient shall develop, within six months of July 11, 1988, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including individuals with handicaps or organizations representing individuals with handicaps. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

8.25 Public housing and multi-family Indian housing.

(a) *Development and alteration of public housing and multi-family Indian housing*.

(1) The requirements of 8.22 shall apply to all newly constructed public housing and multi-family Indian housing.

(2) The requirements of 8.23 shall apply to public housing and multi-family Indian housing developed through rehabilitation and to the alteration of public housing and multi-family Indian housing.

(3) In developing public housing and multi-family Indian housing through the purchase of existing properties PHAs and IHAs shall give priority to facilities which are readily accessible to and usable by individuals with handicaps.

(b) *Existing public housing and multi-family Indian housing—general*. The requirements of 8.24(a) shall apply to public housing and multi-family Indian housing programs.

(c) *Existing public housing and multi-family Indian housing—needs assessment and transition plan*. As soon as possible, each PHA (for the purpose of this paragraph, this includes an Indian Housing Authority) shall assess, on a PHA-wide basis, the needs of current tenants and applicants on its waiting list for accessible units and the extent to which such needs have not been met or cannot reasonably be met within four years through development, alterations otherwise contemplated, or other programs administered by the PHA (e.g., Section 8 Moderate Rehabilitation or Section 8 Existing Housing or Housing Vouchers). If the PHA currently has no accessible units or if the PHA or HUD determines that information regarding the availability of accessible units has not been communicated sufficiently so that, as a result, the number of eligible qualified individuals with handicaps on the waiting list is not fairly representative of the number of such persons in the area, the PHA's assessment shall include the needs of eligible qualified individuals with handicaps in the area. If the PHA determines, on the basis of such assessment, that there is no need for additional accessible dwelling units or that the need is being or will be met within four years through other means, such as new construction, Section 8 or alterations otherwise contemplated, no further action is required by the PHA under this paragraph. If the PHA determines, on the basis of its needs assessment, that alterations to make additional units accessible must be made so that the needs of

eligible qualified individuals with handicaps may be accommodated proportionally to the needs of non-handicapped individuals in the same categories, then the PHA shall develop a transition plan to achieve program accessibility. The PHA shall complete the needs assessment and transition plan, if one is necessary, as expeditiously as possible, but in any event no later than two years after July 11, 1988. The PHA shall complete structural changes necessary to achieve program accessibility as soon as possible but in any event no later than four years after July 11, 1988. The Assistant Secretary for Fair Housing and Equal Opportunity and the Assistant Secretary for Public and Indian Housing may extend the four year period for a period not to exceed two years, on a case-by-case determination that compliance within that period would impose undue financial and administrative burdens on the operation of the recipient's public housing and multi-family Indian housing program. The Secretary or the Undersecretary may further extend this time period in extraordinary circumstances, for a period not to exceed one year. The plan shall be developed with the assistance of interested persons including individuals with handicaps or organizations representing individuals with handicaps. A copy of the needs assessment and transition plan shall be made available for public inspection. The transition plan shall, at a minimum—

(1) Identify physical obstacles in the PHA's facilities (e.g., dwelling units and common areas) that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the PHA's facilities accessible. A PHA may, if necessary, provide in its plan that it will seek HUD approval, under 24 CFR Part 968, of a comprehensive modernization program to meet the needs of eligible individuals with handicaps;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

8.26 Distribution of accessible dwelling units.

Accessible dwelling units required by 8.22, 8.23, 8.24 or 8.25 shall, to the maximum extent feasible and subject to reasonable health and safety requirements, be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities so that a qualified individual with handicaps' choice of living arrangements is, as a whole, comparable to that of other persons eligible for housing assistance under the same program. This provision shall not be construed to require provision of an elevator in any multifamily housing project solely for the purpose of permitting location of accessible units above or below the accessible grade level.

8.27 Occupancy of accessible dwelling units.

(a) Owners and managers of multifamily housing projects having accessible units shall adopt suitable means to assure that information regarding the availability of accessible units reaches eligible individuals with handicaps, and shall take reasonable nondiscriminatory steps to maximize the utilization of such units by eligible individuals whose disability requires the accessibility features of the particular unit. To this end, when an accessible unit becomes vacant, the owner or manager before offering such units to a non-handicapped applicant shall offer such unit:

(1) First, to a current occupant of another unit of the same project, or comparable projects under common control, having handicaps requiring the accessibility features of the vacant unit and occupying a unit not having such features, or, if no such occupant exists, then

(2) Second, to an eligible qualified applicant on the waiting list having a handicap requiring the accessibility features of the vacant unit.

(b) When offering an accessible unit to an applicant not having handicaps requiring the accessibility features of the unit, the owner or manager may require the applicant to agree (and may incorporate this agreement in the lease) to move to a non-accessible unit when available.

8.28 Housing certificate and housing voucher programs.

(a) In carrying out the requirements of this subpart, a recipient administering a Section 8 Existing Housing Certificate program or a housing voucher program shall:

(1) In providing notice of the availability and nature of housing assistance for low-income families under program requirements, adopt suitable means to assure that the notice reaches eligible individuals with handicaps;

(2) In its activities to encourage participation by owners, include encouragement of participation by owners having accessible units;

(3) When issuing a Housing Certificate or Housing Voucher to a family which includes an individual with handicaps include a current listing of available accessible units known to the PHA and, if necessary, otherwise assist the family in locating an available accessible dwelling unit;

(4) Take into account the special problem of ability to locate an accessible unit when considering requests by eligible individuals with handicaps for extensions of Housing Certificates or Housing Vouchers; and

(5) If necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception rent under 982.504(b)(2) for a regular tenancy under the Section 8 certificate program so that the program is readily accessible to and usable by persons with disabilities.

(b) In order to ensure that participating owners do not discriminate in the recipient's federally assisted program, a recipient shall enter into a HUD-approved contract with participating owners, which contract shall include necessary assurances of nondiscrimination.

8.29 Homeownership programs (Sections 235(i) and 235(j), Turnkey III and Indian Housing Mutual Self-Help programs).

Any housing units newly constructed or rehabilitated for purchase or single family (including semi-attached and attached) units to be constructed or rehabilitated in a program or activity receiving Federal financial assistance shall be made accessible upon request of the prospective buyer if the nature of the handicap of an expected occupant so requires. In such case, the buyer shall consult with the seller or builder/sponsor regarding the specific design features to be provided. If accessibility features selected at the option of the homebuyer are ones covered by the standards prescribed by 8.32, those features shall comply with the standards prescribed in 8.32. The buyer shall be permitted to depart from particular specifications of these standards in order to accommodate his or her specific handicap. The cost of making a facility accessible under this paragraph may be included in the mortgage amount within the allowable mortgage limits, where applicable. To the extent such costs exceed allowable mortgage limits, they may be passed on to the prospective homebuyer, subject to maximum sales price limitations (see 24 CFR 235.320.)

8.30 Rental rehabilitation program.

Each grantee or state recipient in the rental rehabilitation program shall, subject to the priority in 24 CFR 511.10(l) and in accordance with other requirements in 24 CFR Part 511, give priority to the selection of projects that will result in dwelling units being made readily accessible to and usable by individuals with handicaps.

8.31 Historic properties.

If historic properties become subject to alterations to which this part applies the requirements of 4.1.7 of the standards of 8.32 of this part shall apply, except in the case of the Urban Development Action Grant (UDAG) program. In the UDAG program the requirements of 36 CFR Part 801 shall apply. Accessibility to historic properties subject to alterations need not be provided if such accessibility would substantially impair the significant historic features of the property or result in undue financial and administrative burdens.

8.32 Accessibility standards.

(a) Effective as of July 11, 1988, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) shall be deemed to comply with the requirements of §8.21, 8.22, 8.23, and 8.25 with respect to those buildings. Departures from particular technical and scoping requirements of the UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided. The alteration of housing facilities shall also be in conformance with additional scoping requirements contained in this part. Persons interested in obtaining a copy of the UFAS are directed to 40.7 of this title.

(b) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of individuals with physical handicaps.

(c) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

(d) For purposes of this section, section 4.1.4(11) of UFAS may not be used to waive or lower the minimum of five percent accessible units required by 8.22(b) or to apply the minimum only to projects of 15 or more dwelling units.

(e) Except as otherwise provided in this paragraph, the provisions of §8.21 (a) and (b), 8.22 (a) and (b), 8.23, 8.25(a) (1) and (2), and 8.29 shall apply to facilities that are designed, constructed or altered after July 11, 1988. If the design of a facility was commenced before July 11, 1988, the provisions shall be followed to the maximum extent practicable, as determined by the Department. For purposes of this paragraph, the date a facility is constructed or altered shall be deemed to be the date bids for the construction or alteration of the facility are solicited. For purposes of the Urban Development Action Grant (UDAG) program, the provisions shall apply to the construction or alteration of facilities that are funded under applications submitted after July 11, 1988. If the UDAG application was submitted before July 11, 1988, the provisions shall apply, to the maximum extent practicable, as determined by the Department.

8.33 Housing adjustments.

A recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps. The recipient may not impose upon individuals with handicaps other policies, such as the prohibition of assistive devices, auxiliary alarms, or guides in housing facilities, that have the effect of limiting the participation of tenants with handicaps in the recipient's federally assisted housing program or activity in violation of this part. Housing policies that the recipient can demonstrate are essential to the housing program or activity will not be regarded as discriminatory within the meaning of this section if modifications to them would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens.

SUBPART D ENFORCEMENT

8.50 Assurances required.

(a) *Assurances*. An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance to HUD, or in the case of a subrecipient to a primary recipient, on a form specified by the responsible civil rights official, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation*.

(1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants*.

(1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

8.51 Self-evaluation.

(a) Each recipient shall, within one year of July 11, 1988, and after consultation with interested persons, including individuals with handicaps or organizations representing individuals with handicaps:

(1) Evaluate its current policies and practices to determine whether, in whole or in part, they do not or may not meet the requirements of this part;

(2) Modify any policies and practices that do not meet the requirements of this part; and

(3) Take appropriate corrective steps to remedy the discrimination revealed by the self-evaluation.

(b) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (a)(1) of this section, maintain on file, make available for public inspection, and provide to the responsible civil rights official, upon request: (1) A list of the interested persons consulted; (2) a description of areas examined and any problems identified; and (3) a description of any modifications made and of any remedial steps taken.

8.52 Remedial and affirmative action.

(a) *Remedial action*.

(1) If the responsible civil rights official finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the responsible civil rights official deems necessary to overcome the effects of the discrimination.

(2) The responsible civil rights official may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action

(i) With respect to individuals with handicaps who are no longer participants in the program but who were participants in the program when such discrimination occurred or

(ii) With respect to individuals with handicaps who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action*. A recipient may take nondiscriminatory steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified individuals with handicaps.

8.53 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee*. A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures*. A recipient that employees fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to housing covered by this part.

8.54 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its federally assisted programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to 8.53. A recipient shall make the initial notification required by this paragraph within 90 days of July 11, 1988. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(c) The recipient shall ensure that members of the population eligible to be served or likely to be affected directly by a federally assisted program who have visual or hearing impairments are provided with the information necessary to understand and participate in the program. Methods for ensuring participation include, but are not limited to, qualified sign language and oral interpreters, readers, or the use of taped and Braille materials.

8.55 Compliance information.

(a) *Cooperation and assistance*. The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports*. Each recipient shall keep such records and submit to the responsible civil rights official or his or her designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible civil rights official or his or her designee may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for the Department data showing the extent to which individuals with handicaps are beneficiaries of federally assisted programs.

(c) *Access to sources of information*. Each recipient shall permit access by the responsible civil rights official during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution, or person and this agency, institution, or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants*. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program or activity under which the recipient receives Federal financial assistance, and make such information available to them in such manner as the responsible civil rights official finds necessary to apprise such persons of the protections against discrimination assured them by this part.

8.56 Conduct of investigations.

(a) *Periodic compliance reviews*. The responsible civil rights official or designee may periodically review the practices of recipients to determine whether they are complying with this part and where he or she has a reasonable basis to do so may conduct on-site reviews. Such basis may include any evidence that a problem exists or that programmatic matters exist that justify on-site investigation in selected circumstances. The responsible civil rights official shall initiate an on-site review by sending to the recipient a letter advising the recipient of the practices to be reviewed; the programs affected by the review; and the opportunity, at any time prior to receipt of a final determination, to make a documentary or other submission that explains, validates, or otherwise addresses the practices under review. In addition, each award official shall include in normal program compliance reviews and monitoring procedures appropriate actions to review and monitor compliance with general or specific program requirements designed to effectuate the requirements of this part.

(b) *Investigations*. The responsible civil rights official shall make a prompt investigation whenever a compliance review, report, complaint or any other information indicates a possible failure to comply with this part.

(c) *Filing a complaint.*

(1) *Who may file*. Any person who believes that he or she has been subjected to discrimination prohibited by this part may by himself or herself or by his or her authorized representative file a complaint with the responsible civil rights official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or who is the authorized representative of a member of that class may file a complaint with the responsible civil rights official.

(2) *Confidentiality*. The responsible civil rights official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) *When to file*. Complaints shall be filed within 180 days of the alleged act of discrimination, unless the responsible civil rights official waives this time limit for good cause shown. For purposes of determining when a complaint is filed under this paragraph, a complaint mailed to the Department shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the Department.

(4) *Where to file complaints*. Complaints may be filed by mail with the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410, or any Regional or Field Office of the Department.

(5) *Contents of complaints*. Each complaint should contain the complainant's name and address, the name and address of the recipient alleged to have violated this part, and a description of the recipient's alleged discriminatory action in sufficient detail to inform the Department of the nature and date of the alleged violation of this part.

(6) *Amendments of complaints*. Complaints may be reasonably and fairly amended at any time. Amendments to complaints such as clarification and amplification of allegations in a complaint or the addition of other recipients may be made at any time during the pendency of the complaint and any amendment shall be deemed to be made as of the original filing date.

(d) *Notification*. The responsible civil rights official will notify the complainant and the recipient of the agency's receipt of the complaint within ten (10) calendar days.

(e) *Complaint processing procedures*. After acknowledging receipt of a complaint, the responsible civil rights official will immediately initiate complaint processing procedures.

(1) Preliminary investigation.

(i) Within twenty (20) calendar days of acknowledgement of the complaint, the responsible civil rights official will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the responsible civil rights official will notify the complainant and the award official. The responsible civil rights official will also notify the applicant or recipient complained against of the allegations and give the applicant or recipient an opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the responsible civil rights official a response to the notice of complaint within thirty (30) calendar days of receiving it. With leave of the responsible civil rights official, an answer may be amended at any time. The responsible civil rights official will permit answers to be amended for good cause shown.

(2) Informal resolution. In accordance with paragraph (j) of this section, the responsible civil rights official shall attempt to resolve complaints informally whenever possible.

(f) *Dismissal of complaint*. If the investigation reveals no violation of this part, the responsible civil rights official will dismiss the complaint and notify the complainant and recipient.

(g) *Letter of findings*. If an informal resolution of the complaint is not reached the responsible civil rights official or his or her designee shall, within 180 days of receipt of the complaint, notify the recipient and the complainant (if any) of the results of the investigation in a letter sent by certified mail, return receipt requested, containing the following:

(1) Preliminary findings of fact and a preliminary finding of compliance or noncompliance;

(2) A description of an appropriate remedy for each violation believed to exist;

(3) A notice that a copy of the Final Investigative Report of the Department will be made available, upon request, to the recipient and the complainant (if any); and

(4) A notice of the right of the recipient and the complainant (if any) to request a review of the letter of findings by the reviewing civil rights official.

(h) *Right to review of the letter of findings*.

(1) A complainant or recipient may request that a complete review be made of the letter of findings within 30 days of receipt, by mailing or delivering to the reviewing civil rights official, Office of Fair Housing and Equal Opportunity, Washington, DC 20410, a written statement of the reasons why the letter of findings should be modified in light of supplementary information.

(2) The reviewing civil rights official shall send by certified mail, return receipt requested, a copy of the request for review to the other party, if any. Such other party shall have 20 days to respond to the request for review.

(3) The reviewing civil rights official shall either sustain or modify the letter of findings within 60 days of the request for review. The reviewing civil rights official's decision shall constitute the formal determination.

(4) If neither party requests that the letter of findings be reviewed, the responsible civil rights official shall, within fourteen (14) calendar days of the expiration of the time period in paragraph (h)(1) of this section, send a formal written determination of compliance or noncompliance to the recipient and copies to the award official.

(i) *Voluntary compliance time limits*. The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance. If the recipient fails to meet this deadline, HUD shall proceed under 8.57.

(j) *Informal resolution/voluntary compliance.*

(1) *General*. It is the policy of the Department to encourage the informal resolution of matters. The responsible civil rights official may attempt to resolve a matter through informal means at any stage of processing. A matter may be resolved by informal means at any time. If a letter of findings making a preliminary finding of noncompliance is issued, the responsible civil rights official shall attempt to resolve the matter by informal means.

(2) *Objectives of informal resolution/voluntary compliance*. In attempting informal resolution, the responsible civil rights official shall attempt to achieve a just resolution of the matter and to obtain assurances where appropriate, that the recipient will satisfactorily remedy any violations of the rights of any complainant and will take such action as will assure the elimination of any violation of this part or the prevention of the occurrence of such violation in the future. The terms of such an informal resolution shall be reduced to a written voluntary compliance agreement, signed by the recipient and the responsible civil rights official, and be made part of the file for the matter. Such voluntary compliance agreements shall seek to protect the interests of the complainant (if any), other persons similarly situated, and the public interest.

(k) *Intimidatory or retaliatory acts prohibited*. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any person for the purpose of interfering with any right or privilege secured by this part, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of investigation, hearing or judicial proceeding arising thereunder.

8.57 Procedure for effecting compliance.

(a) *General*. If there appears to be a failure or threatened failure to comply with this part and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by other means authorized by law. Such other means may include, but are not limited to:

(1) A referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking;

(2) The initiation of debarment proceedings pursuant to Part 24 of this title; and

(3) Any applicable proceeding under State or local law.

(b) *Noncompliance with 8.50*. If an applicant or a recipient of assistance under a contract which is extended or amended on or after July 11, 1988, fails or refuses to furnish an assurance required under 8.50 or otherwise fails or refuses to comply with the requirements imposed by that section, Federal financial assistance may be refused under paragraph (c) of this section. The Department is not required to provide assistance during the pendency of the administrative proceeding under such paragraph (c), except where the assistance is due and payable under a contract approved before July 11, 1988.

(c) *Termination of or refusal to grant or to continue Federal financial assistance*. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until:

(1) The responsible civil rights official has advised the applicant or recipient of its failure to comply and has determined that compliance cannot be secured by voluntary means;

(2) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed under this part;

(3) The action has been approved by the Secretary; and

(4) The expiration of 30 days after the Secretary has filed with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. Any action to suspend

or terminate, or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Notice to State or local government*. Whenever the Secretary determines that a State or unit of general local government which is a recipient of Federal financial assistance under Title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301-5318) has failed to comply with a requirement of this part with respect to a program or activity funded in whole or in part with such assistance, the Secretary shall notify the Governor of the State or the chief executive officer of the unit of general local government of the noncompliance and shall request the Governor or the chief executive officer to secure compliance. The notice shall be given at least sixty days before:

(1) An order suspending, terminating, or refusing to grant or continue Federal financial assistance becomes effective under paragraph (c) of this section; or

(2) Any action to effect compliance by any other means authorized by law is taken under paragraph (a) of this section.

(e) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until:

(1) The responsible civil rights official has determined that compliance cannot be secured by voluntary means;

(2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(3) At least 10 days have elapsed since the mailing of such notice to the applicant or recipient. During this period, additional efforts shall be made to persuade the applicant or recipient to comply with this part and to take such corrective action as may be appropriate.

However, this paragraph shall not be construed to prevent an award official from utilizing appropriate procedures and sanctions established under the program to assure or secure compliance with a specific requirement of the program designed to effectuate the objectives of this part.

8.58 Hearings.

(a) *Opportunity for hearing*. Whenever an opportunity for a hearing is required by 8.57(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action. The notice shall:

(1) Fix a date not less than 20 days after the date of the notice for the applicant or recipient to request the administrative law judge to schedule a hearing, or

(2) Advise the applicant or recipient that the matter has been scheduled for hearing at a stated time and place. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set is a waiver of the right to a hearing under 8.57(c) and consent to the making of a decision on the basis of available information.

(b) *Hearing procedures*. Hearings shall be conducted in accordance with 24 CFR part 180.

PART 40 ACCESSIBILITY STANDARDS FOR DESIGN, CONSTRUCTION, AND ALTERATION OF PUBLICLY OWNED RESIDENTIAL STRUCTURES

40.1 Purpose.

This part prescribes standards for the design, construction, and alteration of publicly owned residential structures to insure that physically handicapped persons will have ready access to, and use of, such structures.

40.2 Definition of "residential structure".

(a) As used in this part, the term *residential structure* means a residential structure (other than a privately owned residential structure and a residential structure on a military reservation):

(1) Constructed or altered by or on behalf of the United States;

(2) Leased in whole or in part by the United States after August 12, 1968, if constructed or altered in accordance with plans and specifications of the United States; or

(3) Financed in whole or in part by a grant or loan made by the United States after August 12, 1968, if such residential structure is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan.

(b) As used in this part, *residential structure* includes the following:

(1) Any residential structure which, in whole or in part, is intended for occupancy by the physically handicapped or designed for occupancy by the elderly;

(2) All elevator residential structures;

(3) Any residential structure that contains 15 or more housing units, unless otherwise specifically prescribed by the Uniform Federal Accessibility Standards contained in appendix A to this part.

(4) Nonresidential structures appurtenant to a residential structure covered under this part.

40.3 Applicability.

(a) The standards prescribed in 40.4 are applicable to residential structures designed after the effective date of this part. If the design of a structure commenced prior to that date, the standards shall be made applicable to the maximum extent practicable, as determined by the head of the department, agency, or instrumentality of the United States concerned. If no design stage is involved in the construction or alteration of a residential structure, the standards of 40.4 shall be applicable to construction or alteration for which bids are solicited after the effective date of this part.

(b) The standards prescribed in 40.4 are not applicable to:

(1) Any portion of a residential structure or its grounds which need not, because of its intended use, be made accessible to, or usable by, the public or by physically handicapped persons;

(2) The alteration of an existing residential structure to the extent that the alteration does not involve work which is related to the standards of this part; or

(3) The alteration of an existing building, or of such portions thereof, to which application of the standards is not structurally feasible.

40.4 Standards.

Residential structures subject to this part shall be designed, constructed or altered to ensure that physically handicapped persons have access to, and use of, these structures. This requirement is satisfied by using the specifications contained in Appendix A to this part, the Uniform Federal Accessibility Standards (UFAS).

40.5 [Reserved]

40.6 Records.

The administering agency's file on each contract, grant, or loan involving the design, construction, or alteration of a residential structure shall include appropriate documentation indicating: (a) That the standards prescribed in 40.4 are applicable to and have been or will be incorporated in the residential structure, or (b) that the grant or loan has been or will be made subject to the requirement that the standards are applicable and will be incorporated in the residential structure. The file should also indicate any modification or waiver of the standards which has been issued by the Secretary of HUD.

40.7 Availability of Accessibility Standards.

Copies of the Uniform Federal Accessibility Standards are available from the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Room 5230, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 755-5404 (this is not a toll-free number). Hearing or speech-impaired individuals may call HUD's TDD number (202) 708-0113 or 1-800-877-8399 (Federal Information Relay Service TDD). (Other than the "800" number, these are not toll-free numbers.)

PART 41 POLICIES AND PROCEDURES FOR THE ENFORCEMENT OF STANDARDS AND REQUIREMENTS FOR ACCESSIBILITY BY THE PHYSICALLY HANDICAPPED

41.1 Applicability.

This part sets forth policies and procedures for the enforcement of standards and requirements for accessibility by the physically handicapped imposed:

(a) For nonresidential buildings or facilities by regulations issued by the General Services Administration at Subchapter D of the Federal Property Management Regulations, Subpart 101-19.6Accommodations for the Physically Handicapped, or

(b) By regulation or contract under any other program of the Department, except a program subject only to standards or requirements at 24 CFR Part 8 imposed pursuant to section 504 of the Rehabilitation Act of 1973.

The policies and procedures of this part shall apply after the effective date of these regulations to all complaints received, and/or findings of noncompliance made, regarding buildings or facilities subject to such regulatory or contractual requirements.

41.2 Definitions.

As used in this part, the term *Secretary* means the Secretary of Housing and Urban Development, or to the extent of any delegation of authority by the Secretary to act under this part, any other Department Official to whom authority has been delegated.

41.3 Assurance and declaration required.

(a) Each Assistant Secretary shall, as a condition for approval of any contract or application for assistance under a program imposing standards and/or requirements for accessibility which are subject to this Part, require an assurance of compliance with those standards and requirements. Such assurance shall be in a form acceptable to the Secretary.

(b) For each project covered under this part, except a project subject to Departmental examinations and inspections as set forth in 41.5(a), the responsible Assistant Secretary shall require a declaration as to project drawings, specifications, and other construction documents. The declaration shall be signed by the licensed, or registered, architect or engineer, or by such other responsible official as designated by HUD, who has prepared such construction documents. The declaration shall affirm that the proposed project, to the best knowledge and belief of the declarer, conforms to applicable accessibility design standards and requirements. The declaration statement shall be in a form acceptable to the Secretary.

41.4 Waiver or modification of standards.

(a) The applicability of standards and requirements for accessibility by the physically handicapped may be waived or modified on a case-by-case basis upon a written request from a recipient of a Departmental grant or loan or from a Departmental agency leasing a building or facility.

(b) For residential buildings or facilities, a waiver or modification may be granted only by the Secretary.

(c) Upon the recommendation of an Assistant Secretary, a waiver or modification for nonresidential buildings or facilities may be granted only by the Administrator, General Services Administration.

(d) No request for a waiver or modification shall be recommended for approval by an Assistant Secretary or approved by the Secretary unless the following criteria obtain:

(1) The granting of the waiver or modification is based upon findings of fact, and is not inconsistent with the provisions of the Architectural Barriers Act, and

(2) Application of the requirement or standard would adversely affect the purposes of the Departmental program under which the loan or grant is being provided or for which the building or facility is being leased.

(e) Requests for a waiver or modification shall be submitted to the appropriate Assistant Secretary for review. Each request shall include:

(1) The name and address of the requestor.

(2) The name and location of the involved building or facility.

(3) Any applicable plans, drawings, specifications or other descriptions of the building or facility.

(4) The standard provision or requirement from which the requestor seeks a waiver or modification.

(5) A description of the building or facility as to its accessibility for the physically handicapped and how the waiving or modification of a standard or requirement would affect that accessibility.

(6) A statement of the facts which establish that the criteria of paragraph (d) of this section would be satisfied.

(7) A description of the steps taken, or to be taken, to comply with standards and requirements for which a waiver or modification is not being requested.

(8) Such other information as the requestor or the responsible Assistant Secretary deems appropriate or necessary.

(f) If the responsible Assistant Secretary finds that the criteria of paragraph (d) of this section are satisfied, then he or she shall submit the request along with his or her recommendations to the Secretary for action or for referral to the Administrator, General Services Administration for action. In reviewing request for waiver and modifications, the Secretary shall assure consistent Department policy regarding the removal of architectural barriers and accessibility by physically handicapped persons.

(g) All waivers and modifications granted pursuant to this part shall have only future effect on; and are limited to cases for which the request is made.

41.5 Achieving compliance.

(a) *Examinations and inspections*. If, for any project, an Assistant Secretary requires Departmental architectural and engineering examinations of drawings and specifications or other construction documents or requires Departmental architectural and engineering inspections during or upon completion of construction, those examinations and inspections shall include a determination of compliance with standards and requirements for accessibility referenced in this part.

(b) *Periodic compliance reviews*. The Secretary, in consultation with the appropriate Assistant Secretary, shall conduct surveys and investigations as deemed appropriate to achieve compliance with standards or requirements subject to this part.

(c) *Complaints*. Any interested person who has reason to believe that there has been noncompliance with standards or requirements subject to this part, may, by himself or herself, or by a representative, file a written complaint with the responsible Department Official or with the Architectural and Transportation Barriers Compliance Board, Washington, DC 20201.

(d) *Investigations*. The Secretary shall, after consultation with the appropriate Assistant Secretary, make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with standards or requirements subject to this part. The investigation should include a determination of the authority under which the standards or requirements were imposed and, where appropriate, a review of the records kept pursuant to 24 CFR 40.6; the circumstances under which the building of facility was designed, constructed or altered; and other factors relevant to a determination as to whether there has been noncompliance with this part.

(e) *Resolution of matters*.

(1) If any examination, inspection, periodic compliance review, complaint, or investigation pursuant to this section indicates a failure to comply with the applicable standards or requirements, the Secretary shall attempt to gain voluntary compliance whenever possible.

(2) If it has been determined that voluntary compliance cannot be achieved, the Secretary shall refer the matter to the appropriate Assistant Secretary for action pursuant to his or her program authority regarding the residential structure or other building or facility under investigation, to achieve compliance with the requirements subject to this part. The Assistant Secretary shall report to the Secretary within 30 days of the date of such referral regarding the action taken and the

schedule and means of achieving compliance, except that the Secretary may specify a shorter or longer reporting period, as deemed appropriate.

(f) *Disposition of unresolved complaints*. Unresolved complaints shall be referred to the Architectural and Transportation Barriers Compliance Board to be processed in accordance with 36 CFR Part 1150. A complaint shall be deemed unresolved if it is not resolved within 90 days of the date of the filing of the complaint with the Department.

(g) *Compliance action by other individuals*. Individuals other than the Secretary may receive complaints and undertake other appropriate actions to achieve compliance with requirements subject to this part, so long as initial notification of such complaints or proposed actions is given both to the Secretary and the appropriate Assistant Secretary.

41.6 Matters involving the Architectural and Transportation Barriers Compliance Board.

(a) *Complaints*. With respect to any complaint referred to the responsible Department Official by the Architectural and Transportation Barriers Compliance Board (A&TBCB), the procedures set forth in this Part shall apply. In such a case, the Secretary shall coordinate all investigations and/or other compliance actions to assure that the Department resolves any architectural barriers deficiencies so as to respond to the A&TBCB within its required 60-day period set forth at 36 CFR 1150.41 for the informal resolution of complaints.

(b) *Citations*. The Office of General Counsel shall, with the assistance of the appropriate Assistant Secretary, respond to any citation issued by the A&TBCB to the Department alleging noncompliance with the standards issued pursuant to the Architectural Barriers Act of 1968, as amended. The applicable procedures regarding such a citation are set forth at 36 CFR Part 1150.

PART 100 DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

SUBPART A GENERAL

100.1 Authority.

This regulation is issued under the authority of the Secretary of Housing and Urban Development to administer and enforce Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (the Fair Housing Act).

100.5 Scope.

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

100.10 Exemptions.

(a) This part does not:

(1) Prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted because of race, color, or national origin;

(2) Prohibit a private club, not in fact open to the public, which, incident to its primary purpose or purposes, provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members;

(3) Limit the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling; or

(4) Prohibit conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802).

(b) Nothing in this part regarding discrimination based on familial status applies with respect to housing for older persons as defined in Subpart E of this part.

(c) Nothing in this part, other than the prohibitions against discriminatory advertising, applies to:

(1) The sale or rental of any single family house by an owner, provided the following conditions are met:

(i) The owner does not own or have any interest in more than three single family houses at any one time.

(ii) The house is sold or rented without the use of a real estate broker, agent or salesperson or the facilities of any person in the business of selling or renting dwellings. If the owner selling the house does not reside in it at the time of the sale or was not the most recent resident of the house prior to such sale, the exemption in this paragraph (c)(1) of this section applies to only one such sale in any 24-month period.

(2) Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his or her residence.

100.20 Definitions.

The terms *Department, Fair Housing Act,* and *Secretary* are defined in 24 CFR part 5.

Aggrieved person includes any person who:

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

Broker or Agent includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.

Discriminatory housing practice means an act that is unlawful under section 804, 805, 806, or 818 of the Fair Housing Act.

Dwelling means any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.

Familial status means one or more individuals (who have not attained the age of 18 years) being domiciled with

(a) A parent or another person having legal custody of such individual or individuals; or

(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

Handicap is defined in 100.201.

Person includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 U.S.C., receivers, and fiduciaries.

Person in the business of selling or renting dwellings means any person who:

(a) Within the preceding twelve months, has participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein;

(b) Within the preceding twelve months, has participated as agent, other than in the sale of his or her own personal residence, in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein; or

(c) Is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

State means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

SUBPART B DISCRIMINATORY HOUSING PRACTICES

100.50 Real estate practices prohibited.

(a) This subpart provides the Department's interpretation of conduct that is unlawful housing discrimination under section 804 and section 806 of the Fair Housing Act. In general the prohibited actions are set forth under sections of this subpart which are most applicable to the discriminatory conduct described. However, an action illustrated in one section can constitute a violation under sections in the subpart. For example, the conduct described in 100.60(b)(3) and (4) would constitute a violation of 100.65(a) as well as 100.60(a).

(b) It shall be unlawful to:

(1) Refuse to sell or rent a dwelling after a bona fide offer has been made, or to refuse to negotiate for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate in the sale or rental of a dwelling because of handicap.

(2) Discriminate in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with sales or rentals, because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Engage in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Make, print or 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 because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(5) Represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that a dwelling is not available for sale or rental when such dwelling is in fact available.

(6) Engage in blockbusting practices in connection with the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Deny access to or membership or participation in, or to discriminate against any person in his or her access to or membership or participation in, any multiple-listing service, real estate brokers' association, or other service organization or facility relating to the business of selling or renting a dwelling or in the terms or conditions or membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(c) The application of the Fair Housing Act with respect to persons with handicaps is discussed in Subpart D of this part.

100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.

(a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a bona fide offer, because of race, color, religion, sex, familial status, or national origin or to refuse to negotiate with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap.

(b) Prohibited actions under this section include, but are not limited to:

(1) Failing to accept or consider a bona fide offer because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Refusing to sell or rent a dwelling to, or to negotiate for the sale or rental of a dwelling with, any person because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Evicting tenants because of their race, color, religion, sex, handicap, familial status, or national origin or because of the race, color, religion, sex, handicap, familial status, or national origin of a tenant's guest.

100.65 Discrimination in terms, conditions and privileges and in services and facilities.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.

(b) Prohibited actions under this section include, but are not limited to:

(1) Using different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits and the terms of a lease and those relating to down payment and closing requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Failing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.

(5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.

100.70 Other prohibited sale and rental conduct.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.

(b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.

(c) Prohibited actions under paragraph (a) of this section, which are generally referred to as unlawful steering practices, include, but are not limited to:

(1) Discouraging any person from inspecting, purchasing or renting a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, or because of the race, color, religion, sex, handicap, familial status, or national origin of persons in a community, neighborhood or development.

(2) Discouraging the purchase or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development.

(3) Communicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Assigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.

(d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:

(1) Discharging or taking other adverse action against an employee, broker or agent because he or she refused to participate in a discriminatory housing practice.

(2) Employing codes or other devices to segregate or reject applicants, purchasers or renters, refusing to take or to show listings of dwellings in certain areas because of race, color, religion, sex, handicap, familial status, or national origin, or refusing to deal with certain brokers or agents because they or one or more of their clients are of a particular race, color, religion, sex, handicap, familial status, or national origin.

(3) Denying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium dwelling because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

100.75 Discriminatory advertisements, statements and notices.

(a) It shall be unlawful to make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(b) The prohibitions in this section shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.

(c) Discriminatory notices, statements and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

(d) 24 CFR Part 109 provides information to assist persons to advertise dwellings in a nondiscriminatory manner and describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.

100.80 Discriminatory representations on the availability of dwellings.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to provide inaccurate or untrue information about the availability of dwellings for sale or rental.

(b) Prohibited actions under this section include, but are not limited to:

(1) Indicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Representing that covenants or other deed, trust or lease provisions which purport to restrict the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin preclude the sale of rental of a dwelling to a person.

(3) Enforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection, sale or rental, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Providing false or inaccurate information regarding the availability of a dwelling for sale or rental to any person, including testers, regardless of whether such person is actually seeking housing, because of race, color, religion, sex, handicap, familial status, or national origin.

100.85 Blockbusting.

(a) It shall be unlawful, for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap.

(b) In establishing a discriminatory housing practice under this section it is not necessary that there was in fact profit as long as profit was a factor for engaging in the blockbusting activity.

(c) Prohibited actions under this section include, but are not limited to:

(1) Engaging, for profit, in conduct (including uninvited solicitations for listings) which conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status, or national origin of persons residing in it, in order to encourage the person to offer a dwelling for sale or rental.

(2) Encouraging, for profit, any person to sell or rent a dwelling through assertions that the entry or prospective entry of persons of a particular race, color, religion, sex, familial status, or national origin, or with handicaps, can or will result in undesirable consequences for the project, neighborhood or community, such as a lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other services or facilities.

100.90 Discrimination in the provision of brokerage services.

(a) It shall be unlawful to deny any person access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against any person in the terms or conditions of such access, membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited actions under this section include, but are not limited to:

(1) Setting different fees for access to or membership in a multiple listing service because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Denying or limiting benefits accruing to members in a real estate brokers' organization because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different standards or criteria for membership in a real estate sales or rental organization because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Establishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings, because of race, color, religion, sex, handicap, familial status, or national origin.

SUBPART C DISCRIMINATION IN RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS

100.110 Discriminatory practices in residential real estate-related transactions.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful housing discrimination under section 805 of the Fair Housing Act.

(b) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

100.115 Residential real estate-related transactions.

The term residential real estate-related transactions means:

(a) The making or purchasing of loans or providing other financial assistance

(1) For purchasing, constructing, improving, repairing or maintaining a dwelling; or

(2) Secured by residential real estate; or

(b) The selling, brokering or appraising of residential real property.

100.120 Discrimination in the making of loans and in the provision of other financial assistance.

(a) It shall be unlawful for any person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available loans or other financial assistance for a dwelling, or which is or is to be secured by a dwelling, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited practices under this section include, but are not limited to, failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

100.125 Discrimination in the purchasing of loans.

(a) It shall be unlawful for any person or entity engaged in the purchasing of loans or other debts or securities which support the purchase, construction, improvement, repair or maintenance of a dwelling, or which are secured by residential real estate, to refuse to purchase such loans, debts, or securities, or to impose different terms or conditions for such purchases, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Purchasing loans or other debts or securities which relate to, or which are secured by dwellings in certain communities or neighborhoods but not in others because of the race, color, religion, sex, handicap, familial status, or national origin of persons in such neighborhoods or communities.

(2) Pooling or packaging loans or other debts or securities which relate to, or which are secured by, dwellings differently because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing or using different terms or conditions on the marketing or sale of securities issued on the basis of loans or other debts or securities which relate to, or which are secured by, dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(c) This section does not prevent consideration, in the purchasing of loans, of factors justified by business necessity, including requirements of Federal law, relating to a transaction's financial security or to protection against default or reduction of the value of the security. Thus, this provision would not preclude considerations employed in normal and prudent transactions, provided that no such factor may in any way relate to race, color, religion, sex, handicap, familial status or national origin.

100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

(a) It shall be unlawful for any person or entity engaged in the making of loans or in the provision of other financial assistance relating to the purchase, construction, improvement, repair or maintenance of dwellings or which are secured by residential real estate to impose different terms or conditions for the availability of such loans or other financial assistance because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Using different policies, practices or procedures in evaluating or in determining creditworthiness of any person in connection with the provision of any loan or other financial assistance for a dwelling or for any loan or other financial assistance which is secured by residential real estate because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration or other terms for a loan or other financial assistance for a dwelling or which is secured by residential real estate, because of race, color, religion, sex, handicap, familial status, or national origin.

100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

(a) It shall be unlawful for any person or other entity whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services, or in the performance of such services, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) For the purposes of this section, the term appraisal means an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.

(c) Nothing in this section prohibits a person engaged in the business of making or furnishing appraisals of residential real property from taking into consideration factors other than race, color, religion, sex, handicap, familial status, or national origin.

(d) Practices which are unlawful under this section include, but are not limited to, using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status or national origin.

100.140 General rules.

(a) *Voluntary self-testing and correction*. The report or results of a self-test a lender voluntarily conducts or authorizes are privileged as provided in this subpart if the lender has taken or is taking appropriate corrective action to address likely violations identified by the self-test. Data collection required by law or any governmental authority (federal, state, or local) is not voluntary.

(b) *Other privileges*. This subpart does not abrogate any evidentiary privilege otherwise provided by law.

100.141 Definitions.

As used in this subpart:

Lender means a person who engages in a residential real estate-related lending transaction.

Residential real estate-related lending transaction means the making of a loan:

(1) For purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(2) Secured by residential real estate.

Self-test means any program, practice or study a lender voluntarily conducts or authorizes which is designed and used specifically to determine the extent or effectiveness of compliance with the Fair Housing Act. The self-test must create data or factual information that is not available and cannot be derived from loan files, application files, or other residential real estate-related lending transaction records. Self-testing includes, but is not limited to, using fictitious credit applicants (testers) or conducting surveys of applicants or customers, nor is it limited to the pre-application stage of loan processing.

100.142 Types of information.

(a) The privilege under this subpart covers:

(1) The report or results of the self-test;

(2) Data or factual information created by the self-test;

(3) Workpapers, draft documents and final documents;

(4) Analyses, opinions, and conclusions if they directly result from the self-test report or results.

(b) The privilege does not cover:

(1) Information about whether a lender conducted a self-test, the methodology used or scope of the self-test, the time period covered by the self-test or the dates it was conducted;

(2) Loan files and application files, or other residential real estate-related lending transaction records (e.g., property appraisal reports, loan committee meeting minutes or other documents reflecting the basis for a decision to approve or deny a loan application, loan policies or procedures, underwriting standards, compensation records) and information or data derived from such files and records, even if such data has been aggregated, summarized or reorganized to facilitate analysis.

100.143 Appropriate corrective action.

(a) The report or results of a self-test are privileged as provided in this subpart if the lender has taken or is taking appropriate corrective action to address likely violations identified by the self-test. Appropriate corrective action is required when a self-test shows it is more likely than not that a violation occurred even though no violation was adjudicated formally.

(b) A lender must take action reasonably likely to remedy the cause and effect of the likely violation and must:

(1) Identify the policies or practices that are the likely cause of the violation, such as inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes; and

(2) Assess the extent and scope of any likely violation, by determining which areas of operation are likely to be affected by those policies and practices, such as stages of the loan application process, types of loans, or the particular branch where the likely violation has occurred. Generally, the scope of the self-test governs the scope of the appropriate corrective action.

(c) Appropriate corrective action may include both prospective and remedial relief, except that to establish a privilege under this subpart:

(1) A lender is not required to provide remedial relief to a tester in a self-test;

(2) A lender is only required to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated;

(3) A lender is not required to provide remedial relief to a particular applicant if the statute of limitations applicable to the violation expired before the lender obtained the results of the self-test or the applicant is otherwise ineligible for such relief.

(d) Depending on the facts involved, appropriate corrective action may include, but is not limited to, one or more of the following:

(1) If the self-test identifies individuals whose applications were inappropriately processed, offering to extend credit if the applications were improperly denied; compensating such persons for any damages, both out-of-pocket and compensatory;

(2) Correcting any institutional policies or procedures that may have contributed to the likely violation, and adopting new policies as appropriate;

(3) Identifying, and then training and/or disciplining the employees involved;

(4) Developing outreach programs, marketing strategies, or loan products to serve more effectively the segments of the lender's market that may have been affected by the likely violation; and

(5) Improving audit and oversight systems to avoid a recurrence of the likely violations.

(e) Determination of appropriate corrective action is fact-based. Not every corrective measure listed in paragraph (d) of this section need be taken for each likely violation.

(f) Taking appropriate corrective action is not an admission by a lender that a violation occurred.

100.144 Scope of privilege.

The report or results of a self-test may not be obtained or used by an aggrieved person, complainant, department or agency in any:

(a) Proceeding or civil action in which a violation of the Fair Housing Act is alleged; or

(b) Examination or investigation relating to compliance with the Fair Housing Act.

100.145 Loss of privilege.

(a) The self-test report or results are not privileged under this subpart if the lender or person with lawful access to the report or results:

(1) Voluntarily discloses any part of the report or results or any other information privileged under this subpart to any aggrieved person, complainant, department, agency, or to the public; or

(2) Discloses the report or results or any other information privileged under this subpart as a defense to charges a lender violated the Fair Housing Act; or

(3) Fails or is unable to produce self-test records or information needed to determine whether the privilege applies.

(b) Disclosures or other actions undertaken to carry out appropriate corrective action do not cause the lender to lose the privilege.

100.146 Limited use of privileged information.

Notwithstanding 100.145, the self-test report or results may be obtained and used by an aggrieved person, applicant, department or agency solely to determine a penalty or remedy after the violation of the Fair Housing Act has been adjudicated or admitted. Disclosures for this limited purpose may be used only for the particular proceeding in which the adjudication or admission is made. Information disclosed under this section remains otherwise privileged under this subpart.

100.147 Adjudication.

An aggrieved person, complainant, department or agency that challenges a privilege asserted under 100.144 may seek a determination of the existence and application of that privilege in:

(a) A court of competent jurisdiction; or

(b) An administrative law proceeding with appropriate jurisdiction.

100.148 Effective date.

The privilege under this subpart applies to self-tests conducted both before and after January 30, 1998, except that a self-test conducted before January 30, 1998 is not privileged:

(a) If there was a court action or administrative proceeding before January 30, 1998, including the filing of a complaint alleging a violation of the Fair Housing Act with the Department or a substantially equivalent state or local agency; or

(b) If any part of the report or results were disclosed before January 30, 1998 to any aggrieved person, complainant, department or agency, or to the general public.

SUBPART D PROHIBITION AGAINST DISCRIMINATION BECAUSE OF HANDICAP

100.200 Purpose.

The purpose of this subpart is to effectuate sections 6 (a) and (b) and 15 of the Fair Housing Amendments Act of 1988.

100.201 Definitions.

As used in this subpart:

Accessible, when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical handicaps. The phrase readily accessible to and usable by is synonymous with accessible. A public or common use area that complies with the appropriate requirements of ANSI A117.1-1986 or a comparable standard is accessible within the meaning of this paragraph.

Accessible route means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors, ramps, elevators and lifts. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps and lifts. A route that complies with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at 100.201a), CABO/ANSI A117.1–1992, ANSI A117.1–1986 (incorporated by reference at 100.201a), or a comparable standard is an "*accessible route*."

Building means a structure, facility or portion thereof that contains or serves one or more dwelling units.

Building entrance on an accessible route means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ANSI A117.1-1986 or a comparable standard complies with the requirements of this paragraph.

Common use areas means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings.

Controlled substance means any drug or other substance, or immediate precursor included in the definition in section 102 of the Controlled Substances Act (21 U.S.C. 802).

Covered multifamily dwellings means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.

Dwelling unit means a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.

Entrance means any access point to a building or portion of a building used by residents for the purpose of entering.

Exterior means all areas of the premises outside of an individual dwelling unit.

First occupancy means a building that has never before been used for any purpose.

Ground floor means a floor of a building with a building entrance on an accessible route. A building may have more than one ground floor.

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.

(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.

Interior means the spaces, parts, components or elements of an individual dwelling unit.

Modification means any change to the public or common use areas of a building or any change to a dwelling unit.

Premises means the interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building.

Public use areas means interior or exterior rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

Site means a parcel of land bounded by a property line or a designated portion of a public right or way.

100.201a Incorporation by reference.

(a) The following standards are incorporated by reference into 24 CFR part 100 pursuant to 5 U.S.C. 552(a) and 1 CFR part 51, as though set forth in full. The incorporation by reference of these standards has been approved by the Director of the Federal Register. The effect of compliance with these standards is as stated in 24 CFR 100.205.

(b) The addresses of organizations from which the referenced standards can be obtained appear below:

(1) American National Standard: Accessible and Usable Buildings and Facilities, 2003 edition, (ICC/ANSI A117.1–2003), may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001–2070, telephone number 1–888–422–7233, *http://www.iccsafe.org/e/category.html*.

(2) American National Standard: Accessible and Usable Buildings and Facilities, 1998 edition, (ICC/ANSI A117.1–1998), may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001–2070, telephone number 1–888–422–7233, *http://www.iccsafe.org/e/category.html*.

(3) American National Standard: Accessible and Usable Buildings and Facilities, 1992 edition, (CABO/ANSI A117.1–1992), may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001–2070, telephone number 1–888–422–7233, *http://www.iccsafe.org/e/category.html*.

(4) American National Standard for Buildings and Facilities: Providing Accessibility and Usability for Physically Handicapped People, 1986 edition, (ANSI A117.1–1986) may be obtained from Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112, telephone number 1–800–854–7179, *global.ihs.com*.

(c) The 1986, 1992, 1998, and 2003 editions of ANSI A117.1 may be inspected at the Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5240, Washington, DC 20410–0001, telephone number 202–708–2333.

100.202 General prohibitions against discrimination because of handicap.

(a) It shall be unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(b) It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(c) It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps:

(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(2) Inquiry 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;

(3) Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;

(4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance;

(5) Inquiring whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.

(d) Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

100.203 Reasonable modifications of existing premises.

(a) It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises, occupied or to be occupied by a handicapped person, if the proposed modifications may be necessary to afford the handicapped person full enjoyment of the premises of a dwelling. 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. The landlord may not increase for handicapped persons any customarily required security deposit. However, 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 landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant.

(b) A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.

(c) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A tenant with a handicap asks his or her landlord for permission to install grab bars in the bathroom at his or her own expense. It is necessary to reinforce the walls with blocking between studs in order to affix the grab bars. It is unlawful for the landlord to refuse to permit the tenant, at the tenant's own expense, from making the modifications necessary to add the grab bars. However, the landlord may condition permission for the modification on the tenant agreeing to restore the bathroom to the condition that existed before the modification, reasonable wear and tear excepted. It would be reasonable for the landlord to require the tenant to remove the grab bars at the end of the tenancy. The landlord may also reasonably require that the wall to which the grab bars are to be attached be repaired and restored to its original condition, reasonable wear and tear excepted. However, it would be unreasonable for the landlord to require the tenant to remove the blocking, since the reinforced walls will not interfere in any way with the landlord's or the next tenant's use and enjoyment of the premises and may be needed by some future tenant.

Example (2): An applicant for rental housing has a child who uses a wheelchair. The bathroom door in the dwelling unit is too narrow to permit the wheelchair to pass. The applicant asks the landlord for permission to widen the doorway at the applicant's own expense. It is unlawful for the landlord to refuse to permit the applicant to make the modification. Further, the landlord may not, in usual circumstances, condition permission for the modification on the applicant paying for the doorway to be narrowed at the end of the lease because a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises.

100.204 Reasonable accommodations.

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

(b) The application of this section may be illustrated by the following examples:

Example (1): A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of 100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

100.205 Design and construction requirements.

(a) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. For purposes of this section, a covered multifamily dwelling shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if the dwelling is occupied by that date, or if the last building permit or renewal thereof for the dwelling is issued by a State, County or local government on or before June 15, 1990. The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A real estate developer plans to construct six covered multifamily dwelling units on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the dwellings, one need not be provided.

Example (2): A real estate developer plans to construct a building consisting of 10 units of multifamily housing on a waterfront site that floods frequently. Because of this unusual characteristic of the site, the builder plans to construct the building on stilts. It is customary for housing in the geographic area where the site is located to be built on stilts. The housing may lawfully be constructed on the proposed site on stilts even though this means that there will be no practical way to provide an accessible route to the building entrance.

Example (3): A real estate developer plans to construct a multifamily housing facility on a particular site. The developer would like the facility to be built on the site to contain as many units as possible. Because of the configuration and terrain of the site, it is possible to construct a building with 105 units on the site provided the site does not have an accessible route leading to the building entrance. It is also possible to construct a building on the site with an accessible route leading to the building entrance. However, such a building would have no more than 100 dwelling units. The building to be constructed on the site must have a building entrance on an accessible route because it is not impractical to provide such an entrance because of the terrain or unusual characteristics of the site.

(c) All covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route shall be designed and constructed in such a manner that

(1) The public and common use areas are readily accessible to and usable by handicapped persons;

(2) All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(3) All premises within covered multifamily dwelling units contain the following features of adaptable design:

(i) An accessible route into and through the covered dwelling unit;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower, stall and shower seat, where such facilities are provided; and

(iv) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(d) The application of paragraph (c) of this section may be illustrated by the following examples:

Example (1): A developer plans to construct a 100 unit condominium apartment building with one elevator. In accordance with paragraph (a), the building has at least one accessible route leading to an accessible entrance. All 100 units are covered multifamily dwelling units and they all must be designed and constructed so that they comply with the accessibility requirements of paragraph (c) of this section.

Example (2): A developer plans to construct 30 garden apartments in a three story building. The building will not have an elevator. The building will have one accessible entrance which will be on the first floor. Since the building does not have an elevator, only the ground floor units are covered multifamily units. The ground floor is the first floor because that is the floor that has an accessible entrance. All of the dwelling units on the first floor must meet the accessibility requirements of paragraph (c) of this section and must have access to at least one of each type of public or common use area available for residents in the building.

(e)(1) Compliance with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at §100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at §100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at §100.201a), or ANSI A117.1–1986 (incorporated by reference at §100.201a) suffices to satisfy the requirements of paragraph (c)(3) of this section.

(2) The following also qualify as HUD-recognized safe harbors for compliance with the Fair Housing Act design and construction requirements:

(i) Fair Housing Accessibility Guidelines, March 6, 1991, in conjunction with the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, June 28, 1994;

(ii) Fair Housing Act Design Manual, published by HUD in 1996, updated in 1998;

(iii) 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (with corrections contained in ICC-issued errata sheet), if adopted without modification and without waiver of any of the provisions;

(iv) 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements;

(v) 2003 International Building Code (IBC), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and conditioned upon the ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."

(vi) 2006 International Building Code; published by ICC, January 2006, with the January 31, 2007, erratum to correct the text missing from Section 1107.7.5, if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and interpreted in accordance with the relevant 2006 IBC Commentary;

(3) Compliance with any other safe harbor recognized by HUD in the future and announced in the Federal Register will also suffice to satisfy the requirements of paragraph (c)(3) of this section.

(f) Compliance with a duly enacted law of a State or unit of general local government that includes the requirements of paragraphs (a) and (c) of this section satisfies the requirements of paragraphs (a) and (c) of this section.

(g)(1) It is the policy of HUD to encourage States and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c) of this section.

(2) A State or unit of general local government may review and approve newly constructed multifamily dwellings for the purpose of making determinations as to whether the requirements of paragraphs (a) and (c) of this section are met.

(h) Determinations of compliance or noncompliance by a State or a unit of general local government under paragraph (f) or (g) of this section are not conclusive in enforcement proceedings under the Fair Housing Amendments Act.

(i) This subpart does not invalidate or limit any law of a State or political subdivision of a State that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subpart.

SUBPART E HOUSING FOR OLDER PERSONS

100.300 Purpose.

The purpose of this subpart is to effectuate the exemption in the Fair Housing Amendments Act of 1988 that relates to housing for older persons.

100.301 Exemption.

(a) The provisions regarding familial status in this part do not apply to housing which satisfies the requirements of §100.302, 100.303 or 100.304.

(b) Nothing in this part limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

100.302 State and Federal elderly housing programs.

The provisions regarding familial status in this part shall not apply to housing provided under any Federal or State program that the Secretary determines is specifically designed and operated to assist elderly persons, as defined in the State or Federal program.

100.303 62 or over housing.

(a) The provisions regarding familial status in this part shall not apply to housing intended for, and solely occupied by, persons 62 years of age or older. Housing satisfies the requirements of this section even though:

(1) There are persons residing in such housing on September 13, 1988 who are under 62 years of age, provided that all new occupants are persons 62 years of age or older;

(2) There are unoccupied units, provided that such units are reserved for occupancy by persons 62 years of age or over;

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(b) The following examples illustrate the application of paragraph (a) of this section:

Example (1): John and Mary apply for housing at the Vista Heights apartment complex which is an elderly housing complex operated for persons 62 years of age or older. John is 62 years of age. Mary is 59 years of age. If Vista Heights wishes to retain its "62 or over" exemption it must refuse to rent to John and Mary because Mary is under 62 years of age. However, if Vista Heights does rent to John and Mary, it might qualify for the "55 or over" exemption in 100.304.

Example (2): The Blueberry Hill retirement community has 100 dwelling units. On September 13, 1988, 15 units were vacant and 35 units were occupied with at least one person who is under 62 years of age. The remaining 50 units were occupied by persons who were all 62 years of age or older. Blueberry Hill can qualify for the "62 or over" exemption as long as all units that were occupied after September 13, 1988 are occupied by persons who were 62 years of age or older. The people under 62 in the 35 units previously described need not be required to leave for Blueberry Hill to qualify for the "62 or over" exemption.

100.304 Housing for persons who are 55 years of age or older.

(a) The provisions regarding familial status in this part shall not apply to housing intended and operated for persons 55 years of age or older. Housing qualifies for this exemption if:

(1) The alleged violation occurred before December 28, 1995 and the housing community or facility complied with the HUD regulations in effect at the time of the alleged violation; or

(2) The alleged violation occurred on or after December 28, 1995 and the housing community or facility complies with:

(i) Section 807(b)(2)(C) (42 U.S.C. 3607(b)) of the Fair Housing Act as amended; and

(ii) 24 CFR 100.305, 100.306, and 100.307.

(b) For purposes of this subpart, housing facility or community means any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion or portions of a single building shall not constitute a housing facility or community. Examples of a housing facility or community include, but are not limited to:

(1) A condominium association;

(2) A cooperative;

(3) A property governed by a homeowners' or resident association;

(4) A municipally zoned area;

(5) A leased property under common private ownership;

(6) A mobile home park; and

(7) A manufactured housing community.

(c) For purposes of this subpart, older person means a person 55 years of age or older.

100.305 80 percent occupancy.

(a) In order for a housing facility or community to qualify as housing for older persons under 100.304, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older.

(b) For purposes of this subpart, occupied unit means:

(1) A dwelling unit that is actually occupied by one or more persons on the date that the exemption is claimed; or

(2) A temporarily vacant unit, if the primary occupant has resided in the unit during the past year and intends to return on a periodic basis.

(c) For purposes of this subpart, occupied by at least one person 55 years of age or older means that on the date the exemption for housing designed for persons who are 55 years of age or older is claimed:

(1) At least one occupant of the dwelling unit is 55 years of age or older; or

(2) If the dwelling unit is temporarily vacant, at least one of the occupants immediately prior to the date on which the unit was temporarily vacated was 55 years of age or older.

(d) Newly constructed housing for first occupancy after March 12, 1989 need not comply with the requirements of this section until at least 25 percent of the units are occupied. For purposes of this section, newly constructed housing includes a facility or community that has been wholly unoccupied for at least 90 days prior to re-occupancy due to renovation or rehabilitation.

(e) Housing satisfies the requirements of this section even though:

(1) On September 13, 1988, under 80 percent of the occupied units in the housing facility or community were occupied by at least one person 55 years of age or older, provided that at least 80 percent of the units occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.

(3) There are units occupied by employees of the housing facility or community (and family members residing in the same unit) who are under 55 years of age, provided the employees perform substantial duties related to the management or maintenance of the facility or community.

(4) There are units occupied by persons who are necessary to provide a reasonable accommodation to disabled residents as required by 100.204 and who are under the age of 55.

(5) For a period expiring one year from the effective date of this final regulation, there are insufficient units occupied by at least one person 55 years of age or older, but the housing facility or community, at the time the exemption is asserted:

(i) Has reserved all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and

(ii) Meets the requirements of §100.304, 100.306, and 100.307.

(f) For purposes of the transition provision described in 100.305(e)(5), a housing facility or community may not evict, refuse to renew leases, or otherwise penalize families with children who reside in the facility or community in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.

(g) Where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.

(h) Each housing facility or community may determine the age restriction, if any, for units that are not occupied by at least one person 55 years of age or older, so long as the housing facility or community complies with the provisions of 100.306.

100.306 Intent to operate as housing designed for persons who are 55 years of age or older.

(a) In order for a housing facility or community to qualify as housing designed for persons who are 55 years of age or older, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. The following factors, among others, are considered relevant in determining whether the housing facility or community has complied with this requirement:

(1) The manner in which the housing facility or community is described to prospective residents;

(2) Any advertising designed to attract prospective residents;

(3) Lease provisions;

(4) Written rules, regulations, covenants, deed or other restrictions;

(5) The maintenance and consistent application of relevant procedures;

(6) Actual practices of the housing facility or community; and

(7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.

(b) Phrases such as “adult living”, “adult community”, or similar statements in any written advertisement or prospectus are not consistent with the intent that the housing facility or community intends to operate as housing for persons 55 years of age or older.

(c) If there is language in deed or other community or facility documents which is inconsistent with the intent to provide housing for persons who are 55 years of age or older housing, HUD shall consider documented evidence of a good faith attempt to remove such language in determining whether the housing facility or community complies with the requirements of this section in conjunction with other evidence of intent.

(d) A housing facility or community may allow occupancy by families with children as long as it meets the requirements of §100.305 and 100.306(a).

100.307 Verification of occupancy.

(a) In order for a housing facility or community to qualify as housing for persons 55 years of age or older, it must be able to produce, in response to a complaint filed under this title, verification of compliance with 100.305 through reliable surveys and affidavits.

(b) A facility or community shall, within 180 days of the effective date of this rule, develop procedures for routinely determining the occupancy of each unit, including the identification of whether at least one occupant of each unit is 55 years of age or older. Such procedures may be part of a normal leasing or purchasing arrangement.

(c) The procedures described in paragraph (b) of this section must provide for regular updates, through surveys or other means, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years. A survey may include information regarding whether any units are occupied by persons described in paragraphs (e)(1), (e)(3), and (e)(4) of 100.305.

(d) Any of the following documents are considered reliable documentation of the age of the occupants of the housing facility or community:

(1) Driver's license;

(2) Birth certificate;

(3) Passport;

(4) Immigration card;

(5) Military identification;

(6) Any other state, local, national, or international official documents containing a birth date of comparable reliability; or

(7) A certification in a lease, application, affidavit, or other document signed by any member of the household age 18 or older asserting that at least one person in the unit is 55 years of age or older.

(e) A facility or community shall consider any one of the forms of verification identified above as adequate for verification of age, provided that it contains specific information about current age or date of birth.

(f) The housing facility or community must establish and maintain appropriate policies to require that occupants comply with the age verification procedures required by this section.

(g) If the occupants of a particular dwelling unit refuse to comply with the age verification procedures, the housing facility or community may, if it has sufficient evidence, consider the unit to be occupied by at least one person 55 years of age or older. Such evidence may include:

(1) Government records or documents, such as a local household census;

(2) Prior forms or applications; or

(3) A statement from an individual who has personal knowledge of the age of the occupants. The individual's statement must set forth the basis for such knowledge and be signed under the penalty of perjury.

(h) Surveys and verification procedures which comply with the requirements of this section shall be admissible in administrative and judicial proceedings for the purpose of verifying occupancy.

(i) A summary of occupancy surveys shall be available for inspection upon reasonable notice and request by any person.

100.308 Good faith defense against civil money damages.

(a) A person shall not be held personally liable for monetary damages for discriminating on the basis of familial status, if the person acted with the good faith belief that the housing facility or community qualified for a housing for older persons exemption under this subpart.

(b)(1) A person claiming the good faith belief defense must have actual knowledge that the housing facility or community has, through an authorized representative, asserted in writing that it qualifies for a housing for older persons exemption.

(2) Before the date on which the discrimination is claimed to have occurred, a community or facility, through its authorized representatives, must certify, in writing and under oath or affirmation, to the person subsequently claiming the defense that it complies with the requirements for such an exemption as housing for persons 55 years of age or older in order for such person to claim the defense.

(3) For purposes of this section, an authorized representative of a housing facility or community means the individual, committee, management company, owner, or other entity having the responsibility for adherence to the requirements established by this subpart.

(4) For purposes of this section, a person means a natural person.

(5) A person shall not be entitled to the good faith defense if the person has actual knowledge that the housing facility or community does not, or will not, qualify as housing for persons 55 years of age or older. Such a person will be ineligible for the good faith defense regardless of whether the person received the written assurance described in paragraph (b) of this section.

SUBPART F INTERFERENCE, COERCION OR INTIMIDATION

100.400 Prohibited interference, coercion or intimidation.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful under section 818 of the Fair Housing Act.

(b) It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.

(c) Conduct made unlawful under this section includes, but is not limited to, the following:

(1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.

(3) Threatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction, because of the race, color, religion, sex, handicap, familial status, or national origin of that person or of any person associated with that person.

(4) Intimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part.

(5) Retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.

PART 103 FAIR HOUSING COMPLAINT PROCESSING

SUBPART A PURPOSE AND DEFINITIONS

103.1 Purpose and applicability.

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. 3610.

(b) This part applies to:

(1) Complaints alleging discriminatory housing practices because of race, color, religion, sex or national origin; and

(2) Complaints alleging discriminatory housing practices on account of handicap or familial status occurring on or after March 12, 1989.

(c) Part 180 of this chapter governs the administrative proceedings before an administrative law judge adjudicating charges issued under 103.405.

(d) The Department will reasonably accommodate persons with disabilities who are participants in complaint processing.

103.5 Other civil rights authorities.

In addition to the Fair Housing Act, other civil rights authorities may be applicable in a particular case. Thus, where a person charged with a discriminatory housing practice in a complaint filed under section 810 of the Fair Housing Act is also prohibited from engaging in similar practices under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-5), section 109 of the Housing and Community Development Act of 1974 (42 U.S.C. 5309), Executive Order 11063 of November 20, 1962, on Equal Opportunity in Housing (27 FR 11527-11530, November 24, 1962), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act (42 U.S.C. 6101) or other applicable law, the person may also be subject to action by HUD or other Federal agencies under the rules, regulations, and procedures prescribed under title VI (24 CFR parts 1 and 2), section 109 (24 CFR 570.602)), Executive Order 11063 (24 CFR part 107), section 504 (24 CFR part 8), or other applicable law.

103.9 Definitions.

The terms *Fair Housing Act, General Counsel*, and *HUD* are defined in 24 CFR part 5.

Aggrieved person includes any person who:

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

Assistant Secretary means the Assistant Secretary for Fair Housing and Equal Opportunity in HUD.

Attorney General means the Attorney General of the United States.

Complainant means the person (including the Assistant Secretary) who files a complaint under this part.

Conciliation means the attempted resolution of issues raised by a complaint, or by the investigation of a complaint, through informal negotiations involving the aggrieved person, the respondent, and the Assistant Secretary.

Conciliation agreement means a written agreement setting forth the resolution of the issues in conciliation.

Discriminatory housing practice means an act that is unlawful under section 804, 805, 806 or 818 of the Fair Housing Act, as described in Part 100.

Dwelling means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, or any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

Person includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustee in cases under title 11 U.S.C., receivers and fiduciaries.

Personal service means handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business, residence or usual place of abode of the person to be served.

Receipt of notice means the day that personal service is completed by handing or delivering a copy of the document to an appropriate person or the date that a document is delivered by certified mail.

Respondent means:

(a) The person or other entity accused in a complaint of a discriminatory housing practice; and

(b) Any other person or entity identified in the course of investigation and notified as required under 103.50.

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

Substantially equivalent State or local agency means a State or local agency certified by HUD under 24 CFR part 115 (including agencies certified for interim referrals).

To rent includes to lease, to sublease, to let, and otherwise to grant for consideration the right to occupy premises not owned by the occupant.

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?

You can notify HUD if you believe there has been discrimination against you in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household.

103.15 Can I file a claim if the discrimination has not yet occurred?

Yes, you may file a claim with HUD if you have knowledge that a discriminatory action is about to occur.

103.20 Can someone help me with filing a claim?

HUD's Office of Fair Housing and Equal Opportunity can help you in filing a claim, if you contact them directly. You, or anyone who acts for you, may also ask any HUD office or an organization, individual, or attorney to help you.

103.25 What information should I provide to HUD?

You should provide us with:

(a) Your name, address, and telephone numbers where you can be reached;

(b) The name and address of the persons, businesses, or organizations you believe discriminated against you;

(c) If there is a specific property involved, you should provide the property's address and physical description, such as apartment, condominium, house, or vacant lot; and

(d) A brief description of how you were discriminated against in an activity related to housing. You should include in this description the date when the discrimination happened and why you believe the discrimination occurred because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household.

103.30 How should I bring a claim that I am the victim of discrimination?

(a) You can file a claim by mail or telephone with any of HUD's Offices of Fair Housing and Equal Opportunity or with any State or local agency that HUD has certified to receive complaints.

(b) You can call or go to any other HUD office for help in filing a claim. These offices will send your claim to HUD's Office of Fair Housing and Equal Opportunity, which will contact you about the filing of your complaint.

103.35 Is there a time limit on when I can file?

Yes, you must notify us within one year that you are a victim of discrimination. If you indicate that there is more than one act of discrimination, or that the discrimination is continuing, we must receive your information within one year of the last incident of discrimination.

103.40 Can I change my complaint after it is filed?

(a) Yes, you may change your fair housing complaint:

(1) At any time to add or remove people according to the law and the facts; or

(2) To correct other items, such as to add additional information found during the investigation of the complaint.

(b) You must approve any change to your complaint; we will consider the changes made as of the date of your original complaint.

SUBPART C REFERRAL OF COMPLAINTS TO STATE AND LOCAL AGENCIES

103.100 Notification and referral to substantially equivalent State or local agencies.

(a) Whenever a complaint alleges a discriminatory housing practice that is within the jurisdiction of a substantially equivalent State or local agency and the agency is certified or may accept interim referrals under 24 CFR Part 115 with regard to the alleged discriminatory housing practice, the Assistant Secretary will notify the agency of the filing of the complaint and refer the complaint to the agency for further processing before HUD takes any action with respect to the complaint. The Assistant Secretary will notify the State or local agency of the referral by certified mail.

(b) The Assistant Secretary will notify the aggrieved person and the respondent, by certified mail or personal service, of the notification and referral under paragraph (a) of this section. The notice will advise the aggrieved person and the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

103.105 Cessation of action on referred complaints.

A referral under 103.100 does not prohibit the Assistant Secretary from taking appropriate action to review or investigate matters in the complaint that raise issues cognizable under other civil rights authorities applicable to departmental programs (see 103.5).

103.110 Reactivation of referred complaints.

The Assistant Secretary may reactivate a complaint referred under 103.100 for processing by HUD if:

(a) The substantially equivalent State or local agency consents or requests the reactivation;

(b) The Assistant Secretary determines that, with respect to the alleged discriminatory housing practice, the agency no longer qualifies for certification as a substantially equivalent State or local agency and may not accept interim referrals; or

(c) The substantially equivalent State or local agency has failed to commence proceedings with respect to the complaint within 30 days of the date that it received the notification and referral of the complaint; or the agency commenced proceedings within this 30-day period, but the Assistant Secretary determines that the agency has failed to carry the proceedings forward with reasonable promptness.

103.115 Notification upon reactivation.

(a) Whenever a complaint referred to a State or local fair housing agency under 103.100 is reactivated under 103.110, the Assistant Secretary will notify the substantially equivalent State or local agency, the aggrieved person and the respondent of HUD's reactivation. The notification will be made by certified mail or personal service.

(b) The notification to the respondent and the aggrieved person will:

(1) Advise the aggrieved person and the respondent of the time limits applicable to complaint processing and the procedural rights and obligations of the aggrieved person and the respondent under this part and Part 180.

(2) State that HUD will process the complaint under the Fair Housing Act and that the State or local agency to which the complaint was referred may continue to process the complaint under State or local law.

(3) Advise the aggrieved person and the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice under Part 180. The notices will also state that the time period includes the time during which an action arising from a breach of conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

SUBPART D INVESTIGATION PROCEDURES

103.200 Investigations.

(a) Upon the filing of a complaint under 103.40, the Assistant Secretary will initiate an investigation. The purposes of an investigation are:

(1) To obtain information concerning the events or transactions that relate to the alleged discriminatory housing practice identified in the complaint.

(2) To document policies or practices of the respondent involved in the alleged discriminatory housing practice raised in the complaint.

(3) To develop factual data necessary for the General Counsel to make a determination under 103.400 whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and for the Assistant Secretary to make a determination under 103.400 that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and to take other actions provided under this part.

(b) Upon the written direction of the Assistant Secretary, HUD may initiate an investigation of housing practices to determine whether a complaint should be filed under Subpart B of this part. Such investigations will be conducted in accordance with the procedures described under this subpart.

103.201 Service of notice on aggrieved person.

Upon the filing of a complaint, the Assistant Secretary will notify, by certified mail or personal service, each aggrieved person on whose behalf the complaint was filed. The notice will:

(a) Acknowledge the filing of the complaint and state the date that the complaint was accepted for filing.

(b) Include a copy of the complaint.

(c) Advise the aggrieved person of the time limits applicable to complaint processing and of the procedural rights and obligations of the aggrieved person under this part and part 180.

(d) Advise the aggrieved person of his or her right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(e) Advise the aggrieved person that retaliation against any person because he or she made a complaint or testified, assisted, or participated in an investigation or conciliation under this part or an administrative proceeding under part 180, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

103.202 Notification of respondent; joinder of additional or substitute respondents.

(a) Within ten days of the filing of a complaint under 103.40 or the filing of an amended complaint under 103.42, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation under subpart D of this part as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.

(b) The Assistant Secretary will also serve notice on any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint.

103.203 Answer to complaint.

(a) The respondent may file an answer not later than ten days after receipt of the notice described in 103.50. The respondent may assert any defense that might be available to a defendant in a court of law. The answer must be signed and affirmed by the respondent. The affirmation must state: "I declare under penalty of perjury that the foregoing is true and correct."

(b) An answer may be reasonably and fairly amended at any time with the consent of the Assistant Secretary.

103.204 HUD complaints and compliance reviews.

(a) The Assistant Secretary may conduct an investigation and file a complaint under this subpart based on information that one or more discriminatory housing practices has occurred, or is about to occur.

(b) HUD may also initiate compliance reviews under other appropriate civil rights authorities, such as E.O. 11063 on Equal Opportunity in Housing, title VI of the Civil Rights Act of 1964, section 109 of the Housing and Community Development Act of 1974, section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act of 1975.

(c) HUD may also make the information you provide available to other Federal, State, or local agencies having an interest in the matter. In making such information available, HUD will take steps to protect the confidentiality of any informant or complainant when desired by the informant or complainant.

103.205 Systemic processing.

Where the Assistant Secretary determines that the alleged discriminatory practices contained in a complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or will affect a large number of persons, the Assistant Secretary may identify the complaint for systemic processing. This determination can be based on the face of the complaint or on information gathered in connection with an investigation. Systemic investigations may focus not only on documenting facts involved in the alleged discriminatory housing practice that is the subject of the complaint but also on review of other policies and procedures related to matters under investigation, to make sure that they also comply with the nondiscrimination requirements of the Fair Housing Act.

103.215 Conduct of investigation.

(a) In conducting investigations under this part, the Assistant Secretary will seek the voluntary cooperation of all persons to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take and record testimony or statements of persons reasonably necessary for the furtherance of the investigation.

(b) The Assistant Secretary may conduct and order discovery in aid of the investigation by the same methods and to the same extent that discovery may be ordered in an administrative proceeding under 24 CFR part 180, except that the Assistant Secretary shall have the power to issue subpoenas described in 24 CFR 180.545 in support of the investigation. Subpoenas issued by the Assistant Secretary must be approved by the General Counsel as to their legality before issuance.

103.220 Cooperation of Federal, State and local agencies.

The Assistant Secretary, in processing Fair Housing Act complaints, may seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial institutions.

103.225 Completion of investigation.

The investigation will remain open until a determination is made under 103.400, or a conciliation agreement is executed and approved under 103.310. Unless it is impracticable to do so, the Assistant Secretary will complete the investigation of the alleged discriminatory housing practice within 100 days of the filing of the complaint (or where the Assistant Secretary reactivates the complaint, within 100 days after service of the notice of reactivation under 103.115). If the Assistant Secretary is unable to complete the investigation within the 100-day period, HUD will notify the aggrieved person and the respondent, by mail, of the reasons for the delay.

103.230 Final investigative report.

(a) At the end of each investigation under this part, the Assistant Secretary will prepare a final investigative report. The investigative report will contain:

(1) The names and dates of contacts with witnesses, except that the report will not disclose the names of witnesses that request anonymity. HUD, however, may be required to disclose the names of such witnesses in the course of an administrative hearing under Part 180 of this chapter or a civil action under Title VIII of the Fair Housing Act;

(2) A summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(3) A summary description of other pertinent records;

(4) A summary of witness statements; and

(5) Answers to interrogatories.

(b) A final investigative report may be amended at any time, if additional evidence is discovered.

(c) Notwithstanding the prohibitions and requirements with respect to disclosure of information contained in 103.330, the Assistant Secretary will make information derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent. Following the completion of investigation, the Assistant Secretary shall notify the aggrieved person and the respondent that the final investigation report is complete and will be provided upon request.

SUBPART E CONCILIATION PROCEDURES

103.300 Conciliation.

(a) During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint.

(b) In conciliating a complaint, HUD will attempt to achieve a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory housing practices, or the prevention of their occurrence, in the future.

(c) Generally, officers, employees, and agents of HUD engaged in the investigation of a complaint under this part will not participate or advise in the conciliation of the same complaint or in any factually related complaint. Where the rights of the aggrieved party and the respondent can be protected and the prohibitions with respect to the disclosure of information can be observed, the investigator may suspend fact finding and engage in efforts to resolve the complaint by conciliation.

103.310 Conciliation agreement.

(a) The terms of a settlement of a complaint will be reduced to a written conciliation agreement. The conciliation agreement shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest. The types of relief that may be sought for the aggrieved person are described in 103.315. The provisions that may be sought for the vindication of the public interest are described in 103.320.

(b)(1) The agreement must be executed by the respondent and the complainant. The agreement is subject to the approval of the Assistant Secretary, who will indicate approval by signing the agreement. The Assistant Secretary will approve an agreement and, if the Assistant Secretary is the complainant, will execute the agreement, only if:

(i) The complainant and the respondent agree to the relief accorded the aggrieved person;

(ii) The provisions of the agreement will adequately vindicate the public interest; and

(iii) If the Assistant Secretary is the complainant, all aggrieved persons named in the complaint are satisfied with the relief provided to protect their interests.

(2) The General Counsel may issue a charge under 103.405 if the aggrieved person and the respondent have executed a conciliation agreement that has not been approved by the Assistant Secretary.

103.315 Relief sought for aggrieved persons.

(a) The following types of relief may be sought for aggrieved persons in conciliation:

(1) Monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;

(2) Other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief; or

(3) Injunctive relief appropriate to the elimination of discriminatory housing practices affecting the aggrieved person or other persons.

(b) The conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Arbitration may award appropriate relief as described in paragraph (a) of this section. The aggrieved person and the respondent may, in the conciliation agreement, limit the types of relief that may be awarded under binding arbitration.

103.320 Provisions sought for the public interest.

The following are types of provisions may be sought for the vindication of the public interest:

(a) Elimination of discriminatory housing practices.

(b) Prevention of future discriminatory housing practices.

(c) Remedial affirmative activities to overcome discriminatory housing practices.

(d) Reporting requirements.

(e) Monitoring and enforcement activities.

103.325 Termination of conciliation efforts.

(a) HUD may terminate its efforts to conciliate the complaint if the respondent fails or refuses to confer with HUD; the aggrieved person or the respondent fail to make a good faith effort to resolve any dispute; or HUD finds, for any reason, that voluntary agreement is not likely to result.

(b) Where the aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced, HUD will terminate conciliation unless the court specifically requests assistance from the Assistant Secretary.

103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation.

(a) Except as provided in paragraph (b) of this section and 103.230(c), nothing that is said or done in the course of conciliation under this part may be made public or used as evidence in a subsequent administrative hearing under Part 180 or in civil actions under Title VIII of the Fair Housing Act, without the written consent of the persons concerned.

(b) Conciliation agreements shall be made public, unless the aggrieved person and respondent request nondisclosure and the Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Assistant Secretary may publish tabulated descriptions of the results of all conciliation efforts.

103.335 Review of compliance with conciliation agreements.

HUD may, from time to time, review compliance with the terms of any conciliation agreement. Whenever HUD has reasonable cause to believe that a respondent has breached a conciliation agreement, the Assistant Secretary shall refer the matter to the Attorney General with a recommendation for the filing of a civil action under section 814(b)(2) of the Fair Housing Act for the enforcement of the terms of the conciliation agreement.

SUBPART F ISSUANCE OF CHARGE

103.400 Reasonable cause determination.

(a) If a conciliation agreement under 103.310 has not been executed by the complainant and the respondent and approved by the Assistant Secretary, the Assistant Secretary shall conduct a review of the factual circumstances revealed as part of HUD's investigation.

(1) If the Assistant Secretary for Fair Housing and Equal Opportunity determines that, based on the totality of factual circumstances known at the time of the Assistant Secretary's review, no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary shall: Issue a short and plain written statement of the facts upon which the Assistant Secretary has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of the dismissal (including the written statement of facts) by mail; and make public disclosure of the dismissal. The respondent may request that no public disclosure be made. Notwithstanding such a request, the fact of dismissal, including the names of the parties, shall be public information available on request. The Assistant Secretary's determination shall be based solely upon the facts concerning the alleged discriminatory housing practice provided by complainant and respondent and otherwise disclosed during the investigation. In making this determination, the Assistant Secretary shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.

(2) If, based on the totality of the factual circumstances known at the time of the decision, the Assistant Secretary believes that reasonable cause may exist to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary shall determine that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, in all cases not involving the legality of local land use laws or ordinances (except as provided in paragraph (b) of this section). The Assistant Secretary's determination

shall be based solely on the facts concerning the alleged discriminatory housing practices provided by complainants and respondents and otherwise identified during the investigation in making this determination. In making this determination, the Assistant Secretary shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.

(i) If the Assistant Secretary determines that reasonable cause exists, the Assistant Secretary, upon receipt of concurrence of the General Counsel, will issue such determination and direct the issuance of a charge under 103.405 on behalf of the aggrieved person, and shall notify the complainant and the respondent of this determination by certified mail or personal service.

(ii) If the Assistant Secretary determines that no reasonable cause exists, the Assistant Secretary shall: Issue a short and plain written statement of the facts upon which the Assistant Secretary has based the no reasonable cause determination; dismiss the complaint; notify the complainant and the respondent of the dismissal (including the written statement of facts) by mail; and make public disclosure of the dismissal. The complainant or respondent may request that no public disclosure be made. Notwithstanding such a request, the fact of dismissal, including the names of the parties, shall be public information available on request.

(3) If the Assistant Secretary determines that the matter involves the legality of local zoning or land use laws or ordinances, the Assistant Secretary, in lieu of making a determination regarding reasonable cause, shall refer the investigative material to the Attorney General for appropriate action under section 814(b)(1) of the Fair Housing Act, and shall notify the complainant and the respondent of this action by mail or personal service.

(b) The Assistant Secretary may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a state law seeking relief with respect to the alleged housing practice and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the Assistant Secretary shall so notify the complainant and the respondent by certified mail or personal service.

(c)(1) A determination of reasonable cause or no reasonable cause by the Assistant Secretary shall be made within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under 103.115), unless it is impracticable to do so.

(2) If the Assistant Secretary is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the complainant and the respondent by mail of the reasons for the delay.

103.405 Issuance of charge.

(a) A charge:

(1) Shall consist of a short and plain written statement of the facts upon which the Assistant Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint filed under subpart B of this part. If the charge is based on grounds that are not alleged in the complaint, HUD will not issue a charge with regard to the grounds unless the record of investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

(b) Within three business days after the issuance of the charge, the General Counsel shall:

(1) Obtain a time and place for hearing from the Chief Docket Clerk of the Office of Administrative Law Judges;

(2) File the charge along with the notifications described in 24 CFR 180.410(b) with the Office of Administrative Law Judges;

(3) Serve the charge and notifications in accordance with 24 CFR 180.410(a); and

(4) Notify the Assistant Secretary of the filing of the charge.

103.410 Election of civil action or provision of administrative proceeding.

(a) If a charge is issued under 103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR Part 180, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act.

(b) The election must be made not later than 20 days after the receipt of service of the charge, or in the case of the Assistant Secretary, not later than 20 days after service. The notice of the election must be filed with the Chief Docket Clerk in the Office of Administrative Law Judges and served on the General Counsel, the Assistant Secretary, the respondent, and the aggrieved persons on whose behalf the complaint was filed. The notification will be filed and served in accordance with the procedures established under 24 CFR Part 180.

(c) If an election is not made under this section, the General Counsel will maintain an administrative proceeding based on the charge in accordance with the procedures under 24 CFR Part 180.

(d) If an election is made under this section, the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court. Such notification and authorization shall include transmission of the file in the case, including a copy of the final investigative report and the charge, to the Attorney General.

(e) The General Counsel shall be available for consultation concerning any legal issues raised by the Attorney General as to how best to proceed in the event that a new court decision or newly discovered evidence is regarded as relevant to the reasonable cause determination.

SUBPART G PROMPT JUDICIAL ACTION

103.500 Prompt judicial action.

(a) If at any time following the filing of a complaint, the General Counsel concludes that prompt judicial action is necessary to carry out the purposes of this part or 24 CFR Part 180, the General Counsel may authorize the Attorney General to commence a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint. To ensure the prompt initiation of the civil action, the General Counsel will consult with the Assistant Attorney General for the Civil Rights Division before making the determination that prompt judicial action is necessary. The commencement of a civil action by the Attorney General under this section will not affect the initiation or continuation of proceedings under this part or administrative proceedings under Part 180.

(b) If the General Counsel has reason to believe that a basis exists for the commencement of proceedings against the respondent under section 814(a) of the Fair Housing Act (Pattern or Practice Cases), proceedings under section 814(c) of the Fair Housing Act (Enforcement of Subpoenas), or proceedings by any governmental licensing or supervisory authorities, the General Counsel shall transmit the information upon which that belief is based to the Attorney General and to other appropriate authorities.

SUBPART H OTHER ACTION

103.510 Other action by HUD.

In addition to the actions described in 103.500, HUD may pursue one or more of the following courses of action:

(a) Refer the matter to the Attorney General for appropriate action (e.g., enforcement of criminal penalties under section 811(c) of the Act).

(b) Take appropriate steps to initiate proceedings leading to the debarment of the respondent under 24 CFR Part 24, or initiate other actions leading to the imposition of administrative sanctions where HUD determines that such actions are necessary to the effective operation and administration of Federal programs or activities.

(c) Take appropriate steps to initiate proceedings under:

(1) 24 CFR Part 1, implementing Title VI of the Civil Rights Act of 1964;

(2) 24 CFR 570.912, implementing section 109 of the Housing and Community Development Act of 1974;

(3) 24 CFR Part 8, implementing section 504 of the Rehabilitation Act of 1973;

(4) 24 CFR Part 107, implementing Executive Order 11063; or

(5) The Age Discrimination Act, 42 U.S.C. 6101.

(d) Inform any other Federal, State or local agency with an interest in the enforcement of respondent's obligations with respect to nondiscrimination in housing.

103.515 Action by other agencies.

In accordance with section 808 (d) and (e) of the Fair Housing Act and Executive Order No. 12259, other Federal agencies, including any agency having regulatory or supervisory authority over financial institutions, are responsible for ensuring that their programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing, and for cooperating with the Assistant Secretary in furthering the purposes of the Fair Housing Act.

Section 2 HUD Notices and Letters

5/17/04 HUD and DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act

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 Act[1] (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).

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 them[5] 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

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[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.

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.

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[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.

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

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[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").

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

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

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

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?

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:

- 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

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 benefits[10] 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)

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).

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.

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

SPECIAL ATTENTION OF:	**NOTICE PIH 2010-26 (HA)**
Regional Directors; State and Area Coordinators; Public Housing Hub Directors; Program Center Coordinators; Troubled Agency Recovery Center Directors; Special Applications Center Director; Public Housing Agencies; Housing Choice Voucher/Section 8 Public Housing Agencies; Resident Management Corporations	Issued: July 26, 2010 Expires: July 31, 2011 Cross Reference: Notice **PIH 2003-31 (HA)** **PIH 2006-13 (HA)** **PIH Letter L-2007-05** **PIH Notice 2009-5**

Subject: Non-Discrimination and Accessibility for Persons with Disabilities

1. PURPOSE: The purpose of this Notice is to remind recipients of Federal funds of their obligation to comply with pertinent laws and implementing regulations which mandate non-discrimination and accessibility in federally funded housing and non-housing programs for persons with disabilities.

   Additionally, this Notice provides information on key compliance elements of the relevant regulations and examples and resources to enhance recipients' compliance efforts. However, specific regulations must be reviewed in their entirety for full compliance.

2. APPLICABILITY: This Notice applies to all public housing programs and activities receiving Federal financial assistance either directly or indirectly from the Office of Public and Indian Housing. This Notice is not applicable to ONAP programs, Tribes or TDHEs.

   Federal financial assistance and programs or activities are both defined very broadly. See 24 CFR 8.3 for the regulatory definitions.

   Contractors or other agents of public housing agencies (PHAs) performing covered work or conducting covered activities on behalf of PHAs are subject to the requirements of this Notice.

3. BACKGROUND: Although the Department is aware that many HUD recipients are doing an excellent job of providing accessibility in their programs for persons with disabilities, it has been brought to the Department's attention that other HUD recipients may not be in compliance with the subject laws and implementing regulations. As part of an effort to

achieve maximum compliance, this Notice will serve to emphasize the importance of compliance.

4. NOTIFICATIONS: It is recommended that PHAs and other recipients of Federal PIH funds provide this Notice to all current and future contractors, agents and housing choice voucher program owners participating in covered programs/activities or performing work covered under the above laws referenced below and implementing regulations.

I. STATUTORY/REGULATORY REQUIREMENTS

Some statutory and regulatory provisions overlap others. Where there is a conflict, the most stringent provision applies including any state or local laws/regulations/codes which may be more stringent than Federal requirements.

A. SELF-EVALUATIONS/NEEDS ASSESSMENTS/TRANSITION PLAN

1. Section 504 of the Rehabilitation Act of 1973 (Section 504)[1]; Title II of the Americans with Disabilities Act of 1990 (ADA)[2]:
   Initially, with the issuance of the Section 504 implementing regulations at 24 CFR Part 8 on June 2, 1988, PHAs were required to conduct needs assessments and develop transition plans to address the identified needs of residents and applicants with disabilities. The transition plan and the needs assessment are required to be available for public review pursuant to 24 CFR § 8.25(c).

   Likewise, PHAs were required to conduct a self-evaluation their current policies and practices to determine whether, in whole or in part, they do not or may not meet the requirements of Section 504. PHAs must then modify any policies and practices that do not meet the requirements and take appropriate corrective steps to remedy the discrimination revealed by the self-evaluation. See 24 CFR § 8.51.

   The Department's Office of Fair Housing and Equal Opportunity (FHEO) will continue, as a matter of routine, to request copies of any self-evaluations, needs assessments or transition plans in every compliance review and complaint investigation conducted of a HUD recipient. These documents may also be reviewed by other HUD offices in conjunction with funding applications and in addressing non-compliance issues that may arise. In addition, effective January 26, 1992, Title II of the ADA required PHAs to conduct a self-evaluation of their current services, policies and practices. *See* 28 CFR §§ 35.105 and 35.150 (d).

   PHA-Plan regulations pursuant to the U.S. Housing Act of 1937 at 24 CFR § 903.7(a)(1)(ii) require the submission of a statement addressing the housing needs of low-income and very low-income families, including such families with disabilities, who reside in the jurisdiction served by the PHA and families who are on the public housing and housing choice voucher program waiting list.

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[1] 29 U.S.C. § 794; 24 CFR Part 8

[2] 42 U.S.C. §§ 12101 et seq.; 28 CFR Part 35

Additionally, to ensure continued compliance with Section 504 and Title II of the ADA, PHAs are encouraged to conduct needs assessments and self-evaluations, at least yearly, working with persons/residents with disabilities and local advocacy groups for persons with disabilities. (*see* 24 CFR §§ 8.25(c) and 8.51 for additional information). Transition plans should be updated as a result of such needs assessments and self-evaluations. The transition plan must be made available for public review.

B. SECTION 504/24 CFR 8 – MAJOR PROVISIONS

[*see* http://www.hud.gov/offices/fheo/disabilities/504keys.cfm]

1. New Construction [see 24 CFR § 8.22 (a) and (b)]. A minimum of 5 percent of the total dwelling units, or at least one unit (whichever is greater), must be made accessible for persons with mobility impairments. An additional minimum of 2 percent of the units, or at least one unit (whichever is greater) must be made accessible for persons with hearing or vision impairments. In circumstances where greater need is shown, HUD may prescribe higher percentages than those listed above. [see 24 CFR 8.22(c).] Accessible units must be on an accessible route from site arrival points and connected by an accessible route to public and common use facilities located elsewhere on the site. Also, see visitability recommendations in Section I. of this Notice.

2. Calculating the Required 5% and 2%. PHAs and all other HUD recipients must calculate and provide the proper number of accessible units consistent with the applicable requirements of Section 504. As noted above for New Construction, 24 CFR § 8.22 (b), requires a minimum of 5 percent of the total dwelling units be made accessible for persons with mobility impairments. An additional 2 percent of the total units must be made accessible for persons with hearing or vision impairments.

   For example, if a recipient newly constructs a 41-unit development, 24 CFR § 8.22 (b), requires a minimum of 5 percent of the total dwelling units be made accessible for persons with mobility impairments. That is 41 total units x 5 percent = 2.05 accessible units. However, to provide the minimum of 5 percent requires that any fraction of a whole number, in this example .05 units, be rounded up to 3 units. If the recipient instead rounded the fraction down to 2 units (2 accessible units ÷ 41total units = 4.8 percent), the recipient would not comply with the requirement that there be a minimum of 5 percent.

   Since 24 CFR § 8.22 (b) requires an additional 2 percent of the total units be made accessible for persons with hearing or vision impairments, the recipient must provide one such unit as prescribed by the regulation because 41 total units x 2 percent = .82 such units.

   This method of calculating the required number of accessible units also applies to developments subject to the Substantial Alterations requirements of 24 CFR § 8.23 (a).

3. Substantial Alterations [see 24 CFR § 8.23 (a)]. If alterations are undertaken to a project that has 15 or more units and the cost of the alterations is 75 percent or more

of the replacement cost of the completed facility, then the provisions of 24 CFR 8.22 (a) and (b) for new construction apply, with the sole exception that load bearing structural members are not required to be removed or altered. If alterations of single elements or spaces of a dwelling unit when considered together, amount to an alteration of a dwelling unit, the entire dwelling unit shall be made accessible. Once 5 percent of the dwelling units in a project are readily accessible to and usable by individuals with mobility impairments, then no additional elements of dwelling units or entire dwelling units are required to be accessible under this paragraph.

4. Other Alterations [see 24 CFR § 8.23 (b)]. When other alterations are undertaken, including, but not limited to moder nization, such alterations are required to be accessible to the maximum extent feasible, up until a point where at least 5 percent of the units in a project are accessible unless HUD prescribes a higher number or percentage pursuant to 24 CFR § 8.23 (b)(2). PHAs should also include up to 2 percent of the units in a development accessible for persons with hearing and vision impairments. See 24 CFR. § 8.32 (c) for exception regarding removing or altering a load-bearing structural member. (Note: these exceptions do not relieve the recipient from compliance utilizing other units/buildings/developments or other methods to achieve compliance with Section 504.)

5. Adaptable Units: Section 504 permits recipients to construct or convert adaptable units. A dwelling unit that is on an accessible route, as defined by Section 504 and UFAS, and is adaptable and otherwise in compliance with the standards set forth in 24 C.F.R. § 8.32 is "accessible". Adaptable or adaptability means the ability of certain elements of a dwelling unit, such as kitchen counters, sinks and grab bars to be added to, raised, lowered, or otherwise altered to accommodate the needs of persons with or without disabilities, or to accommodate the needs of persons with different types or degrees of disabilities. An accessible route is defined as a continuous, unobstructed UFAS-compliant path as prescribed in 24 CFR §§ 8.3 and 8.32; UFAS. § 4.3. *See* 24 CFR §§ 8.3 & 8.32; UFAS §§ 4.34.3-4.34.6.

   Adaptable units may be appropriate when the PHA has no immediate demand for accessible units since adaptable units may be more marketable to families without disabilities. **[NOTE: A unit that meets the requirements of the Fair Housing Act Design & Construction requirements is NOT equivalent to an Adaptable or Accessible Unit as defined by UFAS and Section 504.]**

6. Uniform Federal Accessibility Standards (UFAS) 24 CFR § 8.32 –

   Compliance with UFAS shall be deemed to comply with the accessibility requirements of Section 504, 24 CFR §§ 8.21, 8.22, 8.23 and 8.25. Departures from the technical and scoping requirements of UFAS are permitted where substantially equivalent or greater access and usability of the building is provided. *See* 24 CFR § 8.32 (a). The United States Access Board promulgates the minimum guide lines and requirements for accessible design upon which UFAS is based. The UFAS may be found at: http://www.access-board.gov/ufas/ufas-html/ufas.htm
   See also Section I.C., below.

NOTE: On July 23, 2004, the U.S. Access Board issued new Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Guidelines which cover new construction and alteration of a broad range of facilities in the private and public sectors and serve as the basis for enforceable accessibility standards issued by Federal Agencies, including HUD. These Guidelines, once adopted by HUD, will replace the current UFAS. However, they will only apply to new construction and planned alterations and generally will not apply to existing facilities except where altered. HUD recipients are not required to comply with the new Guidelines until such time as HUD adopts them as enforceable standards. Information about the new Guidelines may be obtained from the Access Board website at http://www.access-board.gov/ada-aba/final.cfm.

7. Reasonable Accommodations [see 24 CFR §§ 8.20, 8.21, 8.24 and 8.33]. PHAs and other recipients of Federal financial assistance are required to make reasonable adjustments to their rules, policies, practices and procedures in order to enable an applicant or resident with a disability to have an equal opportunity to use and enjoy the housing unit, the common areas of a dwelling or participate in or access programs and activities conducted or sponsored by the PHA and/or recipient. When a family member requires a policy modification to accommodate a disability, PHAs must make the policy modification unless doing so would result in a fundamental alteration in the nature of its program or an undue hardship on the PHA's programs. Factors to be considered include:

    - The overall size of the (PHA's) program with respect to the number of employees, number and type of facilities and size of budget;
    - The type of (PHA's) operation, including the composition and structure of the (PHAs) workforce and;
    - The nature and cost of the accommodation needed.

    See discussion on Screening/Reasonable Accommodations in Section 2F(6) and reasonable accommodation under the Fair Housing Act in Section 1E(3). Note: A recipient is not required to accommodate an individual with a disability by modifying a rule or policy that is required by statute. Such a change would be a fundamental alteration of a program.
    For example:

- A PHA that does not allow residents to have pets must modify its policies and allow a tenant with a disability to have an assistance animal if the animal is needed to provide the resident with a disability an equal opportunity to use and enjoy the housing.

- If the recipient provides transportation to PHA sponsored/funded functions or activities then a recipient must ensure that accessible transportation is provided to accommodate persons with disabilities and their aides including the reasonable accompaniment of relative(s) or acquaintance(s).

PHAs and other recipients of Federal financial assistance are also required to provide reasonable accommodations to tenants and applicants with disabilities who need

structural modifications to existing dwelling units and public use and common use areas in order to make effective use of the recipient's program. Under the regulations, this obligation may be met either by making and paying for requested structural modifications or by using other equally effective methods. See 24 CFR §§ 8.20, 8.21(c), 8.24. However, when the PHA is accommodating a resident's disability-related needs without making structural changes, the PHA shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate. *See* 24 CFR §§ 8.21 (c), 8.24 (b) for a variety of suggested, but not all inclusive compliance methods. As with other requested reasonable accommodations, PHAs and other recipients are not required to provide requested structural modifications if doing so would result in a fundamental alteration in the nature of the program or an undue financial and administrative burden. However, the PHA or other recipient is required to provide any other reasonable accommodation up to the point that would not result in an undue financial or administrative burden on the particular recipient and/or constitute a fundamental alteration of the program.

For example:

- A PHA may be required to pay for and install a ramp to allow a resident who is a wheelchair user to have access to a dwelling unit that has a step at the front door if the resident cannot be accommodated by relocation to a different unit that meets the resident's needs.

- A PHA may be required to pay for and install grab bars in the resident's dwelling unit in order to accommodate a resident who has a mobility disability.

- A PHA may be permitted to transfer a resident with disabilities who needs an accessible unit to an appropriate available accessible unit or an appropriate accessible unit that can be modified in lieu of modifying the tenant 's current inaccessible unit.

Note: This requirement to accommodate individual tenant's requests for accessible features is separate from the PHA's affirmative obligation to have an inventory of accessible units available for persons with disabilities pursuant to 24 CFR §§ 8.22, 8.23 and 8.25.

8. Distribution of Accessible Dwelling Units (see 24 CFR § 8.26). Required accessible dwelling units shall, to the maximum extent feasible and subject to reasonable health and safety requirements, be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities so that persons with disabilities have choices of living arrangements comparable to that of other families eligible for assistance under the same program.

9. Occupancy of Accessible Dwelling Units (see 24 CFR § 8.27). PHAs shall adopt suitable means including providing information in its application packets, providing refresher information to each resident during annual re-certifications and posting notices in its Admissions & Occupancy Offices to ensure that information regarding

the availability of accessible dwelling units reaches eligible persons with disabilities. The PHA shall also modify its Admissions, Occupancy and Transfer policies and procedures in order to maximize the occupancy of its accessible units by eligible individuals whose disability requires the accessibility fea tures of the particular unit.

PHAs shall also take reasonable non-discriminatory steps to maximize the utilization of accessible units by eligible individuals whose disability requires the accessibility features of the particular unit. To this end, whe n an accessible unit becomes vacant, the PHA shall:

a. First, offer the unit to a current occupant with disabilities in the same development that requires the accessibility features of the vacant accessible unit and occupying a unit not having those accessib ility features. The PHA must pay moving expenses to transfer a resident with a disability to an accessible unit as an accommodation for the resident's disability.

b. Second, if there is no current resident in the same development who requires the accessibility features of the vacant, accessible unit, the PHA will offer the unit to a current resident with disabilities residing in another development that requires the accessibility features of the vacant, accessible unit and occupying a unit not having those accessibility features.

c. Third, if there is no current resident who requires the accessibility features of the vacant, accessible unit, then the PHA will offer the vacant, accessible unit to an eligible, qualified applicant with disabilities on the PHA's waiting list who can benefit from the accessible features of the available, accessible unit.

d. Fourth, if there is not an eligible qualified resident or applicant with disabilities on the waiting list who wishes to reside in the available, accessib le unit, then the PHA should offer the available accessible unit to an applicant on the waiting list who does not need the accessible features of the unit. However, the PHA may require the applicant to execute a lease that requires the resident to relocat e, at the PHA's expense, to a non-accessible unit within thirty (30) days of notice by the PHA that there is an eligible applicant or existing resident with disabilities who requires the accessibility features of the unit. *See* 24 CFR § 8.27. Although the regulation does not mandate the use of the lease provision requiring the nondisabled family to move, as a best practice, the Department strongly encourages recipients to incorporate it into the lease. By doing so, a recipient may not have to retrofit add itional units because accessible units are occupied by persons who do not need the features of the units. In addition, making sure that accessible units are actually occupied by persons who need the features will make recipients better able to meet their obligation to ensure that their program is usable and accessible to persons who need units with accessible features. See 24 CFR 8.20.

Note: A PHA may not prohibit an eligible disabled family from accepting a non - accessible unit for which the family i s eligible that may become available before an accessible unit. The PHA is required to modify such a non -accessible unit as needed, unless the modification would result in an undue financial and administrative burden.

10. Most Integrated Setting Appropriate (see 24 CFR Part 8 and 28 CFR Part 35). Section 504 regulations at 24 CFR § 8.4(d) require that recipients administer programs and activities receiving Federal financial assistance in the most integrated setting appropriate to the needs of qualified individuals with disabilities. The regulations provide that a specific class of individuals with disabilities may not be excluded from a program unless the program is limited by Federal statute or executive order to a different class of individuals. Section 504 regulations (see 24 CFR § 8.4(b)(1)(iv)) also state that recipients cannot limit benefits to a particular category of people with disabilities unless it is necessary in order to provide housing services that are as effective as those provided to others. Further, the regulations (see 24 CFR § 8.4(5)(i)) state that in determining the site or location of a federally assisted facility, an applicant for assistance or a recipient may not make selections the purpose or effect of which would exclude qualified individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity that receives Federal financial assistance.

11. While Section 504 requires such integration only in programs that are Federally-assisted, Title II of the ADA similarly requires public entities to provide **all** their services in the most integrated setting appropriate to the needs of qualified individuals with disabilities regardless of Federal assistance. The concept of community integration is at the heart of Section 504 and the ADA. Consistent with the standards of Section 504 and the ADA, in most instances, separate programs for individuals with disabilities will not be permitted.

12. PHA Requirements for the Housing Choice Voucher Program (see 24 CFR § 8.28). [*see* Notice PIH 2005-05 and subsequent reinstatements by Notice PIH 2006-21 and PIH Letter L-2007-1: New Freedom Initiative, Executive Order 13217: "Community-Based Alternatives for Individuals with Disabilities," and the Housing Choice Voucher Program.]

    In carrying out the requirements of 24 CFR § 8.28, the PHA or other recipient administering a Housing Choice Voucher Program shall:

    (1) In providing notice of the availability and nature of housing assistance for low-income families under program requirements, adopt a suitable means to ensure that the notice reaches eligible individuals with disabilities and that they can have an equal opportunity to participate in the application process for the Housing Choice Voucher Program;

    I. In its activities to encourage participation by owners, include encouragement of participation by owners having accessible units;

    II. When issuing a Housing Choice Voucher to a family which includes an individual with disabilities, include a current listing of available accessible units known to the PHA and, if necessary, otherwise assist the family in locating an available accessible dwelling unit;

III. Take into account the special problems of locating an accessible unit when considering requests by eligible individuals with disabilities for extensions of Housing Choice Vouchers; and

IV. In order to ensure that participating owners do not discriminate in the recipient's federally assisted program, a recipient shall enter into a HUD-approved contract with participating owners, which contract shall include necessary assurances of non-discrimination.

V. If necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception payment standard under Sec. 982.505(d) for a regular tenancy under the Section 8 voucher program so that the program is readily accessible to and usable by persons with disabilities.

13. Non-housing Facilities (see 24 CFR § 8.21). Newly constructed non-housing facilities shall be designed to be readily accessible to and usable by people with disabilities. Alterations to existing facilities shall be made accessible to the maximum extent feasible – defined as not imposing an undue financial and administrative burden on the operations of the recipient's program or activity. For existing non-housing facilities, PHAs shall operate each program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. There are a number of methods included in the regulation at 24 CFR § 8.21(c)(2) which may be used to accomplish accessibility in existing non-housing programs and activities.

    For example:

    - A PHA operates a community center. The PHA wishes to provide a tutoring program and the only available space available after school is on an inaccessible second floor. A child who uses a wheelchair and lives in the PHA development served by the community center wishes to participate in the tutoring program. The PHA may provide space on the first floor for the child to work with his tutor or make tutoring available at another location that is accessible and convenient to the child as an alternative to installing an elevator or chair lift to get the child to the second floor tutoring site.

    Departures from UFAS are permitted as outlined in Section I. B, item 5 of this Notice.

14. Accessibility Standards Accessibility Standards (see 24 CFR § 8.32). The design, construction or alteration of buildings in conformance with sections 3-8 of the UFAS shall be deemed to comply with the accessibility requirements of §§ 8.21, 8.22, 8.23, and 8.25 with respect to those buildings. Departures from the requirements of UFAS are permitted where substantially equivalent or greater accessibility is provided. The Section 504 requirements at 24 CFR § 8.32 do not require that building alterations be made when such alterations have little likelihood of being accomplished without removing or altering a load-bearing structural member.

15. Common Areas. Section 504 and Title II of the ADA require that a PHA operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is read ily accessible to and usable by individuals with disabilities. *See* 24 CFR § 8.24(a) and 28 CFR § 35.150 (a).

    Therefore, the PHA must ensure that its common areas and public spaces serving its designated accessible units, including, but not limited to, community buildings, management offices, meeting rooms, corridors, hallways, elevators, entrances, parking, public transportation stops, social service offices, mail delivery, laundry rooms/facilities, trash disposal, playgrounds, child care centers, training centers and recreational centers, are accessible to individuals with disabilities. In the alternative, the PHA may offer the program, service or activity, currently located in an inaccessible location, in an equivalent, alternate accessible location.

    Specifically, a PHA may comply with the re quirements of 24 CFR § 8.24 through such means as reassignment of services to accessible buildings, assignment of aides to beneficiaries, provision of housing or related services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. In choosing among available methods, the PHA shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate. *See* 24 CFR § 8.24 (b).

C. ARCHITECTURAL BARRIERS ACT (ABA) OF 1968/24 CFR 40 – MAJOR PROVISIONS

Accessibility Standards for Design, Construction and Alteration of Publicly Owned Residential Structures (see 24 CFR § 40.4) - The Architectural Barriers Act applies to certain buildings financed with Federal funds to e nsure that they are designed, constructed or altered so as to be accessible to persons with disabilities. The Act applies to buildings, other than a privately owned residential structure, which are (1) constructed or altered by or on behalf of the United States; (2) leased in whole or in part by the United States after August 12, 1968, if constructed or altered in accordance with plans and specifications of the United States; or (3) financed in whole or in part by a gra nt or loan made by United States after August 12, 1968, if the structure is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan. *See* 24 CFR § 40.2.

The United States Access Board has issued updated guidelines for the Architectural Barriers Act, as well as the Americans with Disabilities Act. These standards are the *ADA/ABA Accessibility Guidelines*. While other Federal agencies have adopted these updated guidelines as their standards, at present HUD uses the Uniform Federal Accessibility Standards (UFAS).

UFAS Notes:

- Under the Architectural Barriers Act, four standard setting agencies —the General Services Administration, HUD, the Department of Defense, a nd the United States Postal Service (USPS) are responsible for development of the standards for Federal facilities. UFAS is HUD's current standard. See Note in Section I.B.5. The UF AS is available at http://www.access- board.gov/ufas/ufas-html/ufas.htm.

- Figure 47(a) in UFAS does not permit the water closet to encroach on the clear, unobstructed (*see* UFAS §3.5) floor space required to provide an unobstructed 60º turning circle. *See* UFAS § 4.34.2(2).

- UFAS includes a definition of structural impracticability that does not require changes if such changes would result in the removal or alteration of a load - bearing structural member and/or an increased cost of 50 percent or more of the value of the element of the building or facility. *See* UFAS § 3.5. This does not alleviate the recipient's responsibility for making its programs and housing units accessible to persons with disabilities. Recipients instead should look to HUD's regulations for Section 504 at 24 CFR Part 8 in order to ensure compliance.

- The exception for bathrooms found at Section 4.22.3 of UFAS is not applicable to dwelling unit bathrooms.

- UFAS Section 4.34.2(15)(c) requires at least two bedrooms in dwelling uni ts with two or more bedrooms to be accessible and located on an accessible route. PHAs need to be mindful that new construction or substantial rehabilitation of multistory dwelling units must be in compliance with this requirement. Further, the Department wishes to encourage designs that provide persons with disabilities access to all parts of their dwelling units, and therefore encourages PHAs to take advantages of the strategies outlined in the PIH guidebook, *Strategies for Providing Accessibility and Visitability for Hope VI and Mixed Finance Homeownership*." This guidebook may be found at the following link: http://www.hud.gov/offices/pih/programs/ph/hope6/pubs/index.cfm.

- Because UFAS does not fully address accessibility of units for persons with impaired hearing, for the 2 percent units that are required to be accessible for persons with hearing impairments, it is recommended that PHAs follow the July 2004 ADA/ABA Accessibility Guidelines, Section 809.5, Residential Dwelling Units with Communication Features. The ADA/ABA Accessibility Guidelines are available from the U.S. Access Board. See http://www.access-board.gov/ada-aba/. PHAs may also follow the 2003 edition of ICC/ANSI A117.1 Standard for Accessible and Usable Buildings and Facilities, Chapter 10, Section 1005. These Standards are available through the International Code Council, 500 New Jersey Avenue NW, Washington, DC 20001. See also ICC's Website at http://www.iccsafe.org.

Note: The U. S. Access Board issued new ADA and ABA Accessibility Guidelines in July 2004. See the note about this on Page 4, Item B.5.

D. AMERICANS WITH DISABILITIES ACT OF 1990/28 CFR 35 FOR TITLE II (*SEE* WWW.ADA.GOV) –

1. Applicability. Title II of the ADA prohibits discrimination on the basis of disability by public entities. Public entity means any state or local government; or any department, agency, special purpose district or other instrumentality of a State or States or local government, including a PHA. *See* 28 CFR §§ 35.102 and 35.104.

2. Maintenance of Accessible Features. A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities. (*see* 28 CFR § 35.133).

3. Non-discrimination. A public entity shall operate each service, program or activity so that when viewed in its entirety, each service, program or activity is readily accessible to and usable by individuals with disabilities. (*see* 28 CFR § 35.150).

4. Design and Construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such a manner that the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992 (*see* 28 CFR § 35.151(a)).

5. Alterations. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that effects or could effect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities if the alteration was commenced after January 26, 1992. (*see* 28 CFR § 35.151(b)).

6. Accessibility standards. Design, construction, or alteration of facilities in conformance with the UFAS or with the ADA Accessibility Standards (ADA Standards) shall be deemed to comply with requirements of 28 CFR § 35.151 except that the elevator exemption contained at §§ 4.1.3(5) and 4.1.6(1)(j) of the ADA Standards shall not apply. (*see* 28 CFR § 35.151(c)).

7. Common Areas. Section 504 and Title II of the ADA require that a PHA operate each existing housing program or activity, including those receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. *See* 24 CFR § 8.24(a) and 28 CFR § 35.150 (a). (**Note**: The title II regulations at 28 CFR Part 35 contain extensive requirements that apply to public entities, including PHAs, and should be reviewed in their entirety to ensure compliance with the ADA.).

   Therefore, the PHA must ensure that its common areas and public spaces serving its designated accessible units, including, but not limited to, community buildings, management offices, meeting rooms, corridors, hallways, elevators, entrances, parking, transportation stops, social service offices, mail delivery, laundry rooms/facilities, trash disposal, playgrounds, child care centers, training centers and recreational centers, are accessible to individuals with disabilities. In the alternative,

the PHA may offer the program, service or activity, currently located in an inaccessible location, in an equivalent, alternate accessible location.

Specifically, a PHA may comply with the requirements of 28 CFR § 35.150(a) through such means as reassignment of services to accessible buildings, assignment of aides to beneficiaries, provision of housing or related services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. In choosing among available methods, the PHA shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate. (*See* 24 CFR § 8.24 (b)).

E. THE FAIR HOUSING ACT/24 CFR PART 100

[s*ee* http://www.usdoj.gov/crt/housing/title8.htm;
see also http://www.access.gpo.gov/nara/cfr/waisidx_00/24cfr100_00.html]

1. Illegal Inquiries (24 CFR § 100.202) – The Fair Housing Act makes it unlawful for a housing provider to:

   - 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

   - Ask about the nature or severity of a disability of such persons.

   Housing providers may make the following inquiries, provided these inquiries are made of all applicants, regardless of whether the applicant appears to have a disability or says he or she has a disability;

   - An inquiry into an applicant's ability to meet the requirements of tenancy;

   - An inquiry to determine if an applicant is involved in current, illegal use of drugs;

   - 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. A PHA may inquire whether an applicant has a disability for determining if that person is eligible to live in mixed population (elderly/disabled) housing or housing designated for persons with disabilities;

   - 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. This means a PHA may ask applicants if they need units with accessible features, including units designed to be accessible for persons with hearing and/or visual impairments, or if they qualify for a housing choice voucher designated for persons with disabilities only.

   Verification of eligibility for PHA programs and benefits for persons with disabilities: PHAs are required to verify that an applicant qualifies as a person with a disability

before permitting them to move to housing designated for persons with disabilities, or granting the $400 rent calculation deduction, disability expense allowance, or deduction for unreimbursed medical expenses. Applicants and residents cannot be compelled to reveal that they have a disability; however, if they do not, they may not receive any of the benefits that such status confers. The wisest course is to ask **all** applicants whether they wish to claim disability status or need any special unit features or methods of communication for persons with disabilities.

> **Note:** The PHA should explain the consequences of the disclosure of one's disability as having possible benefits in rent calculation or an accessible unit, and required verification of disability prior to receipt of the particular benefit at issue. The verification issue is discussed in greater detail in Chapter 4 of the *Public Housing Occupancy Guidebook* (June 2003).
>
> Verification of disability and need for requested reasonable accommodation(s): To verify that an applicant is a person with a disability, PHA staff can first check to see whether the applicant is under age 62 and receives either Social Security Disability Income (SSDI) or Supplemental Security Income (SSI) income. Receipt of such disability income is sufficient verification that an individual qualifies as a person with a disability. However, individuals with disabilities who do not receive SSI or SSDI may still qualify as a person with a disability under the statutory definitions of disability. In these cases, the individual with a disability may need to provide supporting documentation. (**Note**: Refer to Chapter 4 of the *Public Housing Occupancy Guidebook* (June 2003) for further information.)

If a person requests a reasonable accomodation, then the PHA may need to verify that the person is a qualified individual with a disability and whether a requested accommodation is necessary to provide the individual with an equal opportunity to use or enjoy a dwelling unit, including the public and common areas. In doing so, PHAs should only ask for information that is actually necessary to verify that the person has a disability and that there is a reasonable nexus between the individual's disability and the requested accommodation(s). PHAs are not permitted to inquire about the nature or severity of the person's disability. Further, PHA staff may never inquire about an individual's specific diagnosis or details of treatment. If a PHA receives documentation from a verification source that contains the individual's specific diagnosis, information regarding the individual's treatment and/or information regarding the nature or severity of the person's disability, the PHA should immediately dispose of this confidential information; this information should never be maintained in the individual's file. If the information needs to disposed of, the PHA should note in the individual's file that verification of a disability (as opposed to a specific disability), and special features required was received, the date received and the name and address of the person/organization that provided the verification. Under no circumstances should a PHA request an applicant's or resident's medical records, nor should PHAs require that applicants or residents submit to physical examinations or medical tests such as TB testing or AIDS testing as a condition of occupancy. For further information about verification of disability related to requests for reasonable accomodation, see HUD and the Department of Justice (DOJ) *Joint Statement on Reasonable Accommodations under the Fair Housing Act* (May 17, 2004).

http://www.hud.gov/utilities/intercept.cfm?/offices/fheo/library/huddojstatement.pdf

Note: It is a violation of Section 504 and the Fair Housing Act for a PHA to inquire whether an applicant or tenant is capable of "living independently." Courts have consistently held that this is not a legitimate inquiry to make of applicants or residents in HUD-assisted housing and PHAs should ensure that their screening materials do not include questions related to such an inquiry.

2. Reasonable Modification to Existing Premises (see 24 CFR § 100.203) – Applies to private owners participating in housing choice voucher programs or other tenant-based programs, as well as to PHA owners of existing public housing units. (see Note below.)

   Under the Fair Housing Act, it is unlawful for an owner to refuse to permit a person with a disability, at their own expense, to make reasonable modifications of existing premises occupied or about to be occupied by a person with a disability if such modification may be necessary to afford the person with a disability full enjoyment of the premises. Under certain circumstances the owner may require the tenant to pay into an escrow account funds necessary to restore the interior of the unit to its original condition if the modification would interfere with the owner or next resident's full enjoyment of the premises (see regulation for further requirements and guidance.) An owner may require that a resident restore modifications to the interior of the unit.

   Note: PHAs must follow the more stringent reasonable accommodation requirements of 24 CFR §§ 8.4, 8.20, 8.24 and 8.33, which require PHAs to pay the cost of structural changes to facilities unless the PHA can accommodate the individual with a disability by equally effective means, or unless such structural changes would result in an undue financial and administrative burden (in such cases, the PHA must provide other alternative reasonable accommodation(s).) See also the discussion of reasonable accommodation under Section 504 above. For further information about the reasonable modifications provisions of the Fair Housing Act, see the HUD and DOJ Joint Statement on Reasonable Modifications Under the Fair Housing Act, issued May 5, 2008. This statement is available at: http://www.hud.gov/officies/fheo/disabilities/reasonable_modifications_mar08.pdf.

3. Reasonable Accommodation (see 24 CFR § 100.204) - Applies to private owners participating in Housing Choice Voucher programs, PHAs and all housing providers that are recipients of Federal financial assistance. PHAs are also covered under Section 504. (*see* Section I.B. above.) The Fair Housing Act 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 persons with disabilities equal opportunity to use and enjoy a dwelling unit, including public and common use areas (see regulation for further requirements and guidance). *See* HUD and DOJ *Joint Statement on Reasonable Accommodations under the Fair Housing Act* (May 17, 2004).

http://www.hud.gov/utilities/intercept.cfm?/offices/fheo/library/huddojstatement.pdf.

4. Design and Construction Requirements (see 24 CFR § 100.205) - applies to housing regardless of whether it receives Federal financial assistance. The Fair Housing Act requires that "covered multifamily dwellings" (see definition below) built for first occupancy after March 13, 1991, shall be designed and constructed so that:

   a. At least one building entrance is on an accessible route unless it is impractical due to terrain or unusual characteristics of the site [see 24 CFR § 100.205(a)],
   b. Public and common use areas are accessible [see 24 CFR § 100.205(c)(1)],
   c. All doors into and within all premises are wide enough for passage by persons using wheelchairs [see 24 CFR § 100.205(c)(2),
   d. All premises within covered multifamily dwelling units contain the following features of adaptable design:

      (i) An accessible route into and through the dwelling unit [see 24 CFR § 100.205(c)(3)(i)]
      (ii) Light switches, electrical outlets, thermostats and other environmental controls, are in accessible locations [see 24 CFR § 100.205(c)(3)(ii)]
      (iii) Reinforcements in bathroom walls for later installation of grab bars [see 24 CFR § 100.205(c)(3)(iii)]
      (iv) Usable kitchens and bathrooms for people using wheelchairs [see 24 CFR § 100.205(c)(3)(iv)]

   The Act defines covered multifamily dwelling as:

   (A) buildings consisting of 4 or more units if such buildings have one or more elevators; and
   (B) ground floor units in other buildings consisting of 4 or more units.

   In most cases, multistory dwelling units are not covered by the Fair Housing Act's design and construction requirements. There are two exceptions: (1) If an interior elevator provides access within an individual multistory dwelling unit, that unit is covered, and all floors of the multistory unit must meet the Fair Housing Act's design and construction requirements; and (2) If a multistory townhouse is located in a building that has one or more public elevators, the primary entrance level of the multistory townhouse must be the story served by the elevator, and that story must comply with the Fair Housing Act requirements, including providing an accessible bathroom or powder room on that story.

   On March 6, 1991, the Department published Fair Housing Accessibility Guidelines to give the building industry a safe harbor for compliance with the accessibility requirements of the Act. *See* 56 Federal Register 9472-9515, March 6, 1991. [*see* http://www.hud.gov/offices/fheo/disabilities/fhefhag.cfm.] These Guidelines were supplemented by the following notice, "Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines", published in the Federal Register on June 28, 1994 (59 Federal Register 33362-33368, June 28,

1994). These Guidelines and the Supplemental Notice apply ONLY with respect to the accessibility requirements of the Fair Housing Act.

Following reviews of certain building code documents and three subsequent editions of the ANSI A117.1 standard, the Department currently recognizes ten documents as providing a safe harbor for meeting the accessibility requirements of the Fair Housing Act. **NOTE**: Once again, these safe harbors only apply to the Fair Housing Act. They do not apply to the accessibility requirements mandated under Section 504 of the Rehabilitation Act for HUD-assisted housing. The ten safe harbors are:

1. HUD's March 6, 1991 Fair Housing Accessibility Guidelines (the Guidelines) and the June 28, 1994 Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines;

2. ANSI A117.1-1986 – Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's regulations and the Guidelines;

3. CABO/ANSI A117.1-1992 – Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's regulations, and the Guidelines;

4. ICC/ANSI A117.1-1998 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's regulations, and the Guidelines;

5. HUD's Fair Housing Act Design Manual;

6. Code Requirements for Housing Accessibility 2000 (CRHA), approved and published by the International Code Council (ICC), October 2000;

7. International Building Code (IBC) 2000, as amended by the IBC 2001 Supplement to the International Codes; and

8. 2003 International Building Code (IBC), with one condition. Effective February 28, 2005 HUD determined that the IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."

9. ICC/ANSI A117.1-2003 – Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's regulations and the Guidelines; and

10. 2006 International Building Code, with a January 31, 2007, erratum to correct the text missing from Section 1107.7.5 and interpreted in accordance with the relevant 2006 IBC Commentary.

Note: It should be noted that the ANSI A117.1 standard contains only technical criteria, whereas the Fair Housing Act, HUD's regulations, and the Guidelines contain both scoping and technical criteria. Therefore, in using any of the ANSI standards, it is necessary to also consult the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements. The CRHA and the IBC contain both scoping and technical criteria and are written in building code language.

In many cases, properties constructed with Federal financial assistance from HUD must meet both Section 504 new construction requirements applicable to PHAs at 24 CFR § 8.22 and the Fair Housing Act design and construction requirements. For example:

- A new construction project consisting of a building with a central public elevator is constructed with Federal financial assistance from HUD is required to have 100 percent of the dwelling units meet the Fair Housing Act design and construction requirements (see 24 CFR 100.205), and of this 100 percent, 5 percent, or at least one unit, whichever is greater, is also required to comply with the stricter accessibility requirements of Section 504 and 24 CFR 8.22. In addition, Section 504 requires that an additional 2 percent of the units, or at least one unit, whichever is greater, be made accessible for persons with visual or hearing impairments. *See* 24 CFR § 8.22 (b).

- In a newly-constructed 100-unit two-story walk-up apartment building with no elevator that is constructed with Federal financial assistance, Section 504 requires a total of five accessible units for persons with mobility disabilities (5 percent of 100 units = 5 accessible units). Further, these 5 units must be located on the ground floor, and be built to comply with the Section 504 accessibility requirements at 24 CFR §§ 8.22 and 8.32. In addition, if half of the 100 units are on the ground floor, all 50 of these ground floor units must comply with the Fair Housing Act's design and construction requirements. In addition, Section 504 requires that an additional 2 percent of the units must be accessible for persons with vision or hearing impairments. *See* 24 CFR § 8.22 (b). These units can be located on either floor.

Note: Section 504 requires that an additional 2 percent of the units must be accessible for persons with vision or hearing impairments. These units can be located on either floor of the two-story walk-up, non-elevator building. *See* 24 CFR § 8.22 (b).

- A development consisting entirely of attached multistory dwelling units is not a covered multifamily dwelling for purposes of the Fair Housing Act's design and construction requirements at 24 CFR § 100.205. However, if any of the multistory dwelling units has an internal elevator, that dwelling unit and any public and common use spaces would be required to be accessible under the Fair Housing Act. On the other hand, a development of four or more single-story, attached dwelling units would be covered by the Fair Housing Act's accessibility requirements. In addition, if the development receives Federal financial assistance from HUD, Section 504 requires that 5 percent of the multistory units, or at least one unit, whichever is greater, be accessible for persons with mobility disabilities

and an additional 2 percent of the units, or at least one unit, whichever is greater, be accessible for persons with hearing or vision impairments. *See* 24 CFR § 8.22. For those units required to be accessible for persons with mobility disabilities, this may be accomplished by making 5 percent of the multistory units accessible or by building 5 percent of the development as single-story accessible units.

F. UNIVERSAL DESIGN

Universal Design is a design concept that encourages the construction or rehabilitation of housing and elements of the living environment in a manner that makes them usable by all people, regardless of ability, without the need for adaptation or specialized design. The intent of universal design is to simplify life for everyone by making products and the building environment more usable to as many people as possible at little or no extra cost. Universal design should strive for social integration and avoidance of discrimination, stigma, and dependence. By designing housing that is accessible to all there will be an increase in the availability of affordable housing for all, regardless of age or ability. *See* http://www.design.ncsu.edu/cud.

Note: Universal Design concepts do not typically reach all of the requirements of accessibility laws like Section 504 and the Fair Housing Act, therefore, care must be taken to ensure that the requirements of all applicable laws are met in projects promoting universal design.

II. PROGRAM SPECIFIC COMPLIANCE/ACTIVITIES

A. HOUSING CHOICE VOUCHER PROGRAM

[*see* Notice PIH 2005-05 and subsequent reinstatements by Notice PIH 2006-21 and PIH Letter L-2007-1: New Freedom Initiative, Executive Order 13217: "Community-Based Alternatives for Individuals with Disabilities," and the Housing Choice Voucher Program.]

1. PHAs may give preference in admission to applicants with disabilities based on local needs and priorities. However, the PHA may not give a preference for admission of persons with a specific disability. *See* 24 CFR § 982.207(b)(3).

2. A person with disabilities may choose a suitable unit from among units available for rent in the local rental market.

   A PHA has the discretion to approve exception payments standards up to 110 percent of the Fair Market Rent when requested as a reasonable accommodation. *See 24 CFR § 982.505(d).* The HUD field office may approve an exception payment standard amount within the upper range (between 110-120% of the Fair Market Rent) if required as a reasonable accommodation for a family that includes a person with disabilities. Any exceptions to the payment standards would be granted as a reasonable accommodation after the family with a person with disabilities locates a unit if needed as a reasonable accommodation. *See* 24 CFR § 982.503(c)(2)(ii) and 24 CFR § 8.28(a)(5). Requests for exception rents above 120% that are needed as a reasonable accommodation for a person with a disability to allow the person to rent an

appropriate unit must be submitted to HUD headquarters for regulatory waiver and approval.

3. A PHA may approve the leasing of a unit from a relative to provide reasonable accommodation for persons with disabilities. See 24 CFR § 982.306(d) also see http://www.hud.gov/offices/pih/publications/notices/09/pih2009-22.pdf for additional guidance on live-in aides.

4. Owners of private rental units leased with voucher assistance must make reasonable accommodations in rules, policies, practices or services if necessary for a person with disabilities to use the housing and must allow the person with a disability to make reasonable modifications in accordance with 24 CFR § 100.203. *See also* 24 CFR § 100.204 (a).

B. SECTION 8/HOMEOWNERSHIP OPTION 24 CFR § 982.625 – THRU § 982.643

1. A disabled family meets the first-time homeowner requirement even if the family owned a home within the last three years if use of the homeownership option is needed as a reasonable accommodation so that the housing choice voucher program is readily accessible to and usable by the family member with a disability. See 24 CFR § 982.627 (b)(3

2. The PHA must count welfare assistance for a disabled family in determining whether the family meets the minimum annual income used to determine if a family member qualifies for commencement of home ownership assistance. *See* 24 CFR § 982.627(c)(2)(i).

3. The full-time employment eligibility requirement does not apply to a family with a disability. See 24 CFR§ 982.627(d)(3).

4. The limit on the length of time a family may receive homeownership assistance does not apply to families with disabilities. See 24 CFR§ 982.634(c).

5. Covered homeownership expenses may include principal and interest on mortgage debt incurred by the family to finance the cost of making the home accessible for a family member with a disability if the PHA determines the allowance of such costs is needed as a reasonable accommodation. See 24 CFR § 982.635(c)(vii).

C. PROJECT-BASED VOUCHER PROGRAM

1. PHAs, at their discretion, may choose to use up to 20 percent of their tenant-based assistance for project-based subsidies to encourage the development of projects for persons with disabilities.

2. Under the new law governing project-based assistance, only 25 percent of the units in a project may be subsidized. However, the law allows an exception for units for families with disabilities, elderly families and for families who receive supportive services.

NOTE: 24 CFR § 983.251(d) states that PHAs may give preference to disabled families who need services offered at a particular project in accordance with certain limits. Limits include: families with disabilities that significantly interfere with the ability to obtain and maintain themselves in housing; families who, without appropriate supportive services, will not be able to obtain or maintain themselves in housing; and for families whom such services cannot be provided in a non-segregated setting. Disabled persons cannot be required to accept the particular services offered in a project. In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the project must be open to all otherwise eligible persons with disabilities who may benefit from the services provided in the project.

D. CAPITAL FUND PROGRAM

Planning. Regulations governing the Capital Fund at 24 CFR 968 require compliance with statutory and regulatory requirements prohibiting discrimination against persons with disabilities. PHAs must ensure that all work is in compliance with these requirements in conducting Capital Fund activities.

a. Substantial Alterations. The requirements for new construction at 24 CFR § 8.22(a) and (b) are applicable for all units that are substantially altered. [s*ee* definition of *substantial alteration* at 24 CFR § 8.23(a)].

b. Other Alterations. If alterations are not substantial, then PHAs are required to provide accessible units up to 5 percent of the units in the development or replace the elements being modernized with accessible elements in all units of the project. PHAs should provide an additional 2 percent of the units for persons with hearing or vision impairments. *See* 24 CFR § 8.23 (b).

c. Reasonable Accommodations. PHAs should include in their projections of modernization needs amounts to cover known and projected alterations to units and facilities to address reasonable accommodation requests on a case-by-case basis.

d. Residents/Advocacy Consultation. PHAs are encouraged to ensure that, at least yearly, residents with disabilities and advocates for persons with disabilities have an opportunity to provide input on modernization plans and activities.

The housing needs of persons with disabilities, accessible un its and compliance with Section 504, the ADA, and the FHA are required to be addressed in accordance with 24 CFR § 903.7. Also, see 24 CFR Part 903 for additional related requirements.

Note: Modernization activities covered by statutory civil rights requirements such as Section 504, the ABA, the FHA and the ADA take precedence over non-emergency modernization activities.

E. HOPE VI

1. HOPE VI Notice of Funding Availability (NOFA) Accessibility Requirements.

The design of proposed new construction and/or rehabilitation of housing must conform to the civil rights statutes and regulations delineated in each Grantee's Grant Agreement.

2. Accessible For-Sale Units. The HOPE VI Program encourages PHAs to include 5 percent of for-sale units accessible for persons with mobility impairments and 2 percent for persons with hearing and vision impairments.

3. Visitability. The HOPE VI Program strongly encourages making as many "visitable" units as possible. Visibility standards recommended by HUD apply to units that are not otherwise covered by accessibility requirements. The elements of visitability are also described in the Glossary of HOPE VI terms, which are posted to the HOPE VI website. *See* http://www.hud.gov/hopevi.

4. Advocacy Consultation/Participation. The HOPE VI Program encourages PHAs to work with local advocacy groups that represent persons with disabilities, the elderly and other special needs populations in developing HOPE VI plans.

5. Relocation Units. HOPE VI funds can be used to modify units to be occupied by families in the Housing Choice Voucher Program to make them accessible for residents with disabilities. The Department has determined that the costs of accessibility modification in rental units which are necessary for persons with disabilities who receive tenant-based relocation assistance under the voucher program in connection with a HOPE VI project are eligible HOPE VI expenditures. The method of implementation is to be determined by each individual locality.

6. Homeownership Design Handbook. To order a copy of strategies for providing accessibility and visitability for HOPE VI and mixed finance homeownership, go to the publications and resources page of the HOPE VI website at http://www.hud.gov/offices/pih/programs/ph/hope6/pubs/index.cfm.

7. Designated Housing Plans. All allocation plan applications for designated housing are now published on HUD's web site at www.hud.gov/pih.

8. Single People with Disabilities. The HOPE VI program encourages 1 bedroom units for single people with disabilities.

9. Accessible Townhouse Design. In addition to the designs already available and in use, HOPE VI will continue to explore design alternatives for townhouse dwellings.

F. CHOICE NEIGHBORHOOD PROGRAM

1. Choice Neighborhood Notice of Funding Availability (NOFA) Accessibility Requirements. Must meet all applicable accessibility standards.

G. ADMISSION/OCCUPANCY

1. Application Process. PHAs must ensure that all employees who are involved in the application process understand how to conduct tenant selection and screening without

discriminating on the basis of any protected class, in particular applicants with disabilities. All application offices must be accessible. The PHA must provide accessible materials for persons with sight and hearing impairments and otherwise provide effective communication, upon request. *See* 24 CFR § 8.6 and § 8.54(c). A PHA must make special arrangements to take the application of persons who are unable to come to the PHA's offices because of a disability. At the initial point of contact with each applicant, the PHA must info rm all applicants of alternative forms of communication. *See* 24 CFR § 8.6.

2. Effective Communication/Provision of Auxiliary Aids & Services :

   The PHA shall provide appropriate auxiliary aids and services, where necessary, to afford an individual with disa bilities an equal opportunity to participate in the PHA's programs, services and activities. In determining what auxiliary aids are appropriate, the PHA shall give primary consideration to the request(s) of the individual with disabilities unless doing so would result in a fundamental alteration of the PHA's programs or in undue financial and administrative burden. If an action would result in such an alteration or burdens, the PHA shall take any other action up to the point that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the PHA's program or activity.

   The PHA is not required to provide individually prescribe d devices, readers for personal use or study, or other devices of a personal nature. *See* 24 CFR § 8.6, 28 CFR §§ 35.160 and 35.161.

   When the PHA has initial contact with the applicant, resident, or member of the public, the PHA staff should ask whether the applicant, resident, or member of the public requires an alternate form of communication. Examples of alternative forms of communication might include, but are not limited to: the provision of a qualified sign language interpreter; having written ma terials explained orally by staff either in person or by telephone; provision of written materials in large/bold font; information on audiocassette; permitting applicants to file applications by mail; and permitting alternative sites for the receipt of app lications.

   In addition, the PHA may never require the applicant to provide, or pay for, his/her own sign language interpreter. Rather, it is always the PHA's responsibility to provide, upon request, a qualified sign language interpreter. However, the PH A's responsibility to provide a qualified sign language interpreter does not preclude an individual's right to have a friend, relative or advocate accompany him/her for purposes of conducting business with the PHA.

3. Live-in-Aides. In some cases, individuals with disabilities may require a live-in-aide. A PHA should consider a person a live-in-aide if the person: (1) is determined to be essential to the care and well being of a family member with a disability; (2) is not obligated to support the family member; and (3) would not be living in the unit except to provide the supportive services. A live-in-aide should not be required to share a bedroom with another member of the household. *See* 24 CFR §§ 966.4(d)(3) and 982.316, 982.402(b).

4. Verification. The PHA may verify a person's disability only to the extent necessary to ensure that applicants are qualified for the housing for which they are applying; that applicants are qualified for deductions used in determining adjusted income; that applicants are entitled to any preference they may claim; and that applicants who have requested a reasonable accommodation have a need for the requested accommodation. A PHA may not require applicants to provide access to confidential medical records in order to verify a disability nor may a PHA require specific details as to the disability. A PHA may require documentation of the manifestation of the disability that causes a need for a specific reasonable accommodation or accessible unit. A PHA may not seek the individual's specific diagnosis, nor may the PHA seek information regarding the nature, severity or effects of the individual's disability.

5. Vacant Accessible Units. In order to maximize the use of accessible features of the unit, if an appropriate size accessible unit is not available, a PHA may consider over-housing an applicant with a disability who needs an accessible unit. *See* 24 CFR § 8.27. If there is not an eligible, qualified resident or applicant with disabilities on the waiting list who wishes to reside in the available, accessible or adaptable unit, then the PHA may offer the unit to an applicant on the waiting list or another resident who does not need the accessible features of the unit. *See* 24 CFR § 8.27. However, the PHA may require the applicant or resident to execute a Lease/Lease Addendum that requires the resident to relocate at the PHAs expense to a vacant, non-accessible unit within thirty (30) days of notice by the PHA that there is an eligible applicant or existing resident with disabilities who requires the accessibility features of the unit. See discussion in Section I.B(8).

   In addition, the PHA should maintain an adequate pool of eligible applicants with disabilities who require accessible or adaptable units so that when such a unit becomes available, there is an eligible applicant with disabilities ready and willing to rent the unit. *See* 24 CFR § 8.27. The PHA should also conduct outreach activities for income-eligible persons with disabilities. The outreach activities may include, but are not limited to publicity/advertising in local print media, contacts with advocacy groups representing persons with disabilities and other entities that come into contact with persons with disabilities such as social service agencies, medical providers, etc.

   Reminder – As noted previously in Section I.B.8 – "Occupancy of Accessible Dwelling Units" – Section 504 requires that accessible units must be offered first to a current PHA resident in need of the accessible features of the available accessible unit and second to a qualified applicant with a disability on the PHA's waiting list who requires the accessibility features of the vacant, accessible unit. *See* 24 CFR § 8.27.

6. Screening/Reasonable Accommodations. Many applicants with disabilities will pass screening, will not need a reasonable accommodation, will not need special accessibility features, and will be admitted in exactly the same manner as applicants without disabilities. Applicants who fail screening will receive a rejection letter. This letter must provide all applicants with information concerning the PHA's informal review process and their right to request a hearing. The letter must also state that applicants with disabilities have the right to request reasonable accommodations to participate in

the informal hearing process. The PHA is obligated to provide such reasonable accommodation unless doing so would result in a fundamental alteration in the natur e of the PHA's program.

If requested by the applicant, a PHA must consider verifiable mitigating circumstances that explain and/or overcome any prior misconduct related to a previous tenancy. If a reasonable accommodation would allow an applicant with a disability to meet the eligibility requirements for housing, a housing provider must provide the requested accommodation.

A reasonable accommodation allows the applicant with a disability to meet essential requirements of tenancy; it does not require the PHA to reduce or waive essential eligibility or residency requirements. Examples of reasonable accommodations include, but are not limited to: physical alteration of units; making services and programs currently located in an inaccessible location in an alternate, accessible location; and revising the PHA's policies and procedures. The PHA should focus on finding a reasonable accommodation that will permit the applicant with a disability to comply with the essential obligations of tenancy. A PHA is n ot required to excuse the applicant from meeting those requirements. The PHA should provide all applicants with information regarding the PHA's Reasonable Accommodation Policy and Procedures at the time they apply for admission and at every annual re -certification. Each PHA must have a reasonable accommodation policy. The PHA's respo nsibility to provide reasonable accommodations for applicants and residents is present at all times, including during lease enforcement. See discussion in Section I.B.(7).

7. Unit Size. In public housing, a family with a disability may need a unit that is larger than the PHA's permitted occupancy standards. It is unlawful to fail to provide a reasonable accommodation which denies such a family the opportunity to apply f or and obtain a larger unit if the disability of the family member requires this type of accommodation.

8. Unit Location. In public housing, a family applying for a unit or requesting a transfer may need a first floor unit due to a disability.

   Note: Persons with disabilities cannot be required to occupy first floor units in elevator buildings, or in non-elevator buildings if the person is able to and wishes to use stairs.

9. Pets: Regular PHA pet policies do not apply to animals that are used to assis t persons with disabilities and are necessary as a reasonable accommodation. [An "assistance animal" is an animal that is needed as a reasonable accommodation for persons with disabilities. An assistance animal is not considered a "pet" and thus, is not subject to the PHA's pet policy. Assistance animals are animals that work, provide assistance , perform tasks for the benefit of a person with a disability or provide emotional support that alleviates one or more identified symptoms or effects of a person' s disability.] *See* regulation published on October 27, 2009, 24 CFR Part V, Pet Ownership for the Elderly and Persons with Disabilities, Final Rule.

A PHA may not refuse to allow a person with a disability to have an assistance animal merely because the animal does not have formal training. Some, but not all animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners and, in some cases, no special training is required. The question is whether or not the animal performs the assistance or provides the benefit needed by the person with a disability.

Assistance animals are exempt from a PHA's "pet" restrictions or a PHA's policy requiring pet deposits or monthly pet fees. However, all reasonable lease provisions relating to health and safety apply to assistance/service animals such as maintaining the premises in a clean and sanitary condition and ensuring that neighbors enjoy their premises in a safe and peaceful manner.

H. VISITABILITY

1. Visitability Concept. Although not a requirement, it is recommended that all design, construction and alterations incorporate, whenever practical and economical, the concept of visitability in addition to the requirements under Section 504, the Architectural Barriers Act, Title II of the Americans with Disabilities Act and the Fair Housing Act.

   Visitability is a design concept, for very little or no additional cost, that enhances the ability of persons with disabilities to interact with their neighbors, friends and associates in the community. *See* www.huduser.org/publications/pubasst/strategies.html.

2. Design Considerations. Visitability design incorporates the following in all new construction or alterations, in addition to other requirements mandated by the accessibility laws discussed in this Notice, whenever practical, for as many units as possible within a development:

   a. Provide at least one entrance grade (no steps) approached by an accessible route such as a sidewalk; and
   b. Provide an entrance door, and all interior passage doors, that are at least 2 feet 10 inches wide allowing 32 inches of clear passage space.

3. Benefits of Visitability. Visitability also expands the availability of housing options for individuals who may not require full accessibility. It will assist PHAs in making reasonable accommodations and reduce, in some cases, the need for transfers when individuals become disabled in place. Visitability will also improve the marketability of units.

I. ACCESSIBILITY FUNDING SOURCES

PHA Capital Fund, PHA operating budgets, PHA operating reserves, PHA Housing Choice Voucher administrative fees and administrative fee reserves, State or local Community Development Block Grant funds, State and local HOME Program funds, Corporate donations, non-profit contributions from organizations such as Rotary Clubs, Lions Clubs, sororities/fraternities, etc., subject to applicable program requirements.

For further information about this Notice, contact the nearest HUD Office of Public Housing within your State. Locations of these offices are available on HUD's website at http://www.hud.gov/.

/s/

Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

April 4, 2016

Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.[1] HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.[2] The United States prison population of 2.2 million adults is by far the largest in the world.[3] As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.[4] Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,[5] and over 95 percent of current inmates will be released at some point.[6] When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.[7] Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

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[1] 42 U.S.C. § 3601 *et seq.*
[2] Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), *available at* https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.
[3] Nat'l Acad. Sci., Nat'l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis, et al. eds., 2014), *available at:* http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes.
[4] *Id.*
[5] E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387.
[6] Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, *available at* http://www.bjs.gov/content/pub/pdf/reentry.pdf.
[7] *See, e.g.*, S. Metraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research, #9* (D. Dennis, et al. eds., 2007), *available at:* https://www.huduser.gov/portal//publications/pdf/p9.pdf (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.[8] Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).[9] Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.[10] Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.[11] Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.[12]

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

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[8] *See infra* nn. 16-20 and accompanying text.

[9] The Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin. This memorandum focuses on race and national origin discrimination, although criminal history policies may result in discrimination against other protected classes.

[10] 24 C.F.R. § 100.500; *accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, *Inc.*, ___ U.S. ___, 135 S. Ct. 2507 (2015).

[11] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2514-15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500); *id.* at 2523 (explaining that housing providers may maintain a policy that causes a disparate impact "if they can prove [the policy] is necessary to achieve a valid interest.").

[12] *See* 24 C.F.R. § 100.500.

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin.[13] This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.[14]

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.[15] Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.[16] Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.[17] In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the

[13] 24 C.F.R. § 100.500(c)(1); *accord Inclusive Cmtys. Project*, 135 S. Ct. at 2522-23. A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

[14] *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.") *with Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.,* 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).

[15] *Cf. El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff'd on other grounds,* 479 F.2d 232 (3d Cir. 2007).

[16] *See* FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, *available at* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43 (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013, *available a*t http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

[17] *See* E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387; and U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014, *available at* http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html.

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.[18] In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.[19] Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.[20]

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.[21] The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.[22]

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.[23] Ensuring

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[18] *See id.*
[19] *See id.*
[20] E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387.
[21] 24 C.F.R. § 100.500(c)(2); *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2523.
[22] *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).
[23] *See, e.g.*, Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 ("The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals."); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that "[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds … [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property."); *see also* J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.[24] A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[25] As the Supreme Court has recognized, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."[26] Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.,* by failing to indicate whether the individual was prosecuted, convicted, or acquitted),[27] the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

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landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

[24] As explained in HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be "legitimate" means that a housing provider's justification must be genuine and not false or fabricated. *See* 78 Fed. Reg. at 11470; *see also Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, "in the abstract, a reduction in the concentration of low income housing is a legitimate goal," but concluding "that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so").

[25] HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. *See* Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at: http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf.

[26] *Schware v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); *see also United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) ("[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity."); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) ("[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.").

[27] *See, e.g.,* U.S. Dep't of Justice, *The Attorney General's Report on Criminal History Background Checks* at 3, 17 (June 2006), *available at* http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI's Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and "the most comprehensive single source of criminal history information in the United States," is "still missing final disposition information for approximately 50 percent of its records").

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.[28]

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.[29] But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it "could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[30] Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as "not empirically validated."[31]

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a "substantial, legitimate, nondiscriminatory interest." To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.[32]

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[28] *See* U.S. Equal Emp't Opportunity Comm'n, *EEOC Enforcement Guidance*, *Number 915.002,* 12 (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm*; see also Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer's policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there "was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees," such that "information concerning a … record of arrests without conviction, is irrelevant to [an applicant's] suitability or qualification for employment"), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

[29] There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. *See generally* SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), *available at* http://www.search.org/files/pdf/RNTFCSCJRI.pdf.

[30] *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

[31] *Id.*

[32] *Cf. El*, 479 F.3d at 245-46 (stating that "Title VII … require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not").

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.[33] Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense. [34]

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.[35]

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.[36]

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

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[33] *Cf. Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that "does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden" and violated Title VII).

[34] *Cf. El*, 479 F.3d at 247 (noting that plaintiff's Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person…."); *see also Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); *see* Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology and Pub. Pol'y 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

[35] The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. *See* HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

[36] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 135 S. Ct. 2507.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit "conduct against a person because such person has been convicted … of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."[37] Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person's *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person's *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person's conviction for drug *possession*.

IV. Intentional Discrimination and Use of Criminal History

A housing provider may also violate the Fair Housing Act if the housing provider intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider's use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.[38] A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider's screening policy, but did not provide such assistance to an African American applicant.[39]

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[37] 42 U.S.C. § 3607(b)(4).

[38] *Cf. Sherman Ave. Tenants' Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff's disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff's disproportionately Hispanic neighborhood).

[39] *See, e.g., Muriello*, 217 F. 3d at 522 (holding that Plaintiff's allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.[40] First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."[41] A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.[42] Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.[43]

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual

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[40] *See, generally, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); s*ee, e.g., Allen v. Muriello*, 217 F. 3rd 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

[41] *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

[42] *See, e.g., Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

[43] *See, e.g., Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974)).

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III.D., above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.

Helen R. Kanovsky, General Counsel

the Enforcement of Local Nuisance and Crime-Free Housing Ordinance Against Victims

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

SEPTEMBER 13, 2016

Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services

I. Introduction

The Fair Housing Act (or the Act) prohibits discrimination in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] The Department of Housing and Urban Development's (HUD's) Office of General Counsel issues this guidance to explain how the Fair Housing Act applies to ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to discrimination in violation of the Act.[2]

This guidance primarily focuses on the impact these ordinances may have on domestic violence victims, but the Act and the standards described herein apply equally to victims of domestic violence and other crimes and to those in need of emergency services who may be subjected to discrimination prohibited by the Act due to the operation of these ordinances. This guidance therefore addresses both the discriminatory effects and disparate treatment methods of proof under the Act, and briefly describes the obligation of HUD fund recipients to consider the impacts of these ordinances in assessing how they will fulfill their affirmative obligation to further fair housing.[3] HUD will issue subsequent guidance addressing more specifically how the Fair Housing Act applies to ensure that local nuisance or crime-free housing ordinances do not lead to housing discrimination because of disability.[4]

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[1] 42 U.S.C. §§ 3601-19.

[2] State and local governments use a variety of terms, including "nuisance," "chronic nuisance," "crime-free," or "disorderly behavior" to describe the types of ordinances addressed by this guidance.

[3] Local governments and landlords who receive federal funding may also violate the Violence Against Women Act, which, among other things, prohibits them from denying "assistance, tenancy, or occupancy" to any person because of domestic violence-related activity committed by a household member, guest or "other person in control" of the tenant if the tenant or an "affiliated individual" is the victim. 42 U.S.C. § 14043e-11(b)(3)(A).

[4] Discrimination prohibited by the Fair Housing Act includes "a refusal to make a reasonable accommodation in rules, policies, practices, and services, when such accommodation may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

II. Background

A. Nuisance Ordinances

A growing number of local governments are enacting a variety of nuisance ordinances that can affect housing in potentially discriminatory ways. For example, in Illinois alone, more than 100 such ordinances have been adopted.[5] These ordinances often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a "nuisance" and require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties.[6] The conduct defined as a nuisance varies by ordinance and has ranged from conduct affecting the appearance of the property – such as littering,[7] failing to tend to one's lawn[8] or abandoning a vehicle,[9] to general prohibitions related to the conduct of a tenant or guest – such as disorderly or disruptive conduct,[10] disrupting the quiet use and enjoyment of neighboring properties,[11] or any criminal conduct occurring on or near the property.[12] Nuisance conduct often

[5] The Sargent Shriver National Center on Poverty Law noted that in August 2013, "more than 100 municipalities in the state of Illinois alone ha[d] adopted some kind of [nuisance or crime-free] ordinance," with the number continuing to increase. Emily Werth, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* 1 (2013), http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf. Other research has identified 37 nuisance ordinances in Pennsylvania. News Release, Pennsylvania Coalition Against Domestic Violence, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction* (Oct. 16, 2014) [hereinafter News Release], http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf. Additionally, 59 nuisance ordinances have been identified across every region of the country, including in large metropolitan cities and small towns, 39 of which define domestic violence, assault, sexual abuse, or battery as nuisance activities. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* (online supplement), 78 AM. SOCIOLOGICAL REV. 2–3, 4–18 (2013) [hereinafter Desmond & Valdez (online supplement)], http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

[6] Although nuisance ordinances have been enacted that apply to both owner-occupied and rental housing, this guidance focuses on the application of the Fair Housing Act to a local government's enactment and enforcement of nuisance and crime-free ordinances against persons who reside in rental housing. Much of the legal analysis in this guidance applies equally to owner-occupied housing as well.

[7] *See, e.g.*, PORTLAND, OR., CODE § 14.B.60.010(D)(9) (2013), https://www.portlandoregon.gov/citycode/?c=28531; CARSON CITY, NEV., CODE § 8.08.70 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!.

[8] *See, e.g.*, JEFFERSON, WIS., CODE § 197-6(F) (2002), http://ecode360.com/9781229.

[9] *See, e.g.*, ADAIR VILLAGE, OR. CODE § 40.610(5) (2012), http://www.adairvillage.org/wordpress/wp-content/uploads/2012/06/Chapter-40-Public-Nuisance-2012.pdf; CARSON CITY, NEV., CODE § 8.08.110 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!; *see also* Werth, *supra* note 5, at 17.

[10] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf; WEST CHICAGO, ILL., CODE § 10-53 (2008), https://www.municode.com/library/il/west_chicago/codes/code_of_ordinances?nodeId=COOR_CH10NU_ARTVIICHNUPRAB_S10-52VI.

[11] *See, e.g.*, ARIZ. REV. STAT. § 13-2917 (2006).

[12] *See* SPOKANE, WASH., CODE § 10.08A.20(H) (2016), https://my.spokanecity.org/smc/?Section=10.08A.020; *see also* ACLU WOMEN'S RIGHTS PROJECT & THE SOC. SCI. RESEARCH COUNCIL, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York* 8 (2015) [hereinafter *Silenced*], https://www.aclu.org/report/silenced-how-nuisance-ordinances-punish-crime-victims-new-york (citing as examples of harmful nuisance ordinances PATTERSON, N.Y., CODE § 72-2(K) (2009),

includes what is characterized by the ordinance as an "excessive" number of calls for emergency police or ambulance services, typically defined as just a few calls within a specified period of time by a tenant, neighbor, or other third party, whether or not directly associated with the property.[13]

In some jurisdictions, an incident of domestic violence is defined as a nuisance without regard to whether the resident is the victim or the perpetrator of the domestic violence.[14] In other jurisdictions, incidents of domestic violence are not specifically defined as nuisances, but may still be categorized as such because the ordinance broadly defines nuisance activity as the violation of any federal, state or local law, or includes conduct such as disturbing the peace, excessive noise, disorderly conduct, or calls for emergency services that exceed a specified number within a given timeframe.[15] Some ordinances specifically define "excessive" calls for police or emergency services as nuisances, even when the person in need of services is a victim of domestic violence or another crime or otherwise in need of police, medical or other emergency assistance.[16] Even where ordinances expressly exclude victims of domestic violence or other crimes, victims are still frequently deemed to have committed nuisance conduct because police and other emergency service providers may not log the call as domestic violence, instead categorizing it incorrectly as property damage, disturbing the peace or another type of nuisance conduct.[17] Some victims also are hesitant or afraid to identify themselves as victims of abuse.[18]

The ordinances generally require housing providers either to abate the alleged nuisance or risk penalties, such as fines, loss of their rental permits, condemnation of their properties and, in some extreme instances, incarceration.[19] Some ordinances may require the housing provider to evict the resident and his or her household after a specified number of alleged nuisance

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http://www.pattersonny.org/PDFs/Codes/Chapter72-Chronic_Public_Nuisance_Abatement.pdf; SCOTIA, N.Y., CODE § 196-12 (2009), http://ecode360.com/13862484; GLENS FALLS, N.Y., CODE § 146-2(C)(7) (2000), http://ecode360.com/14410432; AUBURN, N.Y., CODE § 213-3(D)(1) (1997), http://ecode360.com/8969396; ROCHESTER, N.Y., CHARTER § 3-15(B)(1)(W) (1984), http://ecode360.com/28971339); News Release, *supra* note 5.

[13] *See* Werth, *supra* note 5, at 4, 18 n.70.

[14] *See, e.g.*, SPOKANE, WASH., CODE § 10.08A.20(H)(2)(q) (2016), *https://my.spokanecity.org/smc/?Section=10.08A.020*; *see also Silenced*, *supra* note 12, at 12; Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1058 (2015); News Release, *supra* note 5.

[15] *See* Kastner, *supra* note 14, at 1058 ("Similarly, the ordinance could cause survivors to be evicted either because the 911 call was not coded as 'domestic violence' or because the landlord was not aware that domestic violence was occurring and could not create a plan to remediate the issue properly.").

[16] *See* Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, L. & SOC. INQ. 15-17 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf.

[17] *See, e.g.*, BEACON, N.Y., CODE § 159-3(A)(20) (2011) (exempting domestic violence victims from being penalized under nuisance ordinance where a police officer properly "observes evidence that a domestic dispute occurred").

[18] *See, e.g.*, Arnold & Slusser, *supra* note 16, at 15–16.

[19] *See, e.g.*, Desmond & Valdez (online supplement), *supra* note 5, at 4-18; Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1189 (2008).

violations—often quite low—within a specific timeframe.[20] For example, in at least one jurisdiction, three calls for emergency police or medical help within a 30-day period is considered to be a nuisance,[21] and in another jurisdiction, two calls for such services within one year qualify as a nuisance.[22] Even when nuisance ordinances do not explicitly require evictions, a number of landlords resort to evicting the household to avoid penalties.[23]

In many jurisdictions, domestic-violence-related calls are the largest category of calls received by police.[24] "Intimate partner violence, sexual violence, and stalking are widespread" and impact millions of Americans each year.[25] "On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States" – more than 12 million individuals over the course of a year.[26] From 1994 to 2010, approximately 80 percent of the victims of intimate partner violence in the nation were women.[27] Women with disabilities are more likely to be subjected to domestic violence than women without disabilities.[28]

Studies have found that victims of domestic violence often do not report their initial incident of domestic violence and instead suffer multiple assaults before contacting the police or seeking a protective order or other assistance.[29] Victims of domestic violence often are reluctant to

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[20] *See* Werth, *supra* note 5 at 4 n.9.
[21] *See, e.g.*, CINCINNATI, OH. CODE § 761-3(a) (2013), http://www.municode.com/resources/gateway.asp?pid=19996&sid=35.
[22] *See* ST. LOUIS, MO., CODE § 15.42.020(G) (2014), https://www.municode.com/library/mo/st._louis/codes/code_of_ordinances?nodeId=TIT15PUPEMOWE_DIVIVOFAGPUPE_CH15.42PUNU#!.
[23] *See* Arnold & Slusser, *supra* note 16, at 13–15 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf. While local governments might not explicitly require eviction as the primary nuisance abatement method in their ordinances, in practice, governments may indicate to landlords that eviction is the only acceptable nuisance abatement method. *See, e.g.*, Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 135 (2013), http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf ("[T]he [Milwaukee Police Department] cleared landlords who evicted domestic violence victims—'Plan Accepted!'—but pressured those who refused to do so.").
[24] Andrew R. Klein, NATIONAL INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, *Practical Implications of Current Domestic Violence Research* 1 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.
[25] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., *Injury Prevention & Control* (last updated Sep. 8, 2014), http://www.cdc.gov/violenceprevention/nisvs/infographic.html.
[26] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., UNDERSTANDING INTIMATE PARTNER VIOLENCE (2014), https://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf.
[27] *See* SUSAN CASTALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, *Intimate Partner Violence, 1993–2010* 1 (2015), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf. *See also* NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *There's No Place Like Home: State Laws that Protect Housing Rights for Survivors of Domestic and Sexual Violence* 5 (2012) [hereinafter *No Place Like Home*], https://www.nlchp.org/Theres_No_Place_Like_Home ("In some areas of the country 1 in 4 homeless adults reported that domestic violence was a cause of their homelessness, and between 50% and 100% of homeless women have experienced domestic or sexual violence at some point in their lives.").
[28] OFFICE ON WOMEN'S HEALTH, U.S. DEP'T. OF HEALTH AND HUMAN SERV., *Violence Against Women With Disabilities* (last updated Sep. 4, 2015) [hereinafter WOMEN'S HEALTH], http://www.womenshealth.gov/violence-against-women/types-of-violence/violence-against-women-with-disabilities.html.
[29] KLEIN, *supra* note 24, at 6.

seek assistance because of, among other things, fear of reprisal from their attackers.[30] Nuisance ordinances (and crime-free housing ordinances) are becoming an additional factor that operates to discourage victims from reporting domestic violence and obtaining the emergency police and medical assistance they need.[31]

For example, a woman in Norristown, Pennsylvania who had been subjected to domestic violence by her ex-boyfriend was warned by police that if she made one more 911 call, she and her young daughter would be evicted from their home pursuant to the local nuisance ordinance.[32] The ordinance operated under a "three strike" policy, allowing her no more than two calls to 911 for help. As a result, the woman was too afraid to call the police when her ex-boyfriend returned to her home and stabbed her. Rather than call for an ambulance, she ran out of her house in the hope she would not lose her housing.[33] A neighbor called the police and, due to the serious nature of her injuries, the woman was airlifted to the hospital. A few days after she returned home from the hospital, she was served with eviction papers pursuant to the local nuisance ordinance.[34]

B. Crime-Free Lease Ordinances and Crime-Free Housing Programs

A number of local governments enforce crime-free lease ordinances or promote crime-free housing programs that incorporate the use of crime-free lease addenda.[35] Some of these ordinances operate like nuisance ordinances and penalize housing providers who fail to evict tenants when a tenant, resident or other person has allegedly engaged in a violation of a federal, state and/or local law, regardless of whether the tenant or resident was the victim of the crime at issue.[36] Others mandate or strongly encourage housing providers to include lease provisions that require or permit housing providers to evict tenants where a tenant or resident has allegedly engaged in a single incident of criminal activity, regardless of whether the activity occurred on or off the property.[37]

These provisions often allow housing providers to evict tenants when a guest or other person allowed onto the property by the tenant or resident allegedly engages in criminal activity on

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[30] *See* Arnold & Slusser, *supra* note 16, at 15.
[31] *Id.* at 22; Fais, *supra* note 19, at 1202; Werth, *supra* note 5, at 8.
[32] Complaint at 9–17, *Briggs v. Borough of Norristown et al.*, No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013) [hereinafter Complaint], http://www.aclu.org/files/assets/norristown_complaint.pdf.
[33] *Id.*; Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, (Sep. 11, 2015), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.
[34] *Id. See also* Press Release, U.S. Department of Housing and Urban Development, HUD and Philadelphia Area Borough Settle Allegations of Housing Discrimination Against Victims of Domestic Violence (Oct. 2, 2014), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo_14-121.
[35] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR.
[36] *See* Werth, *supra* note 5, at 3 n.8.
[37] *See, e.g.*, SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233; City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259 ("A single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for termination of the lease.").

or near the property, regardless of whether the resident was a victim of the criminal activity or a party to it.[38] The criminal activity that constitutes a lease violation is frequently broadly and ambiguously defined and may include any violation of federal, state or local laws, however minor.[39] Thus, disorderly conduct, excessive noise and similar activity may constitute a crime resulting in eviction.[40] Crime-free lease addenda often do not provide exceptions for cases where a resident or tenant is the victim of domestic violence or another crime.[41] And, as previously noted, even where exceptions do exist, victims of domestic violence and other crimes may be mistakenly categorized and face eviction despite the exception.[42] For example, police often arrest both the victim and the perpetrator under "dual arrest" policies when a victim has defended herself or himself from the perpetrator.[43]

Furthermore, some crime-free housing ordinances mandate or strongly encourage housing providers to implement lease provisions that require eviction based on an arrest alone, or do not require an arrest or conviction to evict a tenant, but rather allow housing providers to rely on a preponderance of the evidence standard while remaining silent on who is responsible for determining that this standard has been met.[44] The principles discussed in HUD's "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions"[45] are instructive in

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[38] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (mandating that all landlords include the Hesperia Crime-Free Lease Addendum, which requires that a single violation of the addendum, whether committed by resident, guest, or other person, provides good cause for termination of tenancy); Hesperia Crime-Free Lease Addendum, http://www.cityofhesperia.us/DocumentCenter/View/13394.

[39] *See* Werth, *supra* note 5, at 17.

[40] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf.

[41] *See* Werth, *supra* note 5, at 8.

[42] *See, e.g.*, OPEN COMMUNITIES & SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *Reducing the Cost of Being Crime Free: Alternative Strategies to Crime Free/Nuisance Property Ordinances in Illinois* 3 (2015) http://povertylaw.org/sites/default/files/images/advocacy/housing/reducing-the-cost-of-crime-free.pdf.

[43] *See, e.g.*, Kastner, *supra* note 14, at 1065; *see* Werth, *supra* note 5, at 21.

[44] *See, e.g.*, Werth, *supra* note 5, at 12 (noting that some ordinances allow evictions based on arrests or citations alone); LAS VEGAS, NEV., CODE § 6.09.20 (2012) (requiring landlords to complete training encouraging use of Crime-Free Addendum, which permits eviction based on single alleged violation, as shown by preponderance of evidence, rather than criminal conviction; Las Vegas Crime Free Multi-Housing Program Crime-Free Addendum (2014), http://www.lvmpd.com/Portals/0/pdf/prevention/English_CFAddendum01_2014.pdf); SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233 (requiring landlords to use Crime-Free Lease Addendum, which permits eviction based on single alleged violation of addendum as shown by preponderance of evidence, rather than criminal conviction); City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259); Hesperia, Cal., Health and Safety Code § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (providing chief of police discretion as to whether or not to notify the landlord of the evidence or documents, if any, used to determine that a resident engaged in criminal activity); *see also* Werth, *supra* note 5, at 4.

[45] *See* HELEN R. KANOVSKY, GENERAL COUNSEL, U.S. DEP'T OF HOUS. & URBAN DEV., *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.

evaluating the fair housing implications of crime-free lease ordinances and crime-free lease addenda mandated or encouraged by localities and enforced by housing providers.[46]

III. Discriminatory Effects Liability and Enforcement of Nuisance Ordinances and Crime-Free Housing Ordinances

A local government's policies and practices to address nuisances, including enactment or enforcement of a nuisance or crime-free housing ordinance, violate the Fair Housing Act when they have an unjustified discriminatory effect, even when the local government had no intent to discriminate.[47] Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.[48] Thus, where a policy or practice that restricts the availability of housing on the basis of nuisance conduct has a disparate impact on individuals of a particular protected class, the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the local government, or if such interest could be served by another practice that has a less discriminatory effect.[49]

Discriminatory effects liability is assessed under a three-step, burden-shifting standard requiring a fact-specific analysis.[50] The following sections discuss the three steps used to analyze whether a local government's enforcement of a nuisance or crime-free housing ordinance results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

A. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action) has the burden to prove that a local government's enforcement of its nuisance or crime-free housing ordinance has a discriminatory effect, that is, that the local government's nuisance or crime-free housing ordinance policy or practice results or predictably will result in a disparate impact on a group of persons because of a protected characteristic.[51] This is also true for a local

[46] In addition to being liable for their own discriminatory conduct, housing providers may have a cause of action under the Fair Housing Act against a locality if a locality's ordinance requires housing providers to discriminate based on a protected characteristic. *See, e.g.*, *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, *1, 13–15 (N.D. Cal. 2011) (concluding that "forcing the owners of a mobile-home park to discriminate on the basis of familial status through a series of city ordinances . . . violates the federal Fair Housing Act.").

[47] 24 C.F.R. § 100.500; *accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, *Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2511 (2015).

[48] For purposes of this guidance, the term "policy or practice" encompasses governments' nuisance and crime-free ordinances as well as their enforcement of the ordinances. It also includes government activities related to crime-free housing programs that may not be specified by ordinance.

[49] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2514–15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500).

[50] *See* 24 C.F.R. § 100.500.

[51] 24 C.F.R. § 100.500(c)(1). A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

government's policy or practice encouraging or incentivizing housing providers to adopt crime-free lease addenda (and the discussion throughout the guidance applies equally to such actions). This burden is satisfied by presenting evidence proving that the challenged policy or practice actually or predictably results in a disparate impact.

Different data sources may be available and useful to demonstrate that a government's ordinance actually or predictably results in a disparate impact, which is ultimately a fact-specific and case-specific inquiry. While state or local statistics typically are presented where available and appropriate based on the local government's jurisdiction or other facts particular to a given case, national statistics may be relevant and appropriate, depending on the specific case and the nature of the claim.

Local statistics are likely to be available for use in establishing whether a local government's enforcement of its nuisance or crime-free ordinance has a disparate impact. Other evidence – for example, resident data and files, demographic data, city and police records including data on enforcement of nuisance or crime-free ordinances, citations and correspondence between housing providers and city officials and court records regarding nuisance abatement – may also be relevant in determining whether a challenged nuisance or crime-free housing ordinance policy or practice causes a disparate impact.

Evidence of nationwide disparities in the enforcement of nuisance or crime-free ordinances based on protected characteristics may be relevant to consider, depending on the specific case and the nature of the claim.[52] Also, in some cases, national statistics may provide grounds for HUD to investigate complaints challenging the enforcement of nuisance ordinances. For example, nationally, women comprise approximately 80 percent of all individuals subjected to domestic violence each year,[53] which may provide grounds for HUD to investigate under the Fair Housing Act allegations that the adverse effects of a nuisance ordinance fall more heavily on victims of domestic violence.

Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a local government will have the opportunity to offer evidence to refute the claim that its nuisance ordinance causes a disparate impact on one or more protected classes.

B. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the local government to prove that the challenged nuisance or crime-free housing ordinance is necessary

[52] *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population."), *with Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).

[53] *See* CASTALANO, *supra* note 27, at 1.

to achieve a substantial, legitimate, nondiscriminatory interest of the local government.[54] The interest of the local government may not be hypothetical or speculative, meaning the local government must be able to prove with evidence what the government interest is, that its interest is legitimate, substantial and nondiscriminatory, and that the challenged practice is necessary to achieve that interest.[55] Assertions based on generalizations or stereotypes about persons deemed to engage in nuisance or criminal conduct are not sufficient to prove that an ordinance or its enforcement is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

As explained in the preamble to HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization.[56] The requirement that an interest be "legitimate" means that the local government's justification must be genuine and not false or fabricated.[57] A number of local governments have nuisance or crime-free ordinances that encourage, require or are likely to result in housing providers evicting or taking other adverse housing actions against residents, including victims of domestic violence and other crimes, because the residents requested police, medical or other emergency assistance, without regard to whether the calls were reasonable under the circumstances.[58] Where such a practice is challenged and proven to have a disparate impact, the local government would have the difficult burden to prove that cutting off access to emergency services for those in grave need of such services, including victims of domestic violence or other crimes, thereby potentially endangering their lives, safety and security,[59] in fact achieves a core interest of the local government and was not undertaken for discriminatory reasons or in a discriminatory manner. Similarly, if the local government's policy or practice requires or encourages housing providers to evict victims of domestic violence or other crimes or others in need of emergency services, the local government would have the burden to prove that such a policy or practice in fact is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a local government successfully proves that its nuisance or crime-free housing ordinance, policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. If the analysis reaches the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another policy or practice that has a less discriminatory effect.[60]

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[54] 24 C.F.R. § 100.500(c)(2).
[55] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (preamble to final rule codified at 24 C.F.R. pt. 100).
[56] 78 Fed. Reg. at 11470.
[57] *Id.*
[58] *See* Werth, *supra* note 5, at 8.
[59] When domestic violence victims are evicted on the basis of a nuisance citation, they may often lack alternative housing and experience homelessness. *See, e.g.*, Amanda Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257, 260 ("on any given day, over 3000 people face homelessness because they are unable to find shelter away from their abusers . . . making domestic violence a leading cause of homelessness in the United States").
[60] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

The identification of a less discriminatory alternative will depend on the particulars of the policy or practice at issue, as well as the specific nature of the underlying problem the ordinance seeks to address.

IV. Intentional Discrimination and Enforcement of Nuisance Ordinances or Crime-Free Housing Ordinances

A local government may also violate the Fair Housing Act if it intentionally discriminates in its adoption or enforcement of a nuisance or crime-free housing ordinance. This occurs when the local government treats a resident differently because of sex, race or another protected characteristic. The analysis is the same as is used to analyze whether any housing ordinance was enacted or enforced for intentionally discriminatory reasons.

Generally, two types of claims of intentional discrimination may arise. One type of intentional discrimination claim arises where a local government enacts a nuisance ordinance or crime-free housing ordinance for discriminatory reasons. Another type is where a government selectively enforces a nuisance or crime-free housing ordinance in a discriminatory manner. For the first type of claim, in determining whether a facially neutral ordinance was enacted for discriminatory reasons, courts generally look to certain factors. The factors, all of which need not be satisfied, include, but are not limited to: (1) the *impact* of the ordinance at issue, such as whether the ordinance disproportionately impacts women compared to men, minority residents compared to white residents, or residents with disabilities or a certain type of disability compared to residents without disabilities; (2) the *historical background* of the ordinance, such as whether there is a history of discriminatory conduct by the local government; (3) the *specific sequence of events*, such as whether the locality adopted the ordinance only after significant community opposition motivated by race or another protected characteristic; (4) *departures from the normal procedural sequence*, such as whether the locality deviated from normal procedures for enacting a nuisance ordinance; (5) *substantive departures*, such as whether the factors usually considered important suggest that a local government should have reached a different result; and (6) the *legislative or administrative record*, such as any statements by members of the local decision-making body.[61]

For the second type of intentional discrimination claim, selective enforcement, where there is no "smoking gun" proving that a local government is selectively enforcing a nuisance or crime-free housing ordinance in a discriminatory way, courts look for evidence from which such an inference can be drawn. The evidence might be direct or circumstantial. For example, courts have noted that an inference of intentional sex discrimination could arise directly from evidence

[61] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). *See also Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 942 (N.D. Ohio 2012) (utilizing *Arlington Heights* factors to analyze whether municipal action was motivated by discriminatory intent); *see, e.g.*, *Valdez v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 36713, *47 (E.D.N.Y 2005) (explaining factors probative of discriminatory intent in case involving town's alleged disproportionate enforcement of zoning and housing codes against Latinos).

that a housing providers seeks to evict female residents shortly after incidents of domestic violence.[62]

A common method of establishing intentional discrimination indirectly, through circumstantial evidence, is through the familiar burden-shifting method of proving intentional discrimination originally established by the Supreme Court in the employment context.[63] In the standard complaint alleging selective enforcement of a nuisance or crime-free ordinance for discriminatory reasons, the plaintiff first must produce evidence to establish a prima facie case of disparate treatment. This may be shown, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) a local government official (or housing provider, depending on the circumstances) took action to enforce the nuisance or crime-free ordinance or lease addendum against the plaintiff or complainant because the plaintiff or complainant allegedly engaged in nuisance or criminal conduct; (3) the local government official or housing provider did not take action to enforce the nuisance or crime-free ordinance or lease addendum against a similarly-situated resident not of the plaintiff or complainant's protected class who engaged in comparable conduct; and (4) the local government or housing provider subjected the plaintiff or complainant to an adverse housing action as a result of the enforcement of the nuisance or crime-free ordinance or lease addendum. It is then the burden of the local government and/or housing provider, depending on the circumstances, to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing action.[64] The proffered nondiscriminatory reason for the challenged decision must be clear, reasonably specific and supported by admissible evidence.[65] Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.[66]

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[62] *See Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (explaining that landlord's attempt to evict victim 72 hours after domestic violence incident could give rise to inference of discrimination on the basis of gender). *See, e.g.*, *Dickinson v Zanesville Metro. Hous. Auth*., 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (articulating that a housing provider's failure to comply with the Violence Against Women Act and assignment of blame to the victim for the results of domestic violence could give rise to an inference of sex discrimination); *Meister v. Kansas City*, 2011 U.S. Dist. LEXIS 19166, *19–20 (D. Kan. 2011) ("[E]vidence that defendant knew that domestic violence caused damage to plaintiff's housing unit would help support a claim that she was evicted under circumstances giving rise to an inference of sex discrimination.").

[63] *See, generally*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating burden-shifting standard of proving intentional discrimination under Title VII).

[64] *See, e.g.*, *Lindsay v. Yates*, 578 F.3d at 415 (articulating that if plaintiff presents evidence from which a reasonable jury could conclude that there exists a prima facie case of housing discrimination, then the burden shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing decision); *Bouley*, 394 F. Supp. 2d at 678 (explaining that once a plaintiff has established a prima facie case of discrimination, the burden then shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision).

[65] *See, e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1040 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

[66] *See, e.g.*, *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups. Our reasoning, in part, is that 'clever men may easily conceal their [discriminatory] motivations.'" (*quoting United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

If the defendant (or respondent in a HUD administrative enforcement action) establishes a legitimate, nondiscriminatory reason for the adverse housing action, a plaintiff or HUD may still prevail by showing that the proffered reason was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination.[67] For example, the fact that the defendant (or respondent) acted upon comparable nuisance or criminal conduct differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that the defendant (or respondent) was not considering such conduct uniformly. Additionally, shifting or inconsistent explanations offered by the defendant (or respondent) for the adverse housing action may provide evidence of pretext. Similarly, a local government's claim that its nuisance citations would not cause tenant evictions because the citations were issued to the housing provider and not the residents could be evidence of pretext.[68] Ultimately, the evidence that may be offered to show that defendant's or respondent's stated justification is pretext for intentional discrimination will depend on the facts of a particular case.

V. Assessment of Nuisance Ordinances and Crime-Free Housing Ordinances as Part of the Duty to Affirmatively Further Fair Housing

In addition to prohibiting discrimination, the Fair Housing Act requires HUD to administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Act.[69] The purpose of the Act's affirmatively furthering fair housing (AFFH) mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: recipients also must take meaningful action to overcome fair housing issues and related barriers to fair housing choice and disparities in access to opportunity based on sex, race, national origin, disability, and other characteristics protected by the Act. Congress has repeatedly reaffirmed the AFFH mandate by requiring HUD program participants to certify that they will affirmatively further fair housing as a condition of receiving Federal funds.[70]

In 2015, HUD issued a rule on affirmatively furthering fair housing which requires grantees who receive Community Development Block Grant, HOME, Housing Opportunities for Persons with AIDS, or Emergency Solutions Grant funding to conduct an assessment of fair housing for purposes of setting goals to affirmatively further fair housing. In conducting their assessments of fair housing, state and local governments should assess their nuisance ordinances, crime-free housing ordinances and related policies or practices, including the processes by which nuisance ordinance and crime-free housing ordinances are enforced, and consider how these ordinances, policies or practices may affect access to housing and access to police, medical and other governmental services based on sex, race, national origin, disability, and other characteristics protected by the Act. One step a local government may take toward meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or

[67] *See, e.g.*, *Bouley*, 394 F. Supp. 2d at 678.
[68] *See Hidden Vill.*, 867 F. Supp. 2d at 952 (noting that "[d]efendants appear blind to the possibility that repeatedly issuing citations to a landlord, based upon the actions of its tenants, would logically create an incentive for the landlord to evict his problem tenant . . . produc[ing] the same result—the eviction of [predominantly African American youth] but by different means.").
[69] 42 U.S.C. § 3608(d), (e)(5).
[70] 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

crime-free ordinance that requires or encourages evictions for use of emergency services, including 911 calls, by domestic violence or other crime victims.

VI. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing ordinances, policies or practices that have an unjustified discriminatory effect because of protected characteristics. While the Act does not prohibit local governments from appropriately considering nuisance or criminal conduct when enacting laws related to housing, governments should ensure that such ordinances and related policies or practices do not discriminate in violation of the Fair Housing Act.

Eighty percent of domestic violence victims are women, and in some communities, racial or ethnic minorities are disproportionately victimized by crime. Where the enforcement of a nuisance or crime-free ordinance penalizes individuals for use of emergency services or for being a victim of domestic violence or other crime, a local government bears the burden of proving that any discriminatory effect caused by such policy or practice is supported by a legally sufficient justification. Such a determination cannot be based on generalizations or stereotypes.

Selective use of nuisance or criminal conduct as a pretext for unequal treatment of individuals based on protected characteristics violates the Act. Repealing ordinances that deny access to housing by requiring or encouraging evictions or that create disparities in access to emergency services because of a protected characteristic is one step local governments can take to avoid Fair Housing Act violations and as part of a strategy to affirmatively further fair housing.

Helen R. Kanovsky, General Counsel

The Agency has determined under 21 CFR 25.33(a) that this action is categorically excluded from the requirement to submit an environmental assessment or an environmental impact statement because it is of a type that does not individually or cumulatively have a significant effect on the human environment.

Elsewhere in this issue of the **Federal Register**, FDA gave notice that the approval of those parts of NADA 138–934 pertaining to the procaine penicillin component indications for growth promotion and increased feed efficiency in swine is withdrawn, effective September 14, 2016. As provided for in the regulatory text of this document, the animal drug regulations are amended to reflect this partial withdrawal of approval and subsequent product reformulation.

NADA 138–934 was identified as being affected by guidance for industry (GFI) #213 ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209,'' December 2013.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for part 558 continues to read as follows:

Authority: 21 U.S.C. 354, 360b, 360ccc, 360ccc–1, 371.

§ 558.140 [Amended]

■ 2. In § 558.140, in paragraph (b)(2), remove ''No. 054771'' and in its place add ''Nos. 054771 and 069254''.

§ 558.145 [Amended]

■ 3. In § 558.145, remove and reserve paragraph (a)(2).

Dated: September 6, 2016.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 2016–21985 Filed 9–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–5248–F–02]

RIN 2529–AA94

Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's fair housing regulations to formalize standards for use in investigations and adjudications involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability. The rule specifies how HUD will evaluate complaints of quid pro quo (''this for that'') harassment and hostile environment harassment under the Fair Housing Act. It will also provide for uniform treatment of Fair Housing Act claims raising allegations of quid pro quo and hostile environment harassment in judicial and administrative forums. This rule defines ''quid pro quo'' and ''hostile environment harassment,'' as prohibited under the Fair Housing Act, and provides illustrations of discriminatory housing practices that constitute such harassment. In addition, this rule clarifies the operation of traditional principles of direct and vicarious liability in the Fair Housing Act context.

DATES: *Effective date:* October 14, 2016.

FOR FURTHER INFORMATION CONTACT: Lynn Grosso, Acting Deputy Assistant Secretary for Enforcement and Programs, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street SW., Room 5204, Washington DC 20410–2000; telephone number 202–402–5361 (this is not a toll-free number). Persons with hearing or speech impairments may contact this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

Both HUD and the courts have long recognized that Title VIII of the Civil Rights Act of 1968, as amended, (42 U.S.C. 3601 *et seq.*) (Fair Housing Act or Act) prohibits harassment in housing and housing-related transactions because of race, color, religion, sex, national origin, disability,[1] and familial status, just as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) (Title VII) prohibits such harassment in employment. But no standards had been formalized for assessing claims of harassment under the Fair Housing Act. Courts have often applied standards first adopted under Title VII to evaluate claims of harassment under the Fair Housing Act, but there are differences between the Fair Housing Act and Title VII, and between harassment in the workplace and harassment in or around one's home, that warrant this rulemaking.

This rule formalizes standards for evaluating claims of quid pro quo and hostile environment harassment in the housing context. The rule does so by defining ''quid pro quo harassment'' and ''hostile environment harassment'' as conduct prohibited under the Fair Housing Act, and by specifying the standards to be used to evaluate whether particular conduct creates a quid pro quo or hostile environment in violation of the Act. Such standards will apply both in administrative adjudications and in cases brought in federal and state courts under the Fair Housing Act. This rule also adds to HUD's existing Fair Housing Act regulations illustrations of discriminatory housing practices that may constitute illegal quid pro quo and hostile environment harassment.

By establishing consistent standards for evaluating claims of quid pro quo and hostile environment harassment, this rule provides guidance to providers of housing or housing-related services seeking to ensure that their properties or businesses are free of unlawful harassment. The rule also provides clarity to victims of harassment and their representatives regarding how to assess potential claims of illegal harassment under the Fair Housing Act.

In addition, this final rule clarifies when housing providers and other entities or individuals covered by the Fair Housing Act may be held directly or vicariously liable under the Act for

[1] This rule uses the term ''disability'' to refer to what the Fair Housing Act and its implementing regulations refer to as ''handicap.'' Both terms have the same legal meaning. *See Bragdon* v. *Abbott,* 524 U.S. 624, 631 (1998).

illegal harassment, as well as for other discriminatory housing practices that violate the Act. This rule sets forth how these traditional liability standards apply in the housing context because, in HUD's experience, there has been significant misunderstanding among public and private housing providers as to the circumstances under which they will be subject to liability under the Fair Housing Act for discriminatory housing practices undertaken by others.

B. Legal Authority for the Regulation

The legal authority for this regulation is found in the Fair Housing Act, which gives the Secretary of HUD the ''authority and responsibility for administering this Act.'' 42 U.S.C. 3608(a). In addition, the Act provides that ''[t]he Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.'' 42 U.S.C. 3614a. HUD also has general rulemaking authority under the Department of Housing and Urban Development Act to make such rules and regulations as may be necessary to carry out its functions, powers and duties. See 42 U.S.C. 3535(d).

C. Summary of Major Provisions

The major provisions of this rule:

- Formalize definitions of ''quid pro quo harassment'' and ''hostile environment harassment'' under the Fair Housing Act.
- Formalize standards for evaluating claims of quid pro quo and hostile environment harassment under the Fair Housing Act.
- Add illustrations of prohibited quid pro quo and hostile environment harassment to HUD's existing Fair Housing Act regulations.
- Identify traditional principles of direct and vicarious liability applicable to all discriminatory housing practices under the Fair Housing Act, including quid pro quo and hostile environment harassment.

Please refer to section III of this preamble, entitled ''This Final Rule,'' for a discussion of the changes made to HUD's regulations by this final rule.

D. Costs and Benefits

This rule formalizes clear, consistent, nationwide standards for evaluating harassment claims under the Fair Housing Act. The rule does not create any new forms of liability under the Fair Housing Act and thus adds no additional costs for housing providers and others engaged in housing transactions.

The benefits of the rule are that it will assist in ensuring compliance with the Fair Housing Act by defining quid pro quo and hostile environment harassment that violates the Act and by specifying traditional principles of direct and vicarious liability, consistent with Supreme Court precedent. Articulating clear standards enables entities subject to the Fair Housing Act's prohibitions and persons protected by its terms to understand the types of conduct that constitute actionable quid pro quo and hostile environment harassment. As a result, HUD expects this rule to facilitate more effective training to avoid discriminatory harassment in housing and decrease the need for protracted litigation to resolve disputed claims.

II. Background

Title VIII of the Civil Rights Act of 1968, as amended (the Fair Housing Act or Act), prohibits discrimination in the availability and enjoyment of housing and housing-related services, facilities, and transactions because of race, color, national origin, religion, sex, disability, and familial status. 42 U.S.C. 3601–19. The Act prohibits a wide range of discriminatory housing and housing-related practices, including, among other things, making discriminatory statements, refusing to rent or sell, denying access to services, setting different terms or conditions, refusing to make reasonable modifications or accommodations, discriminating in residential real estate-related transactions, and retaliating. *See* 42 U.S.C. 3604, 3605, 3606 and 3617.

In 1989, HUD promulgated fair housing regulations at 24 CFR part 100 that address discriminatory conduct in housing generally. The 1989 regulations include examples of discriminatory housing practices that cover quid pro quo sexual harassment and hostile environment harassment generally. Section 100.65(b)(5) identifies, as an example of unlawful conduct, denying or limiting housing-related services or facilities because a person refused to provide sexual favors. Section 100.400(c)(2) offers as an example of illegal conduct ''. . . interfering with persons in their enjoyment of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.'' The 1989 regulations do not, however, expressly define quid pro quo or hostile environment harassment, specify standards for examining such claims, or provide illustrations of other types of quid pro quo or hostile environment harassment prohibited by the Act. The 1989 regulations also do not discuss liability standards for prohibited harassment or other discriminatory housing practices.

Over time, forms of harassment that violate civil rights laws have coalesced into two legal doctrines—quid pro quo and hostile environment. Although HUD and the courts have recognized that the Fair Housing Act prohibits harassment because of race or color,[2] disability,[3] religion,[4] national origin,[5] familial status,[6] and sex,[7] the doctrines of quid pro quo and hostile environment harassment are not well developed under the Fair Housing Act.

As a result, when deciding harassment cases under the Fair Housing Act, courts have often looked to case law decided under Title VII, which prohibits employment discrimination because of race, color, religion, sex, and national origin.[8] But the home and the workplace are significantly different environments such that strict reliance on Title VII case law is not always appropriate. One's home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one's home can be far more intrusive, violative and threatening than harassment in the more public environment of one's work place.[9] Consistent with this reality, the

[2] *See, e.g., Smith* v. *Mission Assoc. Ltd. P'ship,* 225 F. Supp. 2d 1293, 1298–99 (D. Kan. 2002) (42 U.S.C. 3604(b)); *HUD* v. *Tucker,* 2002 ALJ LEXIS 33, *3–4 (HUD ALJ 2002) (42 U.S.C. 3604(a) and (b)).

[3] *See, e.g., Neudecker* v. *Boisclair Corp.,* 351 F. 3d 361, 364 (8th Cir. 2003) (42 U.S.C. 3604(f)(2)).

[4] *See, e.g., Bloch* v. *Frischholz,* 587 F. 3d 771, 787 (7th Cir. 2009) (42 U.S.C. 3604(b), 3617).

[5] *See, e.g., Effendi* v. *Amber Fields Homeowners Assoc.,* 2011 U.S. Dist. Lexis 35265, *1 (N.D. Ill. 2011) (42 U.S.C. 3604(b) and 3617); *Texas* v. *Crest Asset Mgmt.,* 85 F. Supp. 722, 736 (S.D. TX 2000) (42 U.S.C. 3604(a) and (b), 3617).

[6] *See, e.g., Bischoff* v. *Brittain,* 2014 U.S. Dist. LEXIS 145945, *13–14, *17 (E.D. Cal. 2014) (3604(b)); *United States* v. *M. Westland Co.,* 1995 U.S. Dist. LEXIS 22466, *4 (C.D. Cal. 1995) (Fair Housing Act provision not specified).

[7] *See, e.g., Quigley* v. *Winter,* 598 F. 3d 938, 946 (8th Cir. 2010) (42 U.S.C. 804(b), 3617); *Krueger* v. *Cuomo,* 115 F. 3d 487, 491 (7th Cir. 1997) (42 U.S.C. 3604(b), 3617); *Honce* v. *Vigil,* 1 F. 3d 1085, 1088 (10th Cir. 1993) (42 U.S.C. 3604(b)); *Shellhammer* v. *Lewallen,* 770 F. 2d 167 (6th Cir. 1985) (sexual harassment under the Fair Housing Act in general).

[8] *See, e.g., Honce* v. *Vigil,* 1 F. 3d at 1088; *Shellhammer* v. *Lewallen,* 770 F. 2d 167; *Glover* v. *Jones,* 522 F. Supp. 2d 496, 503 (W.D.N.Y. 2007); *Beliveau* v. *Caras,* 873 F. Supp. 1393, 1396 (C.D. Cal. 1995); *see also Neudecker* v. *Boisclair Corp.,* 351 F. 3d at 364 (applying Title VII concepts to find hostile environment based on disability violated Act). Unlike Title VII, the Act also includes disability and familial status among its protected characteristics.

[9] *See, e.g., Quigley* v. *Winter,* 598 F. 3d at 947 (emphasizing that defendant's harassing conduct

Continued

IV. The Public Comments

On October 21, 2015, at 80 FR 63720, HUD published for public comment a proposed rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act. The public comment period closed on December 21, 2015. HUD received 63 comments. The comments were submitted by public housing agencies (PHAs) and other government agencies; private housing providers and their representatives; nonprofit organizations, including fair housing, civil rights, housing advocacy, and legal groups; tenants and other individuals. This section of the preamble addresses significant issues raised in the public comments and provides HUD's responses. All public comments can be viewed at: *http://www.regulations.gov/#!docketDetail;D=HUD-2015-0095.*

The majority of the commenters were generally supportive of the rule, with some urging HUD to publish the rule quickly. This summary does not provide responses to comments that expressed support for the proposed rule without suggesting any modifications to the rule. General supportive comments included statements of the importance of the rule in addressing and preventing sexual assault of tenants by landlords and descriptions of how the rule would empower housing providers, renters, and other consumers to understand and avoid illegal housing practices by defining and illustrating quid pro quo and hostile environment harassment. Some commenters stated that this rule may help providers focus on the importance of eliminating harassment on their properties, and some commenters identified provisions of the rule that would provide useful guidance to housing providers, tenants, residents, and others involved in housing transactions.

More specifically, commenters expressed appreciation that the rule would apply not solely to sexual harassment but to harassment because of all protected characteristics, with some commenters sharing anecdotes of harassment based on a variety of protected characteristics that they believe the rule may help remedy. Other commenters supported the proposed rule's distinction between the Fair Housing Act and Title VII, with commenters endorsing the Department's proposal not to adopt the Title VII affirmative defense to an employer's vicarious liability.

A number of commenters assessed the rule to be in accord with case law, and approved of the balance the rule strikes between the rights and obligations of the parties in a fair housing matter. Some commenters noted that the proposed standard for determining whether conduct constitutes a hostile environment is appropriately individualized to the facts of each case. Some commenters specifically identified the benefits provided by the rule in establishing a uniform framework for fairly evaluating and appropriately responding to alleged harassment, which minimizes the subjective nature of adjudicating such claims. Other commenters expressed appreciation for the proposed rule's recognition that a single incident may establish hostile environment harassment. Some commenters expressed support for the rule's acknowledgement of the fear of retaliation many individuals with disabilities experience when trying to address issues of harassment in their housing.

Many commenters stated that the rule's description of traditional principles of agency liability is accurate and not an expansion of existing liability. Some commenters expressed appreciation that the rule would incorporate traditional liability principles for any type of discriminatory housing practice, not just harassment, and would rely on negligence principles and distinguish between direct and vicarious liability. Other commenters stated that the rule would not burden housing providers because the direct liability standard is aligned with established housing provider business practice. Some commenters expressed appreciation that the rule would place landlords on notice that they should take corrective action early on, once they know or should have known of the discrimination.

Several commenters stated that housing providers are already in possession of the tools they need to create living environments free from harassment. In particular, the commenters stated that housing providers are familiar with the corrective actions they may take in order to enforce their own rules. Another commenter stated that housing providers are in the best position to select, train, oversee, and assure the correct behavior of their agents, noting that effective enforcement of the rule depends on the potential for liability on the part of housing providers.

Some commenters expressed support for the proposed rule while seeking modifications at the final rule stage. For example, a commenter encouraged broad application of the rule so that intervention and corrective action would occur before victims of housing discrimination are forced out of their homes. Another commenter sought an expansive reading of the rule in order to prevent all forms of bullying. Some commenters sought to add factors to the totality of circumstances consideration, while other commenters sought to add to the classes protected by the rule.

Following are HUD's responses to commenters' suggested modifications to the rule and the other significant issues raised in the public comments.

A. Quid Pro Quo and Hostile Environment Harassment: § 100.600

a. General: § 100.600(a)

Issue: A commenter requested that HUD add seniors as a protected class under the rule. Other commenters stated that elderly persons often have disabilities, which make them particularly vulnerable to harassment. These commenters requested that the final rule make clear that the rule protects elderly persons from harassment because of disability.

HUD Response: HUD shares the commenters' concern for elderly persons but does not have the authority to add a new protected class to the Fair Housing Act and therefore is unable to adopt the commenters' recommendation to expand the scope of the rule in this way. Neither age nor senior status is a protected characteristic under the Act, although persons who are discriminated against because of their disabilities are protected under the Act without regard to their age. Therefore, elderly individuals who are subjected to quid pro quo or hostile environment harassment on the basis of disability or another protected characteristic are protected under the Act and this final rule.

Issue: A commenter suggested that HUD include a clause in the final rule to protect whistleblowers who experience harassment for reporting quid pro quo or hostile environment harassment. The commenter reported having witnessed such harassment and explained that whistleblowers are particularly vulnerable to quid pro quo and hostile environment harassment, but because they are not harassed on the basis of their race, color, religion, national origin, sex, familial status, or disability, they are not directly protected by the proposed regulation.

HUD Response: Anyone who is harassed for reporting discriminatory harassment in housing is protected by the Fair Housing Act. Section 818 of the Act makes it unlawful to coerce, intimidate, threaten, or interfere with a person on account of his or her having

IV. The Public Comments

On October 21, 2015, at 80 FR 63720, HUD published for public comment a proposed rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act. The public comment period closed on December 21, 2015. HUD received 63 comments. The comments were submitted by public housing agencies (PHAs) and other government agencies; private housing providers and their representatives; nonprofit organizations, including fair housing, civil rights, housing advocacy, and legal groups; tenants and other individuals. This section of the preamble addresses significant issues raised in the public comments and provides HUD's responses. All public comments can be viewed at: *http://www.regulations.gov/#!docketDetail;D=HUD-2015-0095.*

The majority of the commenters were generally supportive of the rule, with some urging HUD to publish the rule quickly. This summary does not provide responses to comments that expressed support for the proposed rule without suggesting any modifications to the rule. General supportive comments included statements of the importance of the rule in addressing and preventing sexual assault of tenants by landlords and descriptions of how the rule would empower housing providers, renters, and other consumers to understand and avoid illegal housing practices by defining and illustrating quid pro quo and hostile environment harassment. Some commenters stated that this rule may help providers focus on the importance of eliminating harassment on their properties, and some commenters identified provisions of the rule that would provide useful guidance to housing providers, tenants, residents, and others involved in housing transactions.

More specifically, commenters expressed appreciation that the rule would apply not solely to sexual harassment but to harassment because of all protected characteristics, with some commenters sharing anecdotes of harassment based on a variety of protected characteristics that they believe the rule may help remedy. Other commenters supported the proposed rule's distinction between the Fair Housing Act and Title VII, with commenters endorsing the Department's proposal not to adopt the Title VII affirmative defense to an employer's vicarious liability.

A number of commenters assessed the rule to be in accord with case law, and approved of the balance the rule strikes between the rights and obligations of the parties in a fair housing matter. Some commenters noted that the proposed standard for determining whether conduct constitutes a hostile environment is appropriately individualized to the facts of each case. Some commenters specifically identified the benefits provided by the rule in establishing a uniform framework for fairly evaluating and appropriately responding to alleged harassment, which minimizes the subjective nature of adjudicating such claims. Other commenters expressed appreciation for the proposed rule's recognition that a single incident may establish hostile environment harassment. Some commenters expressed support for the rule's acknowledgement of the fear of retaliation many individuals with disabilities experience when trying to address issues of harassment in their housing.

Many commenters stated that the rule's description of traditional principles of agency liability is accurate and not an expansion of existing liability. Some commenters expressed appreciation that the rule would incorporate traditional liability principles for any type of discriminatory housing practice, not just harassment, and would rely on negligence principles and distinguish between direct and vicarious liability. Other commenters stated that the rule would not burden housing providers because the direct liability standard is aligned with established housing provider business practice. Some commenters expressed appreciation that the rule would place landlords on notice that they should take corrective action early on, once they know or should have known of the discrimination.

Several commenters stated that housing providers are already in possession of the tools they need to create living environments free from harassment. In particular, the commenters stated that housing providers are familiar with the corrective actions they may take in order to enforce their own rules. Another commenter stated that housing providers are in the best position to select, train, oversee, and assure the correct behavior of their agents, noting that effective enforcement of the rule depends on the potential for liability on the part of housing providers.

Some commenters expressed support for the proposed rule while seeking modifications at the final rule stage. For example, a commenter encouraged broad application of the rule so that intervention and corrective action would occur before victims of housing discrimination are forced out of their homes. Another commenter sought an expansive reading of the rule in order to prevent all forms of bullying. Some commenters sought to add factors to the totality of circumstances consideration, while other commenters sought to add to the classes protected by the rule.

Following are HUD's responses to commenters' suggested modifications to the rule and the other significant issues raised in the public comments.

A. Quid Pro Quo and Hostile Environment Harassment: § 100.600

a. General: § 100.600(a)

Issue: A commenter requested that HUD add seniors as a protected class under the rule. Other commenters stated that elderly persons often have disabilities, which make them particularly vulnerable to harassment. These commenters requested that the final rule make clear that the rule protects elderly persons from harassment because of disability.

HUD Response: HUD shares the commenters' concern for elderly persons but does not have the authority to add a new protected class to the Fair Housing Act and therefore is unable to adopt the commenters' recommendation to expand the scope of the rule in this way. Neither age nor senior status is a protected characteristic under the Act, although persons who are discriminated against because of their disabilities are protected under the Act without regard to their age. Therefore, elderly individuals who are subjected to quid pro quo or hostile environment harassment on the basis of disability or another protected characteristic are protected under the Act and this final rule.

Issue: A commenter suggested that HUD include a clause in the final rule to protect whistleblowers who experience harassment for reporting quid pro quo or hostile environment harassment. The commenter reported having witnessed such harassment and explained that whistleblowers are particularly vulnerable to quid pro quo and hostile environment harassment, but because they are not harassed on the basis of their race, color, religion, national origin, sex, familial status, or disability, they are not directly protected by the proposed regulation.

HUD Response: Anyone who is harassed for reporting discriminatory harassment in housing is protected by the Fair Housing Act. Section 818 of the Act makes it unlawful to coerce, intimidate, threaten, or interfere with a person on account of his or her having

aided or encouraged another person in the exercise or enjoyment of any right granted or protected by sections 803–806 of the Act. To highlight the essential role whistleblower protection plays in ensuring fair housing, HUD is adding to § 100.400 a new paragraph (c)(6), which provides the following example of a discriminatory housing practice ''Retaliating against any person because that person reported a discriminatory housing practice to a housing provider or other authority.''

Issue: Several commenters urged HUD to state in the final rule that harassment against persons who are lesbian, gay, bisexual, or transgender (LGBT), or because of pregnancy, violates the Fair Housing Act. They asked HUD to define harassment because of sex to include harassment based on sexual orientation, gender identity, sex stereotyping, or pregnancy. The commenters referenced studies about the pervasive harassment and discrimination such persons face in housing. They also noted that a number of federal courts and federal agencies have interpreted Title VII and other laws prohibiting discrimination because of sex to include discrimination on the basis of gender identity, gender transition, or transgender status. The commenters also pointed to HUD's ''Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity'' rule, which provides that persons may not be denied access to HUD programs because of sexual orientation or gender identity.

HUD Response: The Fair Housing Act already expressly prohibits discrimination based on pregnancy as part of its prohibition of discrimination because of familial status (42 U.S.C. 3602(k)), and HUD's Equal Access Rule applies only to HUD programs.

HUD agrees with the commenters' view that the Fair Housing Act's prohibition on sex discrimination prohibits discrimination because of gender identity. In *Price Waterhouse* v. *Hopkins,* the Supreme Court interpreted Title VII's prohibition of sex discrimination to encompass discrimination based on non-conformance with sex stereotypes, stating that ''[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'' [11] Taking note of *Price Waterhouse* and its progeny, in 2010, HUD issued a memorandum recognizing that sex discrimination prohibited by the Fair Housing Act includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion, ''clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.'' [12] Following the EEOC's decision, the Attorney General also concluded that:

> the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination ''because of . . . sex'' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.[13]

HUD reaffirms its view that under the Fair Housing Act, discrimination based on gender identity is sex discrimination. Accordingly, quid pro quo or hostile environment harassment in housing because of a person's gender identity is indistinguishable from harassment because of sex.[14]

HUD, in its 2010 memorandum, also advised that claims of housing discrimination because of sexual orientation can be investigated under the *Price Waterhouse* sex-stereotyping theory. Over the past two decades, an increasing number of Federal courts, building on the *Price Waterhouse* rationale, have found protections under Title VII for those asserting discrimination claims related to their sexual orientation.[15] Many Federal-sector EEOC decisions have found the same.[16] Although some Federal

[11] 490 U.S. 228, 251 (1989).

[12] *Macy* v. *Dept. of Justice,* No. 0120120821, 2012 EEOPUB LEXIS 1181, *13 (EEOC Apr. 20, 2012); s*ee also Lusardi* v. *Dept. of the Army,* No. 0120133395, 2015 EEOPUB LEXIS 896, *17 (EEOC Apr. 1, 2015).

[13] Attorney General Memorandum, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), posted at *http://www.justice.gov/file/188671/download.* Similarly, the Office of Personnel Management revised its nondiscrimination regulations to make clear that sex discrimination under Title VII includes discrimination based on gender identity. *See* 5 CFR 300.102–300.103; s*ee also* OFCCP Directive 2014–02, Gender Identity and Sex Discrimination (Aug. 19, 2014) (stating that discrimination based on gender identity or transgender status is discrimination based on sex), posted at *http://www.dol.gov/ofccp/regs/compliance/directives/Directive_2014–02_508c.pdf.*

[14] *See Glenn* v. *Brumby,* 663 F.3d at 1317 (''discrimination against a transgender individual because of her gender nonconformity is sex discrimination, whether it is described as being on the basis of sex or gender.''); s*ee also Finkle* v. *Howard Cnty,* 12 F. Supp. 3d 780, 788 (D. Md. 2014) (holding that ''Plaintiff's claim that she was discriminated against 'because of her obvious transgender[] status is a cognizable claim of sex discrimination under Title VII''); *Rumble* v. *Fairview Health Services,* No. 14–cv–2037, 2015 U.S. Dist. LEXIS 31591, *4–5 (D. Minn. Mar. 16, 2015) (in Affordable Care Act case, holding that ''[b]ecause the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping. Therefore, Plaintiff's transgender status is necessarily part of his 'sex' or 'gender' identity'').

[15] *See, e.g., Prowel* v. *Wise Bus. Forms, Inc.,* 579 F.3d 285, 291–92 (3rd Cir. 2009) (harassment of a plaintiff because of his ''effeminate traits'' and behaviors could constitute sufficient evidence that he ''was harassed because he did not conform to [the employer's] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation''); *Nichols* v. *Azteca Rest. Enter., Inc.,* 256 F.3d 864, 874–75 (9th Cir. 2001) (coworkers' and supervisors' harassment of a gay male because he did not conform to gender norms created a hostile work environment in violation of Title VII); *Hall* v. *BNSF Ry. Co.,* No. C13–2160 RSM, 2014 U.S. Dist. LEXIS 132878 *8–9 (W.D. Wash. September 22, 2014) (plaintiff's allegation that ''he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males'' stated a sex discrimination claim under Title VII); *Terveer* v. *Billington,* 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (Title VII claim based on sex stated when plaintiff's ''orientation as homosexual'' removed him from the employer's preconceived definition of male); *Heller* v. *Columbia Edgewater Country Club,* 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (''[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.''); *Centola* v. *Potter,* 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (''Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.''). *Cf. Videckis* v. *Pepperdine Univ.,* 2015 U.S. Dist. LEXIS 167672, *16 (C.D. Cal. 2015) (''It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.'').

[16] *Baldwin* v. *Dep't of Transp.,* EEOC Appeal No. 0120133080, slip op. at 9–11 (July 16, 2015); *Complainant* v. *Dep't of Homeland Sec.,* EEOC Appeal No. 0120110576, slip op. at 1 (Aug. 20, 2014) (''While Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII prohibits sex discrimination, including sex-stereotyping discrimination and gender discrimination'' and ''sex discrimination claims may intersect with claims of sexual orientation discrimination.''); *Couch* v. *Dep't of Energy,* EEOC Appeal No. 0120131136, slip op. at 1 (Aug. 13, 2013) (finding harassment claim based on perceived sexual orientation is a discrimination claim based on failure to conform to gender stereotypes); *Culp* v. *Dep't of Homeland Sec.,* EEOC Appeal 0720130012, slip op. at 1 (May 7, 2013) (Title VII covers discrimination based on associating with lesbian colleague); *Castello* v. *U.S. Postal Serv.,* EEOC Appeal No. 0520110649, slip op. at 1 (Dec. 20, 2011) (vacating prior decision and holding that complainant stated claim of discrimination based on sex-stereotyping through evidence of offensive comments by manager about female subordinate's relationships with women); *Veretto* v. *U.S. Postal Serv.,* EEOC Appeal No. 0120110873, slip op. at 1

appellate courts have declined to find sex discrimination under Title VII based on the sole fact of the person's sexual orientation, those courts nonetheless recognized the *Price Waterhous*e sex-stereotyping theory may be used to find discrimination based on sex.[17] These Title VII legal authorities are consistent with HUD's 2010 memorandum, in which HUD interprets the Fair Housing Act's prohibition on sex discrimination to include, at a minimum, discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on sex stereotypes. HUD's interpretation of sex discrimination under the Fair Housing Act is also consistent with the Department of Health and Human Services' rule interpreting sex discrimination under Section 1557 the Affordable Care Act[18] and the Department of Labor's rule interpreting sex discrimination under Title VII of the Civil Rights Act of 1964.[19]

Issue: Some commenters asked HUD to provide a definition of harassment. A commenter noted that the proposed rule defines two types of harassment—quid pro quo and hostile environment, but does not define the general term ''harassment.'' Another commenter stated that if HUD believes that other types of harassment may also violate the Fair Housing Act, HUD should provide a definition of harassment. Other commenters strongly supported the rule's definitions of quid pro quo and hostile environment harassment, describing them as clear and inclusive, and stated that the definitions and related examples provided in the rule clarify what conduct the Fair Housing Act prohibits and will aid all stakeholders' understanding of the rule's provisions.

HUD Response: The term harassment has broad colloquial usage with no defined parameters. For this reason, the final rule defines the specific terms ''quid pro quo'' and ''hostile environment harassment.'' Other conduct that might generically be referred to as harassment might fall in the categories of quid pro quo or hostile environment, or the conduct may constitute a different type of discriminatory housing practice in violation of section 818 of the Act or other provisions of the Act, or the conduct may not violate the Act at all. As the preamble to the proposed rule explained, a violation of section 818 may be established using the standards for quid pro quo or hostile environment harassment or by the specific elements of a section 818 violation, *i.e.,* (1) the plaintiff or complainant exercised or enjoyed—or aided or encouraged another person in the exercise or enjoyment of—a right guaranteed by sections 803–06; (2) the defendant's or respondent's conduct constituted coercion, intimidation, a threat, or interference; and (3) a causal connection existed between the exercise, enjoyment, aid or encouragement of the right and the defendant's or respondent's conduct.

Issue: Some commenters expressed concern that the proposed rule did not expressly state that sections 804(b) and 818 of the Fair Housing Act apply to discrimination that occurs after the complainant or plaintiff acquires the dwelling. The commenters stated that some courts have held that these provisions apply only to discrimination that affects access to housing and urged HUD to add language to the rule making clear that these particular provisions apply to post-acquisition discrimination claims.

HUD Response: HUD believes that the definitions of ''quid pro quo'' and ''hostile environment harassment'' make clear HUD's view that the Act covers post-acquisition conduct and therefore no additional language is required. These definitions mirror the coverage of sections 804(b), 804(f)(2), and 818 of the Fair Housing Act, which plainly apply to both pre-acquisition and post-acquisition discrimination claims. Moreover, HUD has long interpreted and enforced these provisions of the Act and others to protect against discrimination that occurs before one acquires a dwelling as well as while one is living in the dwelling. HUD's 1989 regulations interpreting sections 804(b), 804(f)(2), and 818 of the Act, for example, provide that discrimination prohibited under these provisions includes the ''maintenance or repairs of sale or rental dwellings,'' ''[d]enying or limiting the use of privileges, services, or facilities associated with a dwelling,'' and threatening, intimidating or interfering with persons ''in their enjoyment of a dwelling.'' The inclusion of language covering the maintenance of housing, the continued use of privileges, services, or facilities associated with housing, and the ''exercise or enjoyment'' of housing indicates circumstances in which residents—as opposed to just applicants—benefit from the Act's protections throughout their residency.

Sections 100.65(b)(6)–(7) of the proposed and of the final rule further illustrate some ways in which a person may violate sections 804(b), 804(f)(2), and 818 of the Fair Housing Act: ''conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting the services or facilities in connection therewith, on a person's response to harassment because of [a protected characteristic]; ''subjecting a person to harassment because of [a protected characteristic] that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting services or facilities in connection with the sale or rental of a dwelling.'' In sum, the Act and HUD's regulations, including this final rule, make clear that the Act prohibits discrimination that occurs while a person resides in a dwelling, and courts have repeatedly interpreted the Act similarly.[20]

(July 1, 2011) (court found that ''Complainant has alleged a plausible sex-stereotyping'' claim of harassment because he married a man).

[17] *See, e.g., Gilbert* v. *Country Music Ass'n,* 432 F. App'x 516, 520 (6th Cir. 2011) (acknowledging the validity of a sex-stereotyping claim ''based on gender non-conforming 'behavior observed at work or affecting . . . job performance,' such as . . . 'appearance or mannerisms on the job,' '' but rejecting the plaintiff's sex discrimination claim because his ''allegations involve discrimination based on sexual orientation, nothing more. He does not make a single allegation that anyone discriminated against him based on his 'appearance or mannerisms' or for his 'gender non-conformity.' '') (quoting *Vickers* v. *Fairfield Med. Ctr.,* 453 F.3d 757, 763 (6th Cir. 2006); *Pagan* v. *Gonzalez,* 430 F. App'x 170, 171–72 (3d Cir. 2011) (recognizing that ''discrimination based on a failure to conform to gender stereotypes is cognizable'' but affirming dismissal of the plaintiff's sex discrimination claim based on ''the absence of any evidence to show that the discrimination was based on Pagan's acting in a masculine manner''); *Dawson* v. *Bumble & Bumble,* 398 F.3d 211, 221, 222–23 (2d Cir. 2005) (observing that ''one can fail to conform to gender stereotypes in two ways: (1) Through behavior or (2) through appearance, but dismissing the plaintiff's sex discrimination claim because she ''has produced no substantial evidence from which we may plausibly infer that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action''). *See also Hively* v. *Ivy Tech Community College,* 2016 U.S. App. LEXIS 13746, *16–25 (7th Cir. 2016) (reviewing this line of cases).

[18] Nondiscrimination in Health Programs and Activities, 81 FR 31376, 31388–90 (May 18, 2016) (to be codified at 45 CFR part 92).

[19] Discrimination Because of Sex, 81 FR 39108, 39137–40 (June 15, 2016) (to be codified at 41 CFR part 60–20).

[20] *See, e.g., Bloch* v. *Frischholz,* 587 F.3d at779–81 (ruling that post-sale conduct by a homeowner's association could violate section 804(b) of the Act and allowing section 3604(b) claims to address post-acquisition conduct was consistent with HUD's regulations (citing 24 CFR 100.65(b)(4))); *Comm. Concerning Cmty. Improvement* v. *City of Modesto,* 583 F.3d 690, 713 (9th Cir. 2009) (concluding that the Act covers post-acquisition discrimination); *Neudecker* v. *Boisclair Corp.,* 351 F.3d at 364 (finding plaintiff's post-acquisition harassment claim valid under the Act); *DiCenso* v. *Cisneros,* 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing claim for sexual harassment hostile housing environment under the Act); *Honce* v. *Vigil,* 1 F.3d at 1089–90 (recognizing that the Act prohibits both quid pro quo and hostile housing

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Issue: Some commenters asked HUD to clarify how to distinguish potentially actionable harassment under the Fair Housing Act from protected speech under the First Amendment. A commenter said that it is not clear how conduct that allegedly constitutes harassment under the rule may be distinguished from other speech or conduct that is constitutionally protected or so trivial so as not to qualify as harassment in the first place. Another commenter said that courts have consistently held that the First Amendment protects a tenant who publicly speaks about a neighbor, even if that conduct is motivated by discriminatory intent. Another commenter asked whether the proposed rule would implicate constitutional protections of free speech or free exercise of religion if the housing provider evicts a tenant where, for example, two tenants are having heated religious arguments about the other's choice of religious attire. Another commenter stated that the proposed rule properly balanced the competing rights at issue and did not interfere with constitutionally protected speech because the rule would not encompass speech that is merely offensive or that causes nothing more than hurt feelings.

HUD Response: As discussed elsewhere in this preamble, not every dispute between neighbors is a violation of the Fair Housing Act. Moreover, speech that is protected by the First Amendment is not within the Act's prohibitions. First Amendment protections do not extend to certain acts of coercion, intimidation, or threats of bodily harm proscribed by section 818 of the Act. As the Supreme Court has stated, ''true threats'' have no First Amendment protection.[21] In Notice FHEO–2015–01, HUD has set out substantive and procedural guidelines regarding the filing and investigation of Fair Housing Act complaints that may implicate the First Amendment.[22] The Notice discusses how HUD handles complaints against persons who are not otherwise covered by the Act, but who are alleged to have violated Section 818 of the Act.

Issue: A commenter suggested that the rule is unnecessary because other administrative and legal remedies already exist for victims of harassment under state and local law. Another commenter suggested that the rule is unnecessary because HUD has already charged cases involving harassment under the Act.

HUD Response: This final rule formalizes and provides uniform standards for evaluating complaints of quid pro quo and hostile environment harassment under the Fair Housing Act. While other administrative and legal causes of action may exist for victims of quid pro quo and hostile environment harassment under landlord-tenant law, tort law, or other state law, they do not substitute for the protections against discrimination and the remedies provided under the Act. Moreover, the fact that HUD has previously issued charges of discrimination involving quid pro quo or hostile environment harassment does not negate the need for this rule.

Issue: A commenter asked HUD to abandon the rulemaking process and instead provide specific, clear guidance to the regulated community so that housing providers can ascertain the types of behavior that do and do not constitute harassment under the Fair Housing Act. Other commenters requested that HUD provide technical assistance on various aspects of the rule to residents, housing providers, and practitioners to ensure all parties know their rights under the law.

HUD Response: HUD declines to abandon this rulemaking. This regulation is needed to formalize standards for assessing claims of harassment under the Fair Housing Act and to clarify when housing providers and others covered by the Act may be liable for illegal harassment or other discriminatory housing practices. It has been HUD's experience that there is significant misunderstanding among public and private housing providers about the circumstances under which they may be liable. This regulation provides greater clarity in making that assessment. HUD will continue to offer guidance and training on the Fair Housing Act generally and on this final rule, as needed.

Issue: A commenter recommended that the rule expand the limits for damages in cases that establish sexual harassment in housing.

HUD Response: HUD declines to make this change because it is unnecessary. The Act contains no limit on damages that may be awarded, specifically authorizing an award of ''actual damages.'' 42 U.S.C. 3612(g)(3); 3613(c)(1); 3614(d)(1)(B).

Issue: A commenter asked HUD to consider expanding the time for filing sexual harassment complaints where a hostile environment case includes subsequent harassment that occurs many months after the initial act of sexual harassment.

HUD Response: HUD declines to adopt this recommendation because the Fair Housing Act specifically defines the statute of limitations for filing complaints. It is one year after an alleged discriminatory housing practice occurred or terminated for a complaint with HUD and two years after an alleged discriminatory housing practice occurred or terminated for a civil action in federal district court or state court. *See* 42 U.S.C. 3610; 3613. If a violation is continuing, the limitations period runs from the date of the last occurrence or termination of the discriminatory act.[23]

1. Quid Pro Quo Harassment: § 100.600(a)(1)

Issue: A commenter asked how the rule would ''differentiate between a situation of involuntary quid pro quo that genuinely must be governed by the Act and a situation where one party is manipulating the rule following a mutually beneficial and agreed upon transaction.''

HUD Response: The rule's definition of quid pro quo harassment requires a request or demand that is ''unwelcome.'' A mutually beneficial and agreed upon transaction is not unwelcome and would not constitute quid pro quo harassment under the rule or the Act. It is important to note, however, that, as the rule states, if an individual

environment sexual harassment); *Woods-Drake* v. *Lundy,* 667 F.2d 1198, 1201 (5th Cir. 1982) (finding that a landlord's discriminatory conduct against current tenants violated section 3604(b) of the Act); *Richards* v. *Bono,* No. 5:04CV484–OC–10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) (''[b]ecause the plain meaning of 'rental' contemplates an ongoing relationship, the use of that term in § 3604(b) means that the statute prohibits discrimination at any time during the landlord/tenant relationship, including after the tenant takes possession of the property''); *United States* v. *Koch,* 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (''[I]t is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein.''); U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Questions and Answers on Sexual Harassment under the Fair Housing Act (2008), available at *http://portal.hud.gov/hudportal/documents/huddoc?id=QAndASexualHarassment.pdf* (recognizing that current tenants may file fair housing complaints under the Act); Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not,* 115 Colum. L. Rev. Sidebar 106, 122–23 (2015) (explaining that many post-acquisition actions, such as evictions and harassment, may give rise to violations under sections 804(a) and 804(b) of the Act).

[21] *See, e.g., R.A.V.* v. *City of St. Paul,* 505 U.S. 377, 388 (1992).

[22] Notice FHEO 2015–01 *found at: http://portal.hud.gov/hudportal/documents/huddoc?id=5-26-2015notice.pdf.*

[23] *See, e.g., Havens Realty Corp.* v. *Coleman,* 455 U.S. 363, 380–81 (1982); *Neudecker* v. *Boisclair Corp.,* 351 F.3d at 363 ; *Spann* v. *Colonial Vill., Inc.,* 899 F.2d 24, 34–35 (D.C. Cir. 1990); *Heights Cmty Congress* v. *Hilltop Realty, Inc.,* 774 F.2d 135, 139–41 (6th Cir. 1985).

acquiesces to an unwelcome request or demand, unlawful quid pro quo harassment may have occurred. Moreover, if a housing provider regularly or routinely confers housing benefits based upon the granting of sexual favors, such conduct may constitute quid pro quo harassment or hostile environment harassment against others who do not welcome such conduct, regardless of whether any objectionable conduct is directed at them and regardless of whether the individuals who received favorable treatment willingly granted the sexual favors.[24] Liability in all situations involving allegations of harassment must be determined on a case-by-case basis.

Issue: A commenter stated that the preamble to the proposed rule was vague in stating that ''a person is aggrieved if that person is denied or delayed in receiving a housing-related opportunity or benefit because another received the benefit.'' The commenter was concerned that this statement would require a PHA to identify, investigate, and document a defense to any tenant-perceived delay in receiving benefits.

HUD Response: The quoted phrase is not vague when read in context, which explains the meaning of quid pro quo harassment under the Fair Housing Act. The phrase refers to a person who is aggrieved because he or she is denied a benefit that went to another in exchange for sexual favors, for example. Aggrieved persons under the Act and HUD's regulation are limited to those who were injured (or are about to be injured) by a discriminatory housing practice as defined in the Act. Neither the Fair Housing Act nor this final rule prohibits delays in receiving housing-related opportunities or benefits for nondiscriminatory reasons. If, however, an applicant or tenant alleges that he or she has been denied or delayed in receiving a benefit because others submitted to requests for sexual favors, the PHA should investigate to determine if quid pro quo or hostile environment harassment has occurred.

2. Hostile Environment Harassment: § 100.600(a)(2)

Issue: Several commenters recommended that HUD ensure consistency of the discussion of hostile environment harassment throughout the preamble in order to prevent any unintentional barriers for harassment victims seeking to bring claims under the Fair Housing Act. The commenters specifically stated that in one section of the preamble to the proposed rule, HUD defines ''hostile environment harassment'' to require unwelcome conduct because of a protected characteristic that ''*unreasonably* interferes'' with the use and enjoyment of a dwelling, or with the exercise of other rights protected by the Act. By contrast, the commenters stated, other sections of the preamble rightly omit the ''unreasonably'' qualifier when discussing hostile environment harassment. The commenters requested that the word ''unreasonably'' be removed from the discussion in the preamble because it is unnecessary and will create confusion. They stated that unwelcome conduct that is ''sufficiently severe or pervasive'' as to interfere with one's enjoyment of rights protected under the Act is in itself unreasonable.

HUD Response: The term ''unreasonably'' does not appear in the definition of ''hostile environment harassment'' in the regulatory text of the proposed rule. The term ''unreasonably'' was used in the preamble to the proposed rule to convey how a claim of hostile environment would be evaluated; that is, from the perspective of a reasonable person in the aggrieved person's position. HUD agrees that the use of the term ''unreasonably'' in the preamble may have caused confusion by conflating the substantive standard with the method of proof. In this final rule, as was the case in the proposed rule, the definition of ''hostile environment harassment'' in § 100.600(a)(2) is not phrased as requiring proof that unwelcome conduct ''unreasonably'' interfere with a right protected by the Fair Housing Act. But it remains that whether unwelcome conduct is sufficiently severe or pervasive as to interfere with rights protected by the Act, and therefore constitute hostile environment harassment, is evaluated from the perspective of a reasonable person in the aggrieved person's position.

Issue: A commenter suggested that HUD include definitions and descriptions of ''bullying'' in this final rule because bullying is very similar to hostile environment harassment.

HUD Response: HUD does not agree that it is necessary to add the word ''bullying'' to the final rule in order to cover conduct that could be considered bullying. Section 100.600(a)(2) of the proposed rule and of this final rule, which defines hostile environment harassment and specifies the factors to be considered when evaluating whether particular conduct creates a hostile environment in violation of the Act, is broadly worded and fully captures the concept of bullying because of a protected characteristic that the commenter seeks to include.

Issue: A commenter said HUD should include social isolation and neglect as forms of harassment under the rule, especially when they occur with the intent to drive a person from his or her home or interfere with his or her enjoyment of a dwelling. According to the commenter, these actions have major implications for the psychological well-being of an individual.

HUD Response: HUD appreciates that social isolation and neglect are serious concerns. This rule is limited to conduct engaged in because of a protected characteristic. If a tenant is subjected to unwanted severe or pervasive conduct because of a disability, for example, which leads to social isolation with the intent or effect of driving the tenant from his or her home or interfering with his or her enjoyment of a dwelling, such conduct could constitute hostile environment harassment under the standards set forth in the rule.

Issue: A commenter said the rule could more clearly distinguish harassment from inappropriate behavior or disputes that do not rise to the level of harassment. Other commenters stated that they appreciated the rule's emphasis on the totality of the circumstances, which will ensure that mere disagreements, mistaken remarks, or isolated words spoken in the heat of the moment will not result in liability unless the totality of the circumstances establishes hostile environment harassment.

HUD Response: HUD agrees that not every disagreement between persons involved in a housing transaction constitutes unlawful harassment because of a protected characteristic in violation of the Act and believes the rule appropriately captures the distinction. Section 100.600(a)(2) of the proposed rule and of this final rule defining hostile environment harassment requires that the unwelcome conduct be ''sufficiently *severe or pervasive''* as to interfere with defined features of the housing transaction: The availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms or conditions of a residential real estate-related transaction.

[24] *Cf.* EEOC Policy Guidance No. N–915.048, Employer Liability under Title VII for Sexual Favoritism (Jan. 12, 1990) (providing that widespread sexual favoritism based upon solicitations for and/or the granting of sexual favors or other sexual conduct ''can form the basis of an implicit 'quid pro quo' harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive'').

Issue: A commenter recommended that the final rule recognize the role of preferential treatment for services and living arrangements, except when provided because of disability, as a type of discrimination. The commenter said that preferential treatment is a means through which to encourage and reward secondary actors for their role in creating a hostile environment, and the rule should recognize it as such. The commenter also recommended that HUD request and make available data regarding repairs or upgrades so any non-monetary favor in exchange for harassment, by an agent not directly employed by the management or owner, may be determined.

HUD Response: HUD declines to adopt the commenter's suggestions because the rule as currently proposed already accommodates the commenter's concerns. Providing preferential treatment that creates a hostile environment because of race, color, religion, sex, familial status, or national origin already violates the Fair Housing Act under the standards proposed in the rule. Moreover, HUD's regulations already contain illustrations as to this type of violation. Therefore, additional language regarding preferential treatment is not needed. In addition, processes for requesting and making available data regarding repairs or upgrades are outside the scope of this rule. HUD notes that in investigations, it requests data regarding repairs or upgrades as appropriate to determine whether a violation of the Fair Housing Act has occurred.

Issue: Two commenters asked whether the rule would apply to situations in which residential property managers or other employees of a housing provider are harassed by the housing provider's tenants. One of the commenters explained that she was a resident of the building she managed, that she had a disability, and that she had suffered harassment and threats by other residents.

HUD Response: The proposed standards generally would not apply to situations in which a property manager or other housing provider employee is harassed by the housing provider's tenants because such situations ordinarily do not involve a housing-related transaction covered by the Act. Where, however, a property manager is also a resident of the building that the property manager manages (*e.g.,* a resident-manager), the property manager is entitled to the same protection from discriminatory harassment under the Act and under this final rule as any other resident. Additionally, Section 818 of the Act makes it unlawful to coerce, intimidate, threaten, or interfere with any person on account of the person having assisted others in enjoying or exercising their fair housing rights. Therefore, to the extent that a property manager or other housing provider employee (whether a resident or not) is subjected to coercion, intimidation, threats, or interference because he or she aided or encouraged other people in exercising or enjoying a right protected by the Act—*e.g.,* by receiving and responding to one tenant's complaint of discriminatory harassment by another tenant—the manager or employee may be entitled to protection under the Act.[25]

i. Totality of the Circumstances: § 100.600(a)(2)(i)

Issue: Some commenters requested that HUD clarify the definition of ''totality of the circumstances'' in § 100.600(a)(2)(i) because, in the commenters' view, the proposed rule does not sufficiently explain the showing required to prove hostile environment harassment in violation of the Fair Housing Act. Other commenters supported HUD's standard for determining whether conduct constitutes a hostile environment, stating that the standard and its factors are clear and permit an appropriately individualized assessment of the facts of each case. These commenters stated that the rule's explanation of hostile environment harassment provides meaningful guidance to both housing providers and potential claimants.

HUD Response: HUD believes the ''totality of the circumstances'' standard in this final rule provides an appropriate standard for assessing claims of hostile environment harassment, while also providing courts with the flexibility to consider the numerous and varied factual circumstances that may be relevant when assessing a specific claim. HUD therefore chooses not to alter the definition of the term ''totality of the circumstances,'' although it will add to the final rule the standard by which the evidence is to be evaluated, which is from the perspective of a reasonable person in the aggrieved person's position. Section 100.600(a)(2) defines what constitutes hostile environment harassment under the Act. In accordance with this provision, establishing a hostile environment harassment violation requires proving that: A person was subjected to unwelcome spoken, written, or physical conduct; the conduct was because of a protected characteristic; and the conduct was, considering the totality of the circumstances, sufficiently severe or pervasive as to interfere with or deprive the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act. Whether a hostile environment harassment violation has occurred is a fact-specific inquiry, and the rule supplies a non-exhaustive list of factors that must be considered in making that determination. It would be impossible to quantify in the rule the amount of evidence necessary to make such a showing in every case involving a claim of hostile environment harassment. The additional instruction in the rule text, and not just the preamble, that the ''totality of the circumstances'' is to be evaluated from the perspective of a reasonable person in the aggrieved person's position will aid all parties in assessing whether a ''hostile environment'' has been created.

Issue: HUD received several comments regarding the explanation in the preamble to the proposed rule that hostile environment harassment should be assessed from the perspective of a reasonable person in the aggrieved person's position. A commenter expressed concern that this standard is too subjective, stating that one reasonable person's measure may be different from another reasonable person's measure. Another commenter asked HUD to provide a definition of the term ''reasonable person.'' Other commenters approved of the standard articulated in the preamble to the proposed rule and commended HUD for recognizing that the reasonable person standard must take into account the circumstances of the aggrieved person. A commenter recommended that the rule text itself explicitly state this objective standard. Another commenter, however, recommended that HUD not add the standard to the rule text itself because such addition may invite courts to second-guess the rationality and behavior of the actual victim, rather than focusing on the conduct and its surrounding circumstances.

HUD Response: As HUD explained in the preamble to the proposed rule, whether unwelcome conduct is sufficiently severe or pervasive to create a hostile housing environment is evaluated from the perspective of a reasonable person in the aggrieved person's position. This standard is an objective one, but ensures that an assessment of the totality of the circumstances includes consideration of whether persons of the same protected class and of like personal experience as

[25] A property manager may also be protected by Title VII, whether or not he or she resides at the housing.

the plaintiff or complainant would find the challenged conduct to create a hostile environment. At the proposed rule stage, HUD chose not to add the ''reasonable person in the aggrieved person's position'' standard to the text of the rule itself. But in light of the confusion expressed by some of the commenters, HUD has added this standard to the text of the final rule discussing the totality of the circumstances standard. In adding this reasonable person standard for assessing the evidence to the rule text, HUD does not intend to create an additional requirement for proving a hostile environment harassment claim beyond the showing required under § 100.600(a)(2) of the rule. The definition of hostile environment harassment in this final rule remains unchanged and focuses on defining the types of conduct that may establish a claim of hostile environment harassment under the Fair Housing Act.

(A) Factors To Be Considered: § 100.600(a)(2)(i)(A)

Issue: Several commenters commended HUD's explanation in the preamble to the proposed rule that individuals have heightened rights within their home for privacy and freedom from unwelcome speech and conduct. Many commenters agreed with HUD that harassment in or around one's home can be far more intrusive, violative, and threatening than harassment in the more public environment of one's workplace. Some commenters said these considerations should be explicitly incorporated into the text of the rule itself. Commenters specifically requested that HUD revise proposed § 100.600(a)(2)(i)(A) by adding as a factor to be considered in determining whether hostile environment harassment exists ''the heightened rights in or around one's home for privacy and freedom from harassment'' or ''the heightened reasonable expectation of privacy and freedom from harassment in one's home.'' Another commenter said that § 100.600(a)(2)(i)(A) should expressly state that conduct occurring in one's home may result in a violation of the Fair Housing Act even though the same conduct in one's place of employment may not violate Title VII.

HUD Response: HUD declines to add language regarding individuals' heightened rights within the home for privacy and freedom from unwelcome speech and conduct to the rule text in § 100.600(a)(2)(i)(A). The non-exhaustive list of factors included in § 100.600(a)(2)(i)(A) identifies circumstances that can be demonstrated with evidence during the adjudication of a claim of hostile environment harassment under the Act. Evidence regarding the ''location of the conduct,'' as explicitly identified in § 100.600(a)(2)(i)(A), is a critical factor for consideration and will allow courts to take into account the heightened privacy and other rights that exist within the home when determining whether hostile environment harassment occurred. For similar reasons, HUD also declines to add language stating that harassing conduct may result in a violation of the Fair Housing Act even though such conduct might not violate Title VII. HUD believes that by establishing a hostile environment harassment standard tailored to the specific rights protected by the Fair Housing Act and by directing that hostile environment claims under the Act are to be evaluated by assessing the totality of the circumstances—including the location of the unwelcome conduct and the context in which it occurred—the final rule ensures that courts consider factors unique to the housing context when making the fact-specific determination of whether the particular conduct at issue violates the Act. Therefore, while HUD agrees that unwelcome conduct in or around the home can be particularly intrusive and threatening and may violate the Fair Housing Act even though the same or similar conduct in an employment setting may not violate Title VII, HUD does not believe the proposed additions to § 100.600(a)(2)(i)(A) are necessary.

Issue: A commenter supported HUD's identification of the relationship of the persons involved as a factor to be considered when determining whether hostile environment harassment has occurred, but recommended that the final rule further refine the concept. Specifically, in the homeowner's association context, the commenter drew distinctions between the relationships among the different resident-owners and between a board member and a resident-owner. The commenter also distinguished these relationships from landlord-tenant relationships.

HUD Response: HUD appreciates these distinctions and believes the rule already accommodates them by requiring the relationship of the parties involved be taken into account in determining whether a hostile environment has been created. This is one of several factors that HUD identified for evaluating allegations of hostile environment harassment. In a community governed by a homeowner's association, for example, the influence an owner-board member has over another resident by virtue of his or her authority to make association policy, to approve homeowner requests, and to bring or adjudicate charges of association rule violations may be greater than a non-board member, and thus each person's relationship to the victim should be considered when assessing whether a hostile environment exists. No further refinement to the rule is necessary to address the commenter's concerns; nor is any further refinement desirable, as it would risk inadvertently inserting limiting factors into the otherwise broad and flexible totality of the circumstances test.

(B) Physiological or Physical Harm: § 100.600(a)(2)(i)(B)

Issue: A commenter stated that § 100.600(a)(2)(i)(B) of the proposed rule, which concerns psychological or physical harm, is confusing. The commenter requested that HUD clarify the meaning of this provision.

HUD Response: HUD agrees that § 100.600(a)(2)(i)(B) may be confusing and has revised this provision at the final rule stage; the revision is intended to clarify without altering the meaning of the provision. Proposed § 100.600(a)(2)(i)(B) provided that ''Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, as well as the amount of damages to which an aggrieved person may be entitled. Neither psychological nor physical harm, however, must be demonstrated to prove that a hostile environment exists.'' Final § 100.600(a)(2)(i)(B) provides that ''Neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment was created and, if so, the amount of damages to which an aggrieved person may be entitled.'' As explained at the proposed rule stage, evidence of such harm is but one of many factors that may be considered in assessing the totality of the circumstances. So long as the unwelcome conduct is sufficiently severe or pervasive as to interfere with or deprive the victim of a right protected by the Act, there is no need to also demonstrate psychological or physical injury in order to prove a hostile environment violation.

ii. Title VII Affirmative Defense: § 100.600(a)(2)(ii)

Issue: HUD received several comments on § 100.600(a)(2)(ii) of the proposed rule, which provides that the

Title VII affirmative defense to an employer's vicarious liability for hostile environment harassment by a supervisor does not apply to claims brought pursuant to the Fair Housing Act. Several commenters commended HUD's decision not to extend the Title VII affirmative defense to the Fair Housing Act and agreed with HUD that such a defense would be inappropriate in the housing context, in part because of the lack of an exhaustion requirement under the Fair Housing Act, as well as the differences between an agent in the employment context versus an agent in the housing context.

Other commenters recommended that HUD apply the judicially-created Title VII affirmative defense to Fair Housing Act claims. One such commenter stated that HUD, by rule, cannot import a Title VII cause of action onto the Fair Housing Act without the judicially-created limitations on a Title VII employer's liability under that cause of action. Another commenter believed that HUD eliminated an existing affirmative defense for housing providers that is available in the employment context. Given the scope of potential harassment claims, this commenter found unwarranted HUD's position that the Title VII affirmative defense is not relevant to harassment in the housing context because, in HUD's view, a housing agent who harasses residents is inevitably aided by his or her agency relationship with the housing provider. In the commenter's view, a responsible housing provider who exercises reasonable care to prevent harassment, and who provides a complaint mechanism that a resident unreasonably fails to invoke, should be afforded the same affirmative defense available to employers in analogous situations. Another commenter asked HUD to reconsider its decision to reject the affirmative defense as it appears unfair and based on an assertion that agents of housing providers are equivalent to a supervisory employer in terms of their power over applicants and/or tenants.

HUD Response: After carefully considering the analysis provided by the commenters on both sides of the issue, HUD has retained its view that the Title VII affirmative defense is not appropriate to include as a defense under the Fair Housing Act. HUD has never found occasion to employ such a defense and remains unaware of any court having extended the Title VII affirmative defense to fair housing claims, and commenters did not identify any such case law. Moreover, unlike Title VII, which requires employees to exhaust their administrative remedies before filing an action in court, the Fair Housing Act has no exhaustion requirement, and nothing in the text of the Fair Housing Act otherwise indicates that Congress intended to permit a housing provider to avoid vicarious liability for discriminatory harassment perpetrated by its agents by establishing its own complaint process or procedure. To the contrary, the Act authorizes any aggrieved person to directly commence a civil action in federal or state court, whether or not the individual has previously chosen to file an administrative complaint with HUD.[26] Therefore, as explained in the preamble to the proposed rule, the Title VII affirmative defense is not appropriately applied to harassment in the housing context because its adoption would impose burdens on victims of discriminatory harassment that are incompatible with the broad protections and streamlined enforcement mechanisms afforded by the Fair Housing Act.

HUD notes that some comments on this issue demonstrated a misunderstanding of the potential scope of the Title VII affirmative defense. The Title VII affirmative defense does not apply to harassment claims based on direct liability. Thus, contrary to the perceptions of some commenters, the affirmative defense does not apply to cases in which an employer—or housing provider—knew or should have known of an agent or third-party's harassment and failed to stop it, because such cases involve direct rather than vicarious liability.

Therefore, in exercising its power to promulgate rules to interpret and carry out the Act, HUD believes it would be inappropriate to add, for the first time, an affirmative defense that would require victims of hostile environment harassment—who are often housing insecure or otherwise especially vulnerable—to choose between the risk of retaliation by the perpetrator and the risk of losing their right to hold a housing provider liable for the acts of its agents. Instead, the traditional principles of vicarious liability—including those standards that hold a principal liable for an agent's conduct that is taken within the scope of employment, with the apparent authority of the principal, or that is otherwise aided by the agency relationship—will continue to govern a housing provider's liability for harassment. While HUD declines to extend the Title VII affirmative defense to the Fair Housing Act, the development and dissemination of anti-harassment policies will still assist housing providers to avoid litigation by identifying and quickly addressing improper conduct by employees or other agents.

Issue: A commenter requested that HUD create safe harbors from liability for housing providers for harassment by their agents and third-parties. Specifically, the commenter stated that liability for unknown and unintended harassment by an agent or third-party should not be imposed on a housing provider where the housing provider: (1) Provides periodic mandatory fair housing training for its employees and agents (including training related to harassment claims); (2) requires unaffiliated management companies to conduct similar training of their employees, report to the property owner on a regular basis about the steps it is taking to avoid fair housing claims generally, and promptly report any potential fair housing claim to a designated official of the housing provider; and (3) implements and publicizes a hotline or other secure communication mechanism whereby a tenant can confidentially notify the housing provider about possible harassment by employees or other tenants.

Another commenter expressed concern that the rule as proposed would expand a PHA's exposure to liability by making the PHA liable for perceived hostile environment harassment that occurs beyond its knowledge or control and fails to create or incentivize any new remedies to protect tenants against hostile environment harassment. As a result, according to the commenter, the proposed rule raises the possibility that future litigation over alleged harassment might be driven by plaintiff attorneys' fees rather than the merit of the allegations or effective remedies. In light of these concerns, the commenter suggested that HUD revise the proposed rule to adopt defenses similar to those applicable to public agencies under California state law for injuries caused by dangerous conditions on the public agency's property. As described by the commenter, the State law defense provides that liability attaches to the public agency if the plaintiff establishes that: (1) The public employee's negligence or wrongful act or omission created the dangerous condition; or (2) the public entity had actual or constructive notice of the dangerous condition before the injury occurred. The commenter believes this standard incentivizes the public agency to maintain its property and train its staff in order to limit its exposure to liability and reduce the risk of injuries.

[26] *See* 42 U.S.C. 3614(a).

HUD Response: As explained in the preamble to the proposed rule, traditional principles of tort liability and agency law apply in fair housing cases. The standards for direct and vicarious liability established in this final rule continue to reflect such principles and do not impose any new legal obligations or create or define new agency relationships or duties of care. For the same reasons that HUD does not interpret the Fair Housing Act to import the Title VII affirmative defense for a claim of hostile environment harassment by the provider's agent, HUD does not believe the requested safe harbor or state law-derived defense from liability is appropriate.

The California State law identified by the commenter essentially imposes a negligence standard for public agency liability, which is akin to the standard of direct liability that governs Fair Housing Act claims under § 100.7(a)(1)(ii). In addition, under traditional principles of agency law, a housing provider may be held vicariously liable for the discriminatory acts of an employee or agent regardless of whether the housing provider knew of or intended the discriminatory conduct where the employee was acting within scope of his or her agency, or where the harassment was aided by the agency relationship. HUD believes that traditional tort and agency law standards for assessing liability under the Act will encourage housing providers to provide appropriate training for their staff and to ensure compliance with the Act.

Issue: A commenter asserted that the proposed rule, including HUD's decision not to adopt the Title VII affirmative defense, raises Federalism implications. The commenter stated that the proposed rule creates a cause of action based on Title VII law that could, ostensibly, be brought against a State, even when the actions are performed by a city or other sub-recipient of funds, and obviate the State's sovereign immunity despite its ongoing assertion that it has not waived such sovereign immunity. The commenter said that the rule would do so while removing the judicially-created Title VII affirmative defense. The commenter recommended that HUD withdraw the rule or create a specific carve-out for actions against a State that limits and defines the extent of vicarious liability, including a safe-haven for conduct or policy akin to an affirmative defense.

HUD Response: Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial, direct compliance costs on state and local governments and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Under the Executive Order, Federalism implications are those having substantial direct effects on states or local governments (individually or collectively), on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have such implications. As discussed elsewhere, the rule creates no new cause of action, liability or obligation on the part of any housing provider, including a State. The rule interprets the Fair Housing Act's prohibition on discriminatory harassment, and in doing so, neither alters the substantive prohibitions against discrimination in the Act nor creates enhanced liability or compliance costs for States or any other entities or individuals. Similarly, the rule does not alter any sovereign immunity protections that a State may have under the Eleventh Amendment. In addition, the rule does not remove a pre-existing affirmative defense, because no court of which HUD is aware has ever applied the Title VII affirmative defense or any other affirmative defense or safe harbor to Fair Housing Act claims; nor has HUD ever applied such a standard. HUD notes further that creating an affirmative defense or safe harbor for States would not be consistent with Congressional intent, for the reasons discussed above.

b. Type of Conduct: § 100.600(b)

Issue: A commenter inquired whether a verbal or written account from an aggrieved tenant would be enough to comprise a showing of hostile environment harassment under the Act.

HUD Response: A verbal or written account from an aggrieved tenant may be enough to provide notice to a housing provider that a hostile environment may be occurring, but whether it would be sufficient to establish that the conduct is sufficiently severe or pervasive to create a hostile environment depends on the totality of the circumstances.

c. Number of Incidents: § 100.600(c)

Issue: A commenter expressed concern that the proposed rule includes both a ''totality of the circumstances standard'' and a ''single incident standard'' and asked HUD to provide more descriptive language to determine the existence of a hostile environment based on such standards. The commenter asked HUD to clarify or provide examples of when a single incident of harassment would be sufficient to create a hostile environment. Several other commenters expressed approval of § 100.600(c) of the proposed rule, which provides that a single incident of harassment because of race, color, religion, sex, familial status, national origin, or disability may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo. Other commenters stated that in some cases a single act can be so severe as to deprive individuals of their right to use and enjoy their housing.

HUD Response: HUD did not intend to propose two different standards for determining whether hostile environment harassment has occurred. To avoid confusion and better clarify the relationship between § 100.600(c) and § 100.600(a)(2), HUD is revising § 100.600(c) at this final rule stage. Section 100.600(a)(2) of the rule provides the only standard that must be met to prove a claim of hostile environment harassment under the Act—namely, that: A person was subjected to unwelcome spoken, written, or physical conduct; the conduct was because of a protected characteristic; and the conduct was sufficiently severe or pervasive as to interfere with or deprive the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act. As provided in § 100.600(a)(2)(i), a determination of whether this standard has been met is to be based on the totality of the circumstances. Section 100.600(c) is included in the rule to make clear that a single incident of harassment because of a protected characteristic, if sufficiently severe, can constitute a hostile environment harassment violation (as defined in § 100.600(a)(2)). Whether a claim of hostile environment harassment is based on a single incident or repeated incidents of unwelcome conduct, an assessment of the totality of the circumstances is still required. For example, the nature of the unwelcome conduct (*e.g.,* whether it was spoken, written and/or physical) and the location of the conduct (*e.g.,* whether it occurred inside the victim's apartment or in a common space), among other potential considerations, would factor into an assessment of whether a single incident of harassment was sufficiently severe to interfere with or deprive the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act.

HUD is revising proposed § 100.600(c) at this final rule stage as follows.

Proposed § 100.600(c) provided that: ''A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo.'' Final § 100.600(c) now provides: ''A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment, or evidences a quid pro quo.''

B. Illustrations: §§ 100.60, 100.65, 100.80, 100.90, 100.120, 100.130, and 100.135

Issue: Several commenters supported the illustrations included throughout the proposed rule and asked HUD to provide additional examples of prohibited practices in the final rule. They requested more examples of: Unwelcome conduct; how quid pro quo harassment occurs with respect to protected classes other than sex; single incidents that constitute a hostile environment; and when direct liability exists. Commenters also recommended that HUD add to the final rule examples clarifying the relationship between age and disability and add examples of harassment of pregnant women, Muslims, persons with limited English proficiency, persons with mental health-related disabilities or HIV/AIDS, and persons who assert their rights to organize. Another commenter stated that HUD has provided useful illustrations of what does not violate the Act in other fair housing contexts, and requested that HUD do the same here, citing 24 CFR 100.205(b) (concerning the impracticality of meeting the Act's design and construction standards).

HUD Response: HUD retains the illustrations contained in the proposed rule, but otherwise declines to add more illustrations to the final rule. The rule contains numerous illustrations of possible quid pro quo and hostile environment harassment referencing all protected classes. But whether illegal harassment has or has not occurred in a particular situation is fact-specific and must be determined on a case-by-case basis. For this reason, the illustrations provided are simply more specific descriptions of the legal standard, *e.g.,* conditioning the availability of housing on a person's response to sexual harassment illustrates an unlawful refusal to sell or rent. Providing illustrations as to what does not violate the Act would not be appropriate because of the necessarily fact-specific nature of such an inquiry. HUD notes that § 100.205(b), which the commenter cited, does not describe conduct that does not violate the Act, but rather provides examples of when the impracticality exception to the Act's design and construction requirements is applicable. Lastly, some of the suggested examples are outside the scope of the Act, *e.g.,* the right to organize, but HUD notes that persons would be protected by the Act to the extent the harassment is because of their race, color, religion, sex, familial status, national origin, or disability.

C. Liability for Discriminatory Housing Practices: § 100.7

a. Direct Liability for One's Own Discriminatory Conduct: § 100.7(a)(1)(i)

Issue: A commenter stated that the language in § 100.7(a)(1)(i), which states that a person is directly liable for the person's own conduct that results in a discriminatory housing practice, may lead to the liability of innocent actors and third-parties who somehow contributed to an illegal discriminatory action. The commenter gave as an example a situation in which a person supplied the pen that a housing provider used to make notes on an application that the housing provider later rejected because of a protected characteristic of the applicant.

HUD Response: The rule creates no new or enhanced forms of liability. As discussed in the preamble of the proposed rule, § 100.7(a)(1)(i) does nothing more than restate the most basic form of direct liability, *i.e.,* that a person is directly liable for his or her own discriminatory housing practices, as defined by the Act. Whether a person's conduct constitutes a discriminatory housing practice under sections 804–806 or 818 of the Act depends upon the specific facts.

b. Direct Liability for Negligent Failure To Correct and End Discrimination: § 100.7(a)(1)(ii) and (iii)

Issue: Several commenters expressed concern about the ''should have known'' standard in proposed § 100.7(a)(1)(ii) and (iii), which states that a person is directly liable for ''(ii) [f]ailing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person *knew or should have known* of the discriminatory conduct,'' and ''(iii) [f]ailing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person *knew or should have known* of the discriminatory conduct . . . '' (emphasis added).

Some commenters stated that this standard creates almost certain liability for landlords and that requiring actual knowledge would be more fair to property owners because liability would only attach for failing to act on known discrimination. A commenter stated that the final rule should limit liability where a housing provider has limited knowledge of misconduct. In contrast, other commenters stated that the ''knew or should have known'' standard is reasonable and consistent with the Fair Housing Act, legal negligence principles, and business practices of housing providers. One commenter complained that the proposed rule appears to require actual knowledge, even though the standard only requires that a defendant ''should have known'' of the harassment.

Commenters asked HUD to clarify how a housing provider ''should have known'' about harassment, especially in the context of tenant-on-tenant harassment. A commenter questioned what the housing provider needs to know before liability attaches and whether the housing provider needs to know that the harasser's actions violate the Fair Housing Act or only that the harasser took some action toward the victim. Several commenters expressed concern that a PHA might be liable when a housing voucher holder is harassed but neither the apartment owner nor voucher holder informs the housing agency about the harassment. One commenter expressed a similar concern that owners living in another city or state may not learn that harassment is taking place on their property unless the tenant tells the owner, and another commenter asked about a PHA's potential liability when harassment occurs over the internet but is unknown to the housing agency.

HUD Response: The ''knew or should have known'' standard is well established in civil rights and tort law.[27] A housing provider ''should have known'' of the harassment of one resident by another when the housing provider had knowledge from which a reasonable person would conclude that the harassment was occurring. Such knowledge can come from, for example, the harassed resident, another resident,

[27] As the Supreme Court has recognized, fair housing actions are essentially tort actions. *See Meyer* v. *Holley,* 537 U.S. 280, 285 (2003) (citing *Curtis* v. *Loether,* 415 U.S. 189, 195–96 (1974)); *see also Burlington Indus.* v. *Ellerth,* 524 U.S. 742, 759 (''An employer is negligent with respect to sexual harassment if it *knew or should have known* about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII. . . .'') (emphasis added).

or a friend of the harassed resident.[28] There is no requirement that the resident contact the housing provider about the harassment, only that the housing provider have knowledge from which a reasonable person would conclude that harassment was occurring. If the housing provider has no information from which a reasonable person would conclude that one resident or a third-party was harassing another resident, the housing provider is not liable for failing to take action to correct and end the harassment. If the knowledge component is not met, a housing provider cannot be held liable for a resident's or third-party's discriminatory conduct. HUD disagrees that this standard will subject landlords to certain liability. Application of this standard to the liability provisions of the rule helps clarify the Act's coverage for residents and housing providers. It is intended to help guide housing providers in their assessment of when to intervene to prevent or end discriminatory conduct. HUD encourages housing providers to create safe, welcoming, and responsive housing environments by regularly training staff, developing and publicizing anti-discrimination policies, and acting quickly to resolve complaints once sufficient information exists that would lead a reasonable person to conclude that harassment was occurring.

Issue: A commenter was concerned that § 100.7(a)(1)(ii) is seeking to hold the agent liable for the actions of its principal, contrary to Supreme Court precedent, and asked why this provision is necessary in light of proposed § 100.7(b) (vicarious liability), which states that the housing provider is already liable for the unlawful actions of the agent, whether known or not.

HUD Response: Section 100.7(a)(1)(ii) addresses a principal's direct liability for the principal's own negligent conduct in overseeing (or failing to oversee) its agent or employee. Under the negligence theory of direct liability, the principal is liable only if the principal knew or should have known of the agent's discriminatory conduct and failed to take corrective action to end it. Section 100.7(b), by contrast, holds the principal vicariously liable for the discriminatory conduct of its agent, regardless of whether the principal knew or should have known of the agent's conduct. As the commenter noted, an agent is not vicariously liable for the principal's conduct, but is directly liable for his or her own actions. Section 100.7 does not create liability that does not already exist; it does not hold the agent liable for the conduct of the principal, and it is entirely consistent with traditional agency principles and Supreme Court precedent.

Issue: A commenter asked for clarification of the term ''third-party'' in § 100.7(a)(1)(iii). The commenter was concerned that if left undefined, the term would include everyone. The commenter asked HUD to limit the term to what the commenter perceived to be HUD's primary concern—''liability resulting from a landlord's failure to assist a tenant subject to another tenant's harassment.''

HUD Response: HUD does not agree that its use of the term ''third-party'' requires further clarification in the text of the rule. In the context of the rule, liability for discriminatory conduct by a ''third-party'' is appropriately limited to a non-employee or non-agent who engaged in quid pro quo or hostile environment harassment of which the housing provider knew or should have known and had the power to correct.

Issue: A commenter stated that it is unclear from the proposed rule whether the obligation in proposed § 100.7(a)(1)(iii) to take action to end a discriminatory housing practice by a third-party *must* be derived from a contract, lease, or law, or whether it *could* be derived from these sources. The commenter also requested that HUD clarify in the rule whether generic lease provisions related to the use and enjoyment of one's home that are found in almost every lease would be enough to create the obligation and related liability contemplated in § 100.7(a)(1)(iii). Another commenter expressed a concern that housing providers would take steps to minimize their liability for failing to take corrective action by revising their leases and other documents so that they do not create a duty to protect tenants. A commenter expressed concern that the term ''duty,'' incorporated from other laws and contracts, is difficult to fully assess and therefore bound to create unanticipated consequences.

HUD Response: HUD recognizes that proposed § 100.7(a)(1)(iii) may have caused some confusion, so HUD has reworded the provision in the final rule. Proposed § 100.7(a)(1)(iii) stated that a person is directly liable for ''failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowner's association, condominium or cooperative), or by federal, state or local law.'' Revised section 100.7(a)(1)(iii) of this final rule provides that a person is directly liable for ''failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct a discriminatory housing practice by a third-party depends upon the extent of control or any other legal responsibility the person may have with respect to the conduct of such third-party.'' The final rule does not use the term ''duty,'' and no longer identifies specific categories of potential sources for such a duty. A housing provider's obligation to take prompt action to correct and end a discriminatory housing practice by a third-party derives from the Fair Housing Act itself, and its liability for not correcting the discriminatory conduct of which it knew or should have known depends upon the extent of the housing provider's control or any other legal responsibility the provider may have with respect to the conduct of such third-party.[29] For example, when a housing provider enters into a lease agreement with a tenant, the lease typically obligates the housing provider to exercise reasonable care to protect the residents' safety and curtail unlawful conduct in areas under the housing provider's control, whether or not the lease contains specific language creating that responsibility. Even if the lease does not expressly create such obligations, the power to act may derive from other legal responsibilities or the operation of law.[30]

[28] *See, e.g., Neudecker* v. *Boisclair Corp.,* 351 F.3d at 364 (owner may be liable for acts of tenants and management's children after failing to respond to plaintiff's complaints of harassment); *Bradley* v. *Carydale Enterprises,* 707 F. Supp. 217 (E.D. Va. 1989) (finding that owners and managers' failure to address one tenant's complaints of racial harassment by another tenant stated a claim under 42 U.S.C. 1981 and 1982).

[29] *See, e.g., Neudecker* v. *Boisclair Corp.,* 351 F. 3d at 364 (owner may be liable for acts of tenants and management's children after failing to respond to plaintiff's complaints of harassment); *Fahnbulleh* v. *GFZ Realty, LLC,* 795 F. Supp. 2d 360, 364–65 (D. Md. 2011) (denying landlord's motion to dismiss because the Act imposes no categorical rule against landlord liability for tenant-on-tenant harassment); *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n,* 1997 U.S. Dist. LEXIS 21762, *26 (D.D.C. 1997) (condo association that knew of harassment by resident but failed to take corrective actions may violate Act).

[30] *See, e.g., Wilstein* v. *San Tropai Condo. Master Ass'n,* 1999 U.S. Dist. LEXIS 7031, *28–33 (N.D. Ill. Apr. 21, 1999) (rejecting condo association's

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Issue: A commenter expressed concern that proposed § 100.7(a)(1)(iii) creates liability on the part of a community association (homeowner association, condominium or cooperative) for the illegal acts of residents over whom they have no control. The commenter urged HUD to remove or revise the proposed rule's extension of direct liability to community associations for the discriminatory actions of non-agents. The commenter stated that community associations generally lack legal authority to mandate that residents take actions described in the preamble of the proposed rule because the associations cannot evict homeowners or otherwise impose conditions not specifically authorized by the association's covenants, conditions, and restrictions (CC&Rs) or state law. The commenter suggested that if the language in § 100.7(a)(1)(iii) remains, it should be modified to clearly state which terms and conditions in association bylaws and regulations constitute a duty on the part of an association or its agents to investigate and punish residents for illegal discriminatory housing practices.

HUD Response: As noted above, HUD has slightly revised § 100.7(a)(1)(iii) to clarify that a housing provider is liable under the Fair Housing Act for third-party conduct if the provider knew or should have known of the discriminatory conduct, has the power to correct it, and failed to do so. HUD also notes that the rule does not add any new forms of liability under the Act or create obligations that do not otherwise exist. The rule does not impose vicarious liability (*see* § 100.7(b)) on a community association for the actions of persons who are not its agents. Section 100.7(a)(1)(ii) describes a community association's liability for its own negligent supervision of its agents, and § 100.7(a)(1)(iii) describes a community association's liability for its own negligence for failing to take prompt action to correct and end a discriminatory housing practice by a third-party. With respect to § 100.7(a)(1)(iii), the rule requires that when a community association has the power to act to correct a discriminatory housing practice by a third party of which it knows or should have known, the community association must do so.

As the commenter recognizes, a community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association's CC&Rs or by other legal authority.[31] Community associations regularly require residents to comply with CC&Rs and community rules through such mechanisms as notices of violations, threats of fines, and fines. HUD understands that community associations may not always have the ability to deny a unit owner access to his or her dwelling; the rule merely requires the community association to take whatever actions it legally can take to end the harassing conduct.

Issue: A few commenters suggested that HUD should reconsider imposing liability on a landlord for tenant-on-tenant harassment because the law in this area is not well-settled. The commenters expressed concern that proposed § 100.7(a)(1)(iii) exceeds the scope of the Act by expanding liability for housing providers to include liability for third-party harassment of a resident when the housing provider did not act with discriminatory intent. One commenter, relying on Title VII case law and an interpretation of the phrase ''because of,'' stated that a landlord must have acted with discriminatory intent in order to be liable under the Fair Housing Act. Another commenter stated that although section 804(a) of the Fair Housing Act does not require a showing of intentional discrimination, claims brought under sections 804(b) and 817 of the Act do, citing *Francis* v. *King Park Manor, Inc.,* 91 F. Supp. 3d 420 (E.D.N.Y. 2015). Another comment stated that to establish a housing provider's liability for failing to take action to correct third-party harassment, the plaintiff must show not just that the housing provider failed to correct the harassment but also that the housing provider did so because of animus against the victim due to a protected characteristic. A commenter pointed to *Lawrence* v. *Courtyards of Deerwood Ass'n, Inc.,* 318 F. Supp. 2d 1133 (S.D. Fla. 2004), as an example of a case in which the court dismissed the fair housing claim against the housing provider because the plaintiffs failed to establish that the housing provider's ineffective response to the harassment was due to racial animus. Commenters also pointed to *Ohio Civil Rights Comm'n* v. *Akron Metro. Hous. Auth.,* 892 NE.2d 415, 420 (Ohio 2008), in which the court declined to impose liability on landlords for failing to take corrective action in response to discriminatory harassment committed by the landlord's tenants. A commenter also suggested that not requiring discriminatory animus on the part of the housing provider would amount to strict liability. The commenters proposed that in light of these contrary federal and state court decisions, HUD should require proof of some degree of animus by the housing provider before subjecting the provider to direct liability for the acts of third parties.

HUD Response: HUD does not agree that a housing provider's failure to act to correct third-party harassment must be motivated by a discriminatory intent or animus before the provider can be held liable for a Fair Housing Act violation. In reaching this conclusion, HUD considered its own experience in administering and enforcing the Fair Housing Act, the broad remedial purposes of the Act,[32] relevant case law including the Supreme Court's recent ruling in *Texas Department of Community Affairs* v. *Inclusive Communities Project, Inc.* holding that the Fair Housing Act is not limited to claims of intentional discrimination, and the views of the EEOC regarding Title VII. The case law cited by the commenters fails to support the proposition that the Fair Housing Act requires discriminatory intent in order to find a housing provider liable for its negligent failure to correct resident-on-resident or other third-party discriminatory conduct. The district court decision in *Francis* v. *Kings Park Manor* is the sole exception to that principle, and HUD disagrees with its ruling. HUD notes that this decision is on appeal to the Second Circuit.

Section 100.7(a)(1)(iii) sets out a negligence standard of liability, which does not require proof of discriminatory

argument that it had no duty to stop harassment of plaintiff by other residents and holding that association could be liable where evidence indicated that association knew of the harassment and bylaws authorized the association to regulate such conduct); *see also Bradley* v. *Carydale Enterprise*s, 707 F. Supp. 217 (E.D. Va. 1989) (finding that owners and managers' failure to address one tenant's racial harassment of a neighboring tenant states a claim under 42 U.S.C. 1981, 1982).

[31] *See, e.g., Wilstein* v. *San Tropai Condo. Master Ass'n,* supra*28–33; *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n,* 1997 U.S. Dist. LEXIS 21762, *26. *See also Freeman* v. *Dal-Tile Corp.,* 750 F. 3d 413, 422–23 (4th Cir. 2014) (holding that ''an employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end [it].'') (internal quotation marks and citations omitted); *Galdamez* v. *Potter,* 415 F. 3d 1015, 1022 (9th Cir. 2005) (''An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.'').

[32] *See e.g., Havens Realty Corp.* v. *Coleman,* 455 U.S. 363, 380 (1982) (Congress intended Fair Housing Act to be broadly remedial); *cf. Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 413 (1968) (describing the Fair Housing Act as ''a comprehensive open housing law''); 42 U.S.C. 3601 (''It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.'').

intent or animus on the part of the provider, but is far from strict liability. Under this standard, a plaintiff or the charging party must prove three elements to establish a housing provider's liability for third-party harassment: (1) The third-party created a hostile environment for the plaintiff or complainant; (2) the housing provider knew or should have known about the conduct creating the hostile environment; and (3) the housing provider failed to take prompt action to correct and end the harassment while having the power to do so. HUD does not agree that a fourth element—that the housing provider's failure to act was more than negligent, and was motivated by discriminatory intent—is necessary or appropriate.

Contrary to one comment, the Supreme Court in *Inclusive Communities Project* has already ruled that the ''because of'' clause in the Fair Housing Act does not require proof of discriminatory intent. While not addressing every aspect of the cited decisions, HUD notes the following: In *Lawrence* v. *Courtyards of Deerwood Ass'n,* cited by another commenter, the court dismissed the discriminatory harassment claim not for lack of discriminatory intent on the part of the landlord, but because it found, *inter alia,* that the dispute did not involve discriminatory harassment of one tenant by another but instead reflected mutual antagonism between two tenants. The court in *Lawrence* distinguished *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n,* 1997 U.S. Dist. LEXIS 21762, *22 (D.D.C 1997), which held the landlord liable under the Fair Housing Act for its failure to adequately address sexual harassment of one tenant by another because ''the [Carrollsburg Condo] association's by-laws specifically authorized the association to curtail conduct that contravened the law'' and provided that a violation of local or federal law was a violation of the association rules.[33]

Finally, the state court decision cited by one commenter did not involve claims under the Fair Housing Act and does not provide reason for HUD to alter § 100.7(a)(1)(iii) at the final rule stage. In *Ohio Civil Rights Commission* v. *Akron Metropolitan Housing Authority,* the Ohio Supreme Court's refusal to hold a landlord liable under a state civil rights law for failing to take corrective action in response to one tenant's racial harassment of another tenant was premised on an incorrect reading of Title VII jurisprudence. The court misconstrued Title VII case law to require an agency relationship between an employer and a perpetrator of harassment in order to hold the employer liable for negligently failing to stop sexual harassment by the perpetrator.[34] In fact, under Title VII, an agency relationship is *not* required in order to hold employers liable for negligently failing to stop discriminatory harassment of which the employer knew or should have known. Both the EEOC and the federal courts have recognized that an employer may be held liable for negligently failing to stop discriminatory harassment in the workplace by non-employees or non-agents.[35] The principle of liability codified in § 100.7(a)(1)(iii) of this final rule is consistent with these Title VII authorities and, in HUD's view, appropriately serves the Fair Housing Act's parallel antidiscrimination objectives in the housing context. In sum, the proposed rule and this final rule reflect HUD's considered judgment, consistent with prevailing precedent and EEOC regulations, that a housing provider (including a homeowner's association) or property manager is liable under the Act for negligently failing to take corrective action against a third-party harasser when the provider or manager knew or should have known of the harassment and had the power to end it. In light of the above, HUD declines to make the proposed revisions to the final rule.

Issue: A commenter stated that the imposition of liability on private landlords for tenant-on-tenant harassment is inappropriate and will have several negative consequences. The commenter stated that private owners do not have the expertise or resources to undertake what is essentially a social services function to mediate disputes between neighbors. In addition, the commenter expressed concern that the proposed rule could make it more difficult and risky for property owners to take affirmative steps to operate racially integrated housing. The commenter stated that the rule will be an economic disincentive for individuals, companies, and other investors to engage in the business of renting residential real estate and that the Section 8 voucher program depends on the participation of these private entities in order to achieve other fair housing goals. The commenter expressed concern that the effect of the proposed rule will be to reduce the supply of available affordable units, thus disproportionately harming low-income families. Other commenters raised concerns that landlords, when confronted by tenants who mutually accuse each other of harassment, will be unable to take necessary corrective actions because of the rule's prohibition against moving or causing injury to a complaining tenant, or will reprimand the wrong tenant because they lack expertise with investigations.

Numerous other commenters supported the rule's recognition that a housing provider may be directly liable for harassment of a tenant by the housing provider's employee or a third-party. These commenters stated that any suggestion that this rule will unduly burden housing providers is exaggerated, that the rule is wholly consistent with the ordinary responsibilities of housing providers to ensure habitability, and that housing providers are familiar with the tools they have to enforce their own rules—tools they frequently wield.

HUD Response: The rule does not create new or enhanced liabilities for housing providers, including those who participate in the Section 8 program. HUD believes that this rule will help clarify the obligations that housing providers already have in offering and maintaining housing environments free from discrimination and that comply with the Fair Housing Act. We are long past the time when racial harassment is a tolerable price for integrated housing; a housing provider is responsible for maintaining its properties free from all discrimination prohibited by the Fair Housing Act. Under the Act, discriminatory practices are those that violate sections 804, 805, 806, or 818. Such practices do not encompass all incivilities, and thus it is important to note that not every quarrel among neighbors amounts to a violation of the Fair Housing Act.[36] Ending harassing or

[33] *Lawrence* v. *Courtyards of Deerwood Ass'n,* 318 F. Supp. 2d at 1149 (citing *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n,* 1997 U.S. Dist. LEXIS 21762 at *22.

[34] 892 NE.2d at 419–20.

[35] *See* 29 CFR 1604.11(e) (''An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where there employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.''); *see also, e.g., Freeman* v. *Dal-Tile Corp.,* 750 F.3d 413, 422–24 (4th Cir. 2014) (employer potentially liable for failing to address discriminatory harassment by a customer); *Lockard* v. *Pizza Hut, Inc.,* 162 F.3d 1062, 1072–75 (10th Cir. 1998) (same; collecting cases recognizing employer liability for failing to correct third-party harassment).

[36] *See, e.g., Bloch* v. *Frischholz,* 587 F.3d at 783 (quoting *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n,* 388 F.3d 327, 330 (7th Cir. 2004) (noting that interference under § 818 ''is more than a 'quarrel among neighbors' ''); *Sporn* v. *Ocean Colony Condominium Assn,* 173 F. Supp. 2d 244, 251–52 (D.N.J. 2001) (noting that section 818 ''does

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otherwise discriminatory conduct may necessitate evicting the tenant who has engaged in the conduct, not the aggrieved tenant.[37] The Act does not, however, prohibit housing providers from offering to move an aggrieved tenant, as long as that tenant may refuse the offer without consequence or retaliation.

Issue: Some commenters stated that the proposed rule outlining third-party liability conflicts with HUD's PIH Notice 2015–19, titled Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions. One commenter was concerned that PIH Notice 2015–19 makes it harder for PHAs to correct situations that may lead to hostile environment harassment, while the proposed harassment rule would make it easier for PHAs to be held liable for the activities of tenants who take actions against other tenants to create a hostile environment. Another commenter was concerned that PHAs would be forced to choose whether to comply with HUD's harassment rule or with HUD's Notice, which prohibits the use of an arrest record as evidence of criminal activity that can support an adverse admission, termination, or eviction decision. These commenters therefore asked HUD to remove third-party liability from the rule.

HUD Response: HUD believes the commenters' concerns are misplaced because there is no conflict between this rule and PIH Notice 2015–19. The rule does not add any new forms of liability under the Fair Housing Act and the formalization of clear and consistent standards for evaluating harassment claims under the Act does not conflict with the requirements of the PIH Notice. Compliance with PIH Notice 2015–19 does not prevent a PHA from considering reliable evidence of relevant criminal activity when considering how to respond to complaints of harassment. Nor does this rule require a PHA to make use of arrest records to determine whether discriminatory harassment has occurred. Consistent with traditional tort liability principles, as well as current federal Fair Housing Act jurisprudence, this rule codifies HUD's longstanding view that a property owner, including a PHA, may be held liable for failing to take corrective action within its power in response to tenant-on-tenant harassment of which the owner knew or should have known. Where a PHA receives a complaint or otherwise learns of possible discriminatory harassment of one resident by another, the PHA is advised to assess the situation and, if necessary, take appropriate corrective action to end the harassment.

Issue: Several commenters expressed concern that application of the rule would conflict with HUD's homeless or permanent supportive housing programs or might have a detrimental effect on persons with mental disabilities. A commenter stated that tenants with severe mental health disabilities may create a hostile environment for neighbors and asked HUD to explain what direct responsibility the housing provider has to correct negative behaviors. A commenter stated that the rule incentivizes evictions over efforts to determine whether a reasonable accommodation might be appropriate for persons with mental disabilities. Another commenter stated that because tenants with mental illness often have difficulty finding housing, the proposed rule might result in an increased rate of homelessness among persons with mental disabilities. A commenter asked HUD to revisit the proposed rule's third-party liability provision to avoid harming this particularly vulnerable population.

Other commenters stated that the rule would help protect many vulnerable persons from eviction. These commenters supported the statement in the proposed rule's preamble that eviction is only one of the many corrective actions housing providers may utilize to address harassment.

HUD Response: The rule neither changes a housing provider's responsibilities toward tenants with mental disabilities nor incentivizes evictions of such persons. It is not uncommon for the behavior of one tenant to frustrate, displease, or annoy another tenant. This is true for behavior by tenants with and without psychiatric disabilities. The rule does not require a housing provider to take action whenever one tenant engages in behavior that another tenant finds objectionable. The Act prohibits discrimination against applicants and tenants with disabilities, including evicting individuals with disabilities because other tenants find them frustrating, displeasing, or annoying. The Act does not, however, require that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of others or would result in substantial physical damage to the property of others.[38] The housing provider must make an individualized assessment as to whether such a threat exists based on reliable objective evidence that considers: (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. In evaluating a recent history of overt acts, a housing provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat. Reasonable accommodations must be made when they may be necessary to afford such persons an equal opportunity to use and enjoy a dwelling. HUD refers the reader to the Joint Statement of HUD and DOJ on Reasonable Accommodations under the Fair Housing Act for further information.[39]

1. Corrective Action: § 100.7(a)(2)

Issue: A commenter asked HUD to remove the prohibition against causing injury to a complaining party.

HUD Response: HUD declines to remove the prohibition on causing additional injury to a person who has already been injured by illegal harassment. Permitting such additional injury would be inconsistent with the Act's purposes to prevent unlawful discrimination and remedy discrimination that has already occurred.

Issue: One commenter requested further guidance as to what constitutes appropriate corrective action by a housing provider to stop tenant-on-tenant harassment. The commenter specifically inquired whether a single verbal statement by a landlord to a tenant who allegedly engaged in harassing conduct would be sufficient corrective action to relieve a landlord from liability under the rule. Another commenter asked HUD to impose realistic and reasonable limitations on housing providers' obligation to take corrective action.

HUD Response: There is no one way that a housing provider must respond to complaints of third-party harassment,

not [] impose a code of civility'' on neighbors); *United States* v. *Weisz,* 914 F. Supp. 1050, 1054–55 (S.D.N.Y. 1996) (holding that allegations that Jewish neighbor harassed complainants because of their religion were ''nothing more than a series of skirmishes in an unfortunate war between neighbors''). *But see Ohana* v. *180 Prospect Place,* 996 F. Supp. 238, 243 (E.D.N.Y. 1998) (neighbors who intentionally intrude upon quietude of another's home may violate Act).

[37] *See, e.g., Miller* v. *Towne Oaks East Apartments,* 797 F. Supp. 557, 562 (E.D. Tex.1992) (finding landlord liable for violating Act by evicting both harasser and victim of harassment instead of only harasser).

[38] 42 U.S.C. 3604(f)(9).

[39] *See* Joint Statement of HUD and DOJ on Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), posted at *http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.*

although the rule makes clear that a provider that fails to effectively respond may be subject to liability under the Act. Section 100.7(a)(2) provides that corrective actions must be effective in ending the discrimination, but may not injure the aggrieved persons. For example, corrective actions appropriate for a housing provider to utilize to stop tenant-on-tenant harassment or other third-party harassment might include verbal and written warnings; enforcing lease provisions to move, evict, or otherwise sanction tenants who harass or permit guests to harass; issuing no-trespass orders against guests; or reporting conduct to the police. What constitutes appropriate and effective corrective action will depend on the nature, frequency, and severity of the harassment. While in some cases a single verbal reprimand by a housing provider may be sufficient to effectively end discriminatory harassment of one tenant by another, the housing provider should notify the victim that such action was taken, and it is advisable for the housing provider to document this action in its records. Additionally, the housing provider should follow up with the victim of the harassment after the corrective action is taken to ensure that it was effective. If the housing provider knows or should have known that the corrective action was ineffective, the provider has a responsibility to take additional corrective actions within its power. If, however, corrective action is effective in ending the discriminatory conduct, a housing provider is not required to take additional action simply because the victim believes further action should have been taken. HUD does not agree that there is a need to add a specific limitation on a housing provider's responsibility to take corrective action within its power to act in response to discriminatory harassment of which the provider knew or should have known.

Issue: A commenter stated that because tenants are not agents or employees, landlords cannot simply compel tenants to take or avoid particular action and do not have the ability to shape or alter tenants' behavior beyond threatening and carrying out evictions. Another commenter asked HUD to consider that there are substantial practical differences between the ability of housing providers to take corrective action to end tenant-on-tenant harassment and their ability to control the actions of their employees because there is no agency relationship in the former. Another commenter stated that most homeowners would be very concerned if association board members, employees, or agents injected themselves into the interpersonal relationships of homeowners and residents to investigate their interactions and relationships for discriminatory elements. This commenter also said that for PHAs, eviction is often unavailable as a remedy for alleged tenant-on-tenant harassment because the U.S. Housing Act of 1937 and federal regulations limit the ability of PHAs to carry out evictions, except for specified causes. In addition, the commenter stated that the result of these restrictions and the proposed rule would be to create significant new liability for PHAs for tenant-on-tenant harassment without creating any new mechanisms for PHAs to mitigate this liability.

In contrast, other commenters stated that the rule does not create any new liability because landlords have an obligation to protect tenants' rights to quiet enjoyment and generally have the right to take actions against renters and occupants who disturb the quiet enjoyment of others.

HUD Response: Neither the proposed rule nor this final rule create new liability for housing providers, including PHAs or homeowner's associations, regarding resident-on-resident harassment. Nor does the rule require a housing provider to take action that is beyond the scope of its power to act. HUD recognizes that specific remedies that may be available to employers to stop an employee's illegal practices will be distinct from those that a housing provider may use to stop residents who are engaging in discriminatory conduct. Creating and posting policy statements against harassment and establishing complaint procedures, offering fair housing training to residents and mediating disputes before they escalate, issuing verbal and written warnings and notices of rule violations, enforcing bylaws prohibiting illegal or disruptive conduct, issuing and enforcing notices to quit, issuing threats of eviction and, if necessary, enforcing evictions and involving the police are powerful tools available to a housing provider to control or remedy a tenant's illegal conduct. These tools are also available to PHAs, and, contrary to one commenter's concern, eviction is available to a PHA to correct a tenant's discriminatory conduct as the PHA may terminate a tenancy for ''serious or repeated violation of material terms of the lease,'' 24 CFR 966.4(l)(2)(i), which include the obligation that tenants must ''act . . . in a manner which will not disturb other residents' peaceful enjoyment of their accommodations. . . .'' 24 CFR 966.4(f)(11).

Issue: A commenter expressed concern that a PHA may be held directly liable for failing to correct actions by third-parties over whom they have little or no control. As an example, the commenter cited harassment of a voucher-holding tenant by neighbors who are not also voucher-holders and not otherwise affiliated with the PHA. Similarly, another commenter stated that the rule could be interpreted to make landlords liable for conduct that occurs off their property or that has nothing to do with a tenant's home.

HUD Response: This rule describes the standard for assessing liability under the Fair Housing Act. These fair housing standards apply to private and public landlords alike and do not turn on whether a tenant holds a Housing Choice Voucher or receives other government rental assistance. HUD also reiterates that a housing provider is not responsible for correcting every negative action by any third-party. Rather, the third-party action must constitute a discriminatory housing practice as defined by the Act, and the housing provider must have the power to correct it. As provided in the final rule and discussed elsewhere in this preamble, whether a housing provider has the power to take corrective measures in a specific situation—and what corrective measures are appropriate—is dependent on the facts, including the extent of control or any other legal responsibility the person may have with respect to the conduct of such third-party. There may be instances where the ability to correct the unlawful conduct is beyond a housing provider's control. Thus, when confronted with discriminatory harassment of one of its Housing Choice Voucher-holders or other tenants, the housing agency should explore what corrective actions are within its power and are appropriate to take.

Issue: A commenter suggested that an unintended consequence of the proposed rule could be that property owners would remove security devices, such as video cameras and other surveillance mechanisms, for fear that such measures may create a duty on the part of the property owner to correct neighbor-on-neighbor harassment. In contrast, other commenters stated that housing providers may feel the need to provide for more oversight of residences which may interfere with residents' right to peaceful enjoyment of their dwelling.

HUD Response: Removing security devices will not relieve a housing provider of its obligation to take the

actions within its power to promptly correct and end a discriminatory housing practice. Elsewhere in the preamble, HUD discusses various options that may be available to housing providers to address neighbor-on-neighbor harassment.

Issue: A commenter stated that owners should be encouraged to use positive incentives, such as promoting better communication with—and healthy relationships among—tenants, and educating tenants about their rights to prevent harassment, instead of taking corrective actions that may harm tenants, such as ending a lease or evicting a tenant—.

HUD Response: HUD agrees that positive incentives are useful tools for preventing harassment. HUD believes, however, that warnings, threats of evictions, evictions, and lease terminations may also be necessary corrective actions to end harassment. The preamble and rule make clear that there is no one way to prevent or correct harassment, only that the methods need to be effective at ending it.

c. Vicarious Liability: § 100.7(b)

Issue: Several commenters questioned the description of vicarious liability at § 100.7(b) of the proposed rule. One commenter said § 100.7(b) could be interpreted to impose vicarious liability on an organization's directors, officers, or owners and suggested HUD clarify, consistent with *Meyer* v. *Holley*, that it is the organization—not the individual directors, officers, or board members—who are the ''principal or employer'' subject to vicarious liability under the Fair Housing Act. The commenter asked HUD to issue clarification that the proposed regulations do not contravene or attempt to reverse *Meyer* v. *Holley,* 537 U.S. 280 (2003). In contrast, other commenters applauded the description of vicarious liability in the rule, stated that the description follows well-established common law tort and agency principles, and expressed support for the proposed rule's reliance on *Meyer* v. *Holley.*

HUD Response: Subsection 100.7(b) merely describes the well-established concept of vicarious liability, under which principals may be held liable for the discriminatory acts of their agents or employees whether or not they knew of the discriminatory conduct. As articulated in *Meyer* v. *Holley,* and as explained in the preambles to the proposed rule and this final rule, traditional agency principles apply to the Fair Housing Act.[40] Under agency principles, a principal is vicariously liable for the actions of his or her agents taken within the scope of their relationship or employment, or for actions taken outside the scope of their relationship or employment when the agent is aided in the commission of such acts by the existence of the agency relationship.[41] Determining whether an agency relationship exists is a factual determination that looks to an agent's responsibilities, duties, and functions; whether the discriminatory conduct of the agent was within the scope of the agency relationship or aided by the existence of the agency relationship is also a fact-specific inquiry.

Issue: Some commenters questioned the statement in the proposed rule's preamble that a principal is vicariously liable for the actions of an agent or employee taken outside the scope of the agency relationship or employment when the agent or employee is aided in the commission of such acts by the existence of the agency relationship. A commenter agreed that a principal is vicariously liable for the acts of its agents committed within the scope of the agency, regardless of knowledge or intent to violate the Act by the principal, but believes that, in adopting the ''aided in agency'' standard, the proposed rule goes beyond traditional tort concepts and does not reflect the limited concepts of vicarious liability endorsed in *Meyer* v. *Holley.* The commenter considered it acceptable to hold a real estate company liable for discriminatory acts or statements made by its brokers in the scope of their agency, but disagreed that a housing provider should be liable for misconduct of a janitorial employee outside the scope of that employee's duty because he wore a badged uniform or possessed keys or passes to tenants' dwellings. Another commenter asked for clarity on the reasoning behind the assertion in the preamble to the proposed rule that an agent who harasses residents or applicants is necessarily aided by his or her agency relationship with the housing provider.

HUD Response: As discussed throughout this preamble, the proposed and final rule do not create new forms of liability. Instead, HUD has decided to adopt well-established principles of agency law, including that a principal may be vicariously liable for the actions of an agent or employee that are taken outside the scope of the employment or agency relationship if the agent or employee is aided in committing the acts by the existence of the employment or agency relationship. Agency law must be applied to the specific facts at issue to determine whether such a situation exists and gives rise to a principal's liability. The statement in the proposed rule that an agent who engages in hostile environment harassment of residents or applicants is aided by the agency relationship with the housing provider was not intended to suggest the agent is necessarily so aided with respect to every discriminatory housing practice. It was intended to explain one of the reasons HUD chose not to import into the Fair Housing Act the Title VII affirmative defense to an employer's vicarious liability for hostile environment harassment. As explained in that context, a housing provider's agent who engages in harassment holds a position of power and authority over the victimized resident or applicant, regardless of the agent's specific duties. This is because a resident or applicant has only an arms-length economic relationship with the housing provider, while an agent-perpetrator is clothed with the authority of the housing provider. Given this inherent imbalance of power and control over the terms or conditions of the housing environment, the distinction between harassment by supervisory and non-supervisory employees that supported the creation of the affirmative defense in the employment context do not extend to the housing context.

D. Other Issues

Issue: A commenter stated that HUD should apply the proposed rule only to its own investigative and administrative

[40] 537 U.S. at 282, 287.

[41] *See, e.g., Glover* v. *Jones,* 522 F. Supp. 2d 496, 507 (W.D.N.Y. 2007) (holding that ''a property owner may be vicariously liable under the Fair Housing Act for the actions of an employee even when they are outside the scope of employment . . . if the employee was aided in accomplishing the tort by the existence of the agency relation.'') (quoting *Mack* v. *Otis Elevator Co.,* 326 F. 3d 116, 123 (2d Cir. 2003) (internal quotation marks omitted); *see also Boswell* v. *GumBayTay,* No. 2:07–CV–135–WKW[WO], 2009 U.S. Dist. LEXIS 45954, *17 (M.D. Ala. June 1, 2009) (holding that vicarious liability attached to property owner where property manager's ''position essentially gave him unfettered access to communicate with and personally visit [the plaintiff]'' and he ''used his power as property manager as a vehicle through which to perpetrate his unlawful conduct by refusing repairs, raising the rent, and attempting to evict [the plaintiff] as a consequence for [her] refusal to provide sexual favors.''); *Glover* at 522 F. Supp. 2d at 507 (rejecting defendant property owner's motion for summary judgment on the issue of vicarious liability where evidence showed that property manager used his ''position as the de facto landlord to perpetrate FHA [harassment] violations . . . giving] him the opportunity to visit the apartment when he wanted, and enabl[ing] him to control Plaintiff's rent''); *Richards* v. *Bono,* 2005 U.S. Dist. LEXIS 43585 at *30 (holding that wife/co-owner of property could be vicariously liable for husband's harassment where husband acted as her agent and used his position as owner, property manager, and maintenance supervisor to subject plaintiff to sexual harassment by using a key to enter plaintiff's apartment and threatening plaintiff with eviction).

actions and should not purport to preempt court-established rules. The commenter stated that in some instances it may be appropriate for federal courts to defer to agency rules, but that this is not a case where *Chevron*[42] deference is appropriate because HUD is not basing the rule on its own experience, but largely on interpretations of federal court decisions. The commenter stated that HUD has no particular expertise in tort law and no authority to interpret tort laws. Another commenter stated that HUD appears to be using the administrative rule-making process to substitute its views for those of the courts, and that HUD must pursue the change it seeks through Congress and/or the courts.

HUD Response: The commenters misconstrue both the rule and HUD's authority under the Act. The Act specifically grants the Secretary of HUD the authority and responsibility to administer and enforce the Act, including promulgating rules to carry out the Act.[43] This rule-making authority is not limited to HUD's investigations or administrative proceedings. Moreover, the rule does not construe tort law, but rather clarifies standards for liability under this part, based on traditional principles of tort liability. It imposes no new legal obligations or duties of care. In addition, the introductory portion of this preamble describes the grounds for *Chevron* deference.

Issue: Some commenters disagreed with HUD's statement in the preamble to the proposed rule that the rule does not create additional costs for housing providers and others covered by the Fair Housing Act. They stated that the proposed rule would lead to increased costs for and litigation against housing providers. Among the other costs cited by commenters are costs for compliance and training, increased insurance premiums, and increased liability because many housing providers would not have the ability to remain diligent to address all harassment claims, leaving them vulnerable to litigation. Another commenter said that the proposed rule creates the possibility for substantial judgments for money damages that PHAs have little ability to pay, because they may not use federal funds to pay judgments for damages.

HUD Response: As noted throughout this preamble, this final rule does not impose any new or enhanced liabilities. Rather, it clarifies existing law under the Fair Housing Act and well-established common law tort and agency principles as they apply under the Act. The rule does not change substantive obligations, but merely formalizes them in a regulation. Because the standards articulated in the rule are already law, the risks of liability and costs of complying will not increase with issuance of the rule. HUD presumes that the vast majority of housing providers are in compliance with the law. Any costs incurred by housing providers to come into compliance as a result of this rulemaking will simply be the costs of compliance with a preexisting statute, administrative practice, and case law. In fact, by formalizing uniform standards for investigations and adjudications under the Fair Housing Act, the rule serves to reduce costs for housing providers by establishing greater clarity with respect to how a determination of liability is to be made.

V. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

This rule establishes uniform standards for use in investigations and processing cases involving harassment and liability under the Fair Housing Act. In establishing such standards, HUD is exercising its rulemaking authority to bring uniformity, clarity, and certainty to an area of legal practice.

The docket file for this rule is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 7th Street SW., Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Persons with hearing or speech impairments may access the above telephone number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. This rule is limited to the procedures governing fair housing enforcement. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 4321, *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The rule establishes standards for evaluating claims of harassment and liability under the Fair Housing Act. The scope of the rule is procedural, and the regulatory changes do not establish any substantive regulatory burdens on small entities. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

[42] *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[43] 42 U.S.C. 3608(a), 3610, 3615.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the equal opportunity in housing program is 14.400.

List of Subjects in 24 CFR Part 100

Aged, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, and in accordance with HUD's authority in 42 U.S.C. 3535(d), HUD amends 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

■ 1. The authority citation for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

■ 2. Add § 100.7 to read as follows:

§ 100.7 Liability for discriminatory housing practices.

(a) *Direct liability.* (1) A person is directly liable for:

(i) The person's own conduct that results in a discriminatory housing practice.

(ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct.

(iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party.

(2) For purposes of determining liability under paragraphs (a)(1)(ii) and (iii) of this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person.

(b) *Vicarious liability.* A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.

■ 3. In § 100.60, add paragraphs (b)(6) and (7) to read as follows:

§ 100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.

* * * * *

(b) * * *

(6) Conditioning the availability of a dwelling, including the price, qualification criteria, or standards or procedures for securing the dwelling, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that causes the person to vacate a dwelling or abandon efforts to secure the dwelling.

■ 4. In § 100.65, add paragraphs (b)(6) and (7) to read as follows:

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

* * * * *

(b) * * *

(6) Conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting the services or facilities in connection therewith, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting services or facilities in connection with the sale or rental of a dwelling.

■ 5. In § 100.80, add paragraph (b)(6) to read as follows:

§ 100.80 Discriminatory representation on the availability of dwellings.

* * * * *

(b) * * *

(6) Representing to an applicant that a unit is unavailable because of the applicant's response to a request for a sexual favor or other harassment because of race, color, religion, sex, handicap, familial status, or national origin.

■ 6. In § 100.90, add paragraphs (b)(5) and (6) to read as follows:

§ 100.90 Discrimination in the provision of brokerage services.

* * * * *

(b) * * *

(5) Conditioning access to brokerage services on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(6) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of discouraging or denying access to brokerage services.

■ 7. In § 100.120, add paragraphs (b)(3) and (4) to read as follows:

§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

* * * * *

(b) * * *

(3) Conditioning the availability of a loan or other financial assistance on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that affects the availability of a loan or other financial assistance.

■ 8. In § 100.130, add paragraphs (b)(4) and (5) to read as follows:

§ 100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

* * * * *

(b) * * *

(4) Conditioning an aspect of a loan or other financial assistance to be provided with respect to a dwelling, or the terms or conditions thereof, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Subjecting a person to harassment because of race, color, religion, sex, handicap, familial status, or national origin that has the effect of imposing different terms or conditions for the availability of such loans or other financial assistance.

■ 9. In § 100.135, revise paragraph (d) to read as follows:

§ 100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

* * * * *

(d) Practices which are unlawful under this section include, but are not limited to:

(1) Using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.

(2) Conditioning the terms of an appraisal of residential real property in connection with the sale, rental, or financing of a dwelling on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

■ 10. In § 100.400, add paragraph (c)(6) to read as follows:

§ 100.400 Prohibited interference, coercion or intimidation.

* * * * *

(c) * * *

(6) Retaliating against any person because that person reported a discriminatory housing practice to a housing provider or other authority.

■ 11. Add subpart H, consisting of § 100.600, to read as follows:

Subpart H— Quid Pro Quo and Hostile Environment Harassment

§ 100.600 Quid pro quo and hostile environment harassment.

(a) *General.* Quid pro quo and hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap may violate sections 804, 805, 806 or 818 of the Act, depending on the conduct. The same conduct may violate one or more of these provisions.

(1) *Quid pro quo harassment.* Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to: The sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.

(2) *Hostile environment harassment.* Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.

(i) *Totality of the circumstances.* Whether hostile environment harassment exists depends upon the totality of the circumstances.

(A) Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.

(B) Neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment existed and, if so, the amount of damages to which an aggrieved person may be entitled.

(C) Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position.

(ii) *Title VII affirmative defense.* The affirmative defense to an employer's vicarious liability for hostile environment harassment by a supervisor under Title VII of the Civil Rights Act of 1964 does not apply to cases brought pursuant to the Fair Housing Act.

(b) *Type of conduct.* Harassment can be written, verbal, or other conduct, and does not require physical contact.

(c) *Number of incidents.* A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment, or evidences a quid pro quo.

Dated: August 18, 2016.

Gustavo Velasquez,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2016–21868 Filed 9–13–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket Number USCG–2015–0854]

RIN 1625–AA00, AA08

Special Local Regulations and Safety Zones; Recurring Marine Events and Fireworks Displays Within the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing a final rule that revises the list of special local regulations and safety zones established for recurring marine events and fireworks displays that take place within the Fifth Coast Guard District area of responsibility. This rule revises the listing of events that informs the public of regularly scheduled marine parades, regattas, other organized water events, and fireworks displays that require additional safety measures provided by regulations. Under this rule, the list of recurring marine events requiring special local regulations or safety zones is updated with revisions, additional events, and removal of events that no longer take place in the Fifth Coast Guard District. When these regulations are enforced, certain restrictions are placed on marine traffic in specified areas. This rulemaking project promotes efficiency by eliminating the need to produce a separate rule for each individual recurring event, and serves to provide notice of the known recurring events requiring a special local regulation or safety zone throughout the year.

DATES: This rule is effective October 14, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2015–0854 in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rulemaking, call or email Dennis Sens,

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

September 15, 2016

Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental or financing of dwellings, and in other housing-related transactions, because of race, color, religion, sex, disability, familial status or national origin.[1] This guidance discusses how the Fair Housing Act applies to a housing provider's consideration of a person's limited ability to read, write, speak or understand English. Specifically, this guidance addresses how the disparate treatment and discriminatory effects methods of proof apply in Fair Housing Act cases in which a housing provider bases an adverse housing action – such as a refusal to rent or renew a lease – on an individual's limited ability to read, write, speak or understand English.[2] Because of the close nexus between limited English proficiency ("LEP")[3] and national origin, the distinctions between intent and effects claims involving LEP and national origin are often subtle and can be difficult to discern.

II. Background

LEP refers to a person's limited ability to read, write, speak, or understand English. Individuals who are LEP are not a protected class under the Act. The Act nonetheless prohibits housing providers from using LEP selectively based on a protected class or as a pretext for discrimination because of a protected class. The Act also prohibits housing providers from using LEP in a way that causes an unjustified discriminatory effect.

Over twenty-five million persons in the United States, approximately nine percent of the United States population, are LEP. Among LEP persons in the United States, approximately 16,350,000 speak Spanish (65%), 1,660,000 speak Chinese (7%), 850,000 speak Vietnamese (3%), 620,000 speak Korean (2%), 530,000 speak Tagalog (2%), 410,000 speak Russian (2%), and fewer speak dozens of other languages.[4]

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[1] 42 U.S.C. §§ 3601-19.

[2] Programs and activities that receive federal financial assistance, including from HUD, have greater obligations to provide meaningful access to their LEP applicants and beneficiaries under Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000d *et seq.*; 24 C.F.R. § 1.4; Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," 65 Fed. Reg. 50121 (Aug. 16, 2000); *see also* Dep't of Hous. & Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007) [hereinafter HUD LEP Guidance]. This guidance does not address the obligations under Title VI that apply to programs and activities that receive federal financial assistance.

[3] Depending on the context, "LEP" is used to stand for "limited English proficiency" or "limited English proficient."

[4] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16001; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16001.

Nearly all LEP persons are LEP because either they or their family members are from non-English speaking countries. The link between national origin and LEP is fairly intuitive[5] but is also supported by statistics. In the United States, 34% of Asians[6] and 32% of Hispanics[7] are LEP as compared with 6% of whites[8] and 2% of non-Hispanic whites.[9] Focusing on place of birth, in the United States 61% of persons born in Latin America[10] and 46% of persons born in Asia[11] are LEP as compared with 2% of persons born in the United States.[12] Thus, housing decisions that are based on LEP generally relate to race or national origin.[13] Sometimes, "the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible."[14]

"National origin" means the geographic area in which a person was born or from which his or her ancestors came.[15] The geographic area need not be a country for it to be considered someone's "national origin," but rather can be a region within a country, or a region that spans multiple countries.[16] In general, national origin discrimination can occur even if the defendant

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[5] *See Faith Action for Cmty. Equity v. Hawaii*, No. 13-00450 SOM/RLP, 2014 U.S. Dist. LEXIS 58817 at *32 (D. Haw. Apr. 28, 2014) (finding it "relatively intuitive" that an "English-only policy disproportionately adversely affects people of national origins other than the United States."); *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) ("English-only rules . . . disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees."); *EEOC v. Synchro-Start Prods.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999) ("[A]ny English-only rule unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others."); *Saucedo v. Bros. Well Serv., Inc.*, 464 F. Supp. 919, 922 (S.D. Tex. 1979) ("A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job.").

[6] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005D; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005D.

[7] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005I; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005I.

[8] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005A; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005A.

[9] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005H; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005H. As used here, "Hispanic" means of "Hispanic, Latino, or Spanish origin."

[10] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table S0506; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S0506.

[11] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table S0505; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S0505.

[12] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B06007; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B06007.

[13] Race and national origin discrimination are highlighted in this memorandum because LEP cases typically involve discrimination on these bases, but particular facts could implicate other protected classes. For example, certain religious groups share a common language. Alternatively, a particular person's inability to read, write or speak in English could coincide with a disability, in which case other statutory protections, such as the obligation to provide reasonable accommodations, would apply.

[14] *Deravin v. Kerik*, 335 F.3d 195, 202 (2d Cir. 2003); *see also Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 923 (7th Cir. 2007) ("[T]here is uncertainty about what constitutes race versus national origin discrimination.).

[15] *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973) (employment discrimination case); *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1138 (C.D. Cal. 2003) (applying the definition of national origin in *Espinoza* to the Fair Housing Act).

[16] *See* Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980) (EEOC explanation that under Title VII national origin need not be a "sovereign nation").

does not know, or is mistaken about, precisely from where the plaintiff originates.[17] Although language discrimination is not necessarily national origin discrimination, national origin discrimination includes discrimination because an individual has the physical, cultural, or linguistic characteristics of persons from a foreign geographic area.[18] Thus, "[c]ourts have found a nexus between language requirements and national origin discrimination."[19]

National statistics also demonstrate a connection between citizenship and LEP: for the U.S. population eighteen years and over, 63% of noncitizens are LEP, compared with 39% of naturalized citizens and 1% of native-born citizens.[20] As with language discrimination, discrimination against non-citizens or against those with a particular immigration status is not national origin discrimination, per se, because one's citizenship and immigration status are related but distinct from one's birthplace or ancestry. A requirement involving citizenship or immigration status will violate the Act when "it has the purpose or [unjustified] effect of discriminating on the basis of national origin."[21]

III. Intentional Discrimination

A housing provider violates the Fair Housing Act if the provider uses a person's LEP to discriminate intentionally because of race, national origin, or another protected characteristic. Selectively enforcing a language-related restriction based on a person's protected class violates the Act, as does using LEP as a pretext for intentional discrimination. In such cases, the use of the language-related criteria is analyzed under the Act the same as is the use of any other potentially discriminatory criteria. In an LEP case, as in any Fair Housing Act case, intentional discrimination can be established through direct or circumstantial evidence. "The key question . . . is whether the plaintiffs have presented sufficient evidence to permit a reasonable jury to conclude [they] suffered an adverse housing action" because of their protected class.[22]

Often, "lack of English proficiency is used as a proxy for national-origin discrimination."[23] Therefore, courts have held that language-related restrictions are "worthy of close scrutiny,"[24] are subject to "a very searching look,"[25] and "should be examined in the most careful possible

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[17] *See Berke v. Ohio Dep't of Pub. Welfare*, No. C-2-75-815, 1978 U.S. Dist. LEXIS 17380, at *22 (S.D. Ohio June 6, 1978) *aff'd*, 628 F.2d 980 (6th Cir. 1980) (Employee satisfied the prima facie elements for national origin discrimination under Title VII even though her employer did not know that she was of Polish origin but could have inferred that her "national origin was other than of the United States.").

[18] *See, e.g.,* 29 C.F.R. § 1601.1 ("The [EEOC] defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.").

[19] *Colindres v. Quietflex Mfg.*, Nos. H-01-4319, -4323, 2004 U.S. Dist. LEXIS 27981, at *36 (S.D. Tex. Mar. 23, 2004).

[20] U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16008; http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16008.

[21] *Espinoza v. Hillwood Square Mut. Asso.*, 522 F. Supp. 559, 568 (E.D. Va. 1981) (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. at 92) (Fair Housing Act claim alleging discrimination against non-citizens survives motion to dismiss because "a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination.").

[22] *Lindsay v. Yates*, 578 F.3d 407, 416 (6th Cir. 2009).

[23] *Aghazadeh v. Me. Med. Ctr.*, No. 98-421-P-C, 1999 U.S. Dist. LEXIS 23538, at *12 (D. Me. July 8, 1999).

[24] *Rivera v. Nibco, Inc.*, 701 F. Supp. 2d 1135, 1141 (E.D. Cal. 2010).

[25] *Fragante v. Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989).

manner."[26] Justifications for language-related restrictions in a Fair Housing Act case must therefore be closely scrutinized to determine whether the restriction is in fact a proxy or pretext for race or national origin discrimination. LEP persons may speak English well enough to conduct essential housing-related matters or have a household member who can provide assistance as needed, so a blanket refusal to deal with LEP persons in the housing context is likely not motivated by genuine communication concerns.[27] Suspect practices include advertisements containing blanket statements such as "all tenants must speak English," or turning away all applicants who are not fluent in English. If the housing provider or resident can access free or low-cost language assistance services, any cost-based justifications for refusing to deal with LEP persons would also be immediately suspect.[28] In addition, the languages residents speak amongst themselves or to their guests do not affect the housing provider or neighbors in any legitimate way. Thus, bans on tenants speaking non-English languages on the property or statements disparaging tenants for speaking non-English languages have no cognizable justification under the Act.[29]

Aside from restrictions against all persons whose primary language is not English, the Act also may be violated by policies or practices that discriminate against persons based on their particular primary language, whether facially or through selective enforcement.[30] For example, if a housing provider has a policy of not selling, renting or lending to persons who speak a certain language, but will conduct those same transactions with persons who speak other languages, intentional discrimination is the likely reason.[31] Courts have recognized that "an individual's primary language skill generally flows from his or her national origin," and "persons of different nationalities are often distinguished by a foreign language."[32] Because a person's primary language generally derives from his or her national origin, singling out persons for disparate treatment because they speak a certain language is typically national origin discrimination. Furthermore, the Act's prohibitions include making statements with respect to the sale or rental of a dwelling indicating "any preference, limitation, or discrimination" based on national origin, evaluated according to the perceptions of a reasonable person.[33] A reasonable person could understand a restriction against persons who speak a specific language as indicating a "preference, limitation, or discrimination" against individuals whose national origins are areas where that

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[26] *Smothers v. Benitez*, 806 F. Supp. 299, 306 (D.P.R. 1992).
[27] *See Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 601 (9th Cir. 1993) (explaining that the court will not permit "an easy refuge" for the defendant "to state falsely that it was not the person's national origin" but rather his "communication skills" that motivated the adverse action).
[28] *See Faith Action for Cmty. Equity,* 2014 U.S. Dist. LEXIS 58817 at *35 (In a Title VI case, based on an allegation that a third party "has been willing to offer competent translations at no cost to Defendants, and that this offer has been repeatedly rejected… any cost-based justification for the English-only policy is undermined.").
[29] *See, e.g., Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013) (Fair Housing Act claim survived a motion to dismiss based in part on the housing provider's statement that tenant "should learn English now that she is in America.").
[30] *See Wilkie v. Geisinger Sys. Servs.*, No. 3:12-CV-580, 2014 U.S. Dist. LEXIS 132162, at *27 (M.D. Pa. Sep. 18, 2014) ("[I]f Plaintiff can prove that she alone was prohibited from speaking another language, then such a restriction would be indicative of discrimination."); *Aghazadeh*, 1999 U.S. Dist. LEXIS 23538, at *8 ("Discrimination against an individual because she speaks Farsi, for example, could be considered discrimination on the basis of her national origin" because "it is reasonable to infer that Farsi is the primary language of Iran.").
[31] *See Lopez v. Advantage Plumbing & Mech. Corp.,* No. 15-CV-4507 (AJN), 2016 U.S. Dist. LEXIS 43608, at *12 (S.D.N.Y. Mar. 30, 2016) ("[C]ourts have recognized that prohibiting certain non-English languages in the workplace while permitting others may constitute actionable employment discrimination.").
[32] *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th Cir. 1986), *vacated as moot*, 484 F.2d 131 (9th Cir. 1987).
[33] 42 U.S.C. § 3604(c); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991) (describing the standard for 42 U.S.C. § 3604(c) as the perception of an "ordinary" or "reasonable" person).

language is primarily used. Therefore, a notice, statement, or advertisement with respect to the sale or rental of a dwelling containing such a restriction will likely violate the Act.

Under Title VII of the Civil Rights Act of 1964 ("Title VII"),[34] some courts have recognized as legitimate the needs of employers to require that employees speak English for effective supervision, a cohesive workforce and to put customers at ease.[35] A housing provider's relationship with a resident, however, is quite different from that of a supervisor with an employee in that generally a supervisor must instruct and monitor the employee to improve performance. Likewise, the relationship among neighbors does not resemble that of coworkers in that generally neighbors can coexist effectively with minimal communication. Title VII also has the bona fide occupational qualification defense,[36] which does not exist under the Fair Housing Act. Thus, many of the interests asserted by employers that some courts have recognized as non-pretextual under Title VII will be inapplicable with regards to housing, lending or other real-estate related transactions covered by the Act.

A person's accent and his or her national origin are "inextricably intertwined."[37] It is thus inconceivable that a housing decision that treats someone differently because he or she speaks English fluently but with an accent is anything but intentional discrimination because of national origin in violation of the Act.[38] The same is true for housing-related policies or practices that treat persons with certain accents differently than persons with other accents.[39]

Targeting individuals for unfair or illegal housing-related services who are LEP or speak a particular language may also constitute intentional discrimination in violation of the Act. This is akin to "reverse redlining," where a service provider, such as a lender or insurer, targets a group of persons who share a race or national origin, or targets an area where most of the residents share a race or national origin, for the extension of credit or insurance on unfair or illegal terms.[40] Targeting in this manner violates the Act, regardless of whether the defendant acts based on animus towards the individuals' race or national origin group. In the same way, targeting such a group or area for other housing-related services, such as home loan modifications or audits, on unfair or illegal terms also violates the Act.[41] In some of these targeting cases, the discrimination has consisted of unfair and illegal language-related practices,

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[34] 42 U.S.C. § 2000e *et seq.*

[35] *See, e.g., Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999) (collecting cases).

[36] *See* 42 U.S.C. § 2000e-2(e)(1).

[37] *Gold v. FedEx Freight E., Inc.*, 487 F.3d 1001, 1008 (6th Cir. 2007); *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1195 (9th Cir. 2003).

[38] *Compare Gold*, 487 F.3d 1001 at 1009 ("Our characterization of [defendant's] comments concerning [plaintiff's] accent as direct evidence of national-origin discrimination is consistent with the Supreme Court's statements on the subject."); *with Shah v. Oklahoma,* 485 F. App'x 971, 974 (10th Cir. 2012) ("[C]omments regarding a plaintiff's accent may constitute circumstantial evidence of discrimination.").

[39] *See Odima,* 53 F.3d at 1491 n.2 (in finding employment discrimination, noting that the plaintiff, who spoke with a Nigerian accent, was told to go to speech therapy to advance his career while a coworker, who spoke with an Austrian accent, was not).

[40] *See Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

[41] *See HUD v. The Home Loan Auditors, L.L.C.* (Jan. 7, 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=16-1-CHARGE-CALI.PDF

such as false advertising in non-English mediums and failing to explain untranslated documents or translating them inaccurately.[42]

If a housing provider is required to provide housing-related language assistance services to LEP persons under federal, state or local law, or by contract, and the housing provider fails to comply with that requirement, this too may constitute intentional discrimination.[43] By failing to comply with a requirement to provide language assistance, the housing provider may be denying individuals, based on their national origin, an equal opportunity to enjoy the housing benefits to which that requirement entitles them.[44]

IV. Discriminatory Effects Liability and Use of Limited English Proficiency to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.[45] Under this standard, a facially-neutral policy or practice that has a discriminatory effect because of race, national origin, or another protected characteristic violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of LEP has a discriminatory effect based on national origin, race, or other protected characteristic, such policy or practice violates the Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.[46] Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.[47]

The following sections discuss the three steps used to analyze claims that a housing provider's use of LEP results in an unjustified discriminatory effect in violation of the Act.

A. Assessing the Discriminatory Effect

In the first step of the analysis, the plaintiff (or HUD in an administrative proceeding) must prove that the defendant's policy or practice concerning LEP persons has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of the group's national origin, race, or other protected characteristic.[48] The burden of proving this first

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[42] *Id.*; *Garcia v. Zak*, 37 MDLR 55 (Mass. Comm'n Against Discrimination, Apr. 28, 2015).
[43] *See Cabrera,* 977 F. Supp. 2d at 977 (denying a motion to dismiss as to plaintiffs' intentional Fair Housing Act claim where the plaintiffs, LEP tenants, alleged, *inter alia,* that their landlord failed to provide translation services as required by their lease).
[44] *See Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (finding that one could "logically infer" discriminatory intent where the defendant "chose to continue a policy of failing to ensure bilingual services" as required by Title VI "knowing that Spanish-speaking applicants and recipients . . . were being harmed as the consequence").
[45] 24 C.F.R. § 100.500; *accord Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2514-15 (2015).
[46] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2514-15 (summarizing the standards in HUD's discriminatory effects regulations at 24 C.F.R. § 100.500).
[47] *See* 24 C.F.R. § 100.500.
[48] *Id.* A discriminatory effect can also be proven with evidence that the policy creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing a disparate impact claim, which in HUD's experience is more commonly asserted in this context.

step of the analysis is satisfied by presenting evidence proving that the challenged practice causes or predictably will cause a disparate impact.

Census data may be used to prove that an LEP-related policy has a disparate impact based on race, national origin or another protected characteristic.[49] The U.S. Census Bureau publishes data relating LEP to other criteria that may be relevant to a given case, such as national origin, race, geography, language spoken, citizenship, and age, and it also provides Public Use Microdata Sample files that can be used to produce figures relating LEP to other potentially relevant criteria, such as income, household size and renter/owner status. Other evidence can also demonstrate the existence of a disparate impact, such as the characteristics of the actual applicants or residents affected by a housing provider's policy, where, for example, a landlord is alleged to have evicted all tenants who are LEP. No single comparative method is generally required or always preferred. Regardless of the method of analysis, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

A policy disfavoring LEP persons can have a disparate impact on persons of multiple national origins; in other words, the members of the injured group need not all be of the same national origin. As one court explained:

> The fact that the impact of the English-only policy does not fall only on one national origin or a few national origins does not prevent the impact of the policy from being disparate. Indeed, if an impact cannot be 'disparate' when it affects multiple national origins, then any policy would be immune from challenge so long as it casts its discriminatory net widely enough. If a policy differently affects individuals from nations where English is the primary language and nations where it is not, then the policy has a disparate impact.[50]

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.[51] The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to supply evidence proving that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy.[52] Assertions based on generalizations or stereotypes about LEP persons will not satisfy the housing provider's burden.

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[49] *Cf. Veles v. Lindow*, No 99-15795, 2000 U.S. App. LEXIS 27672, at *3 (9th Cir. Nov. 1, 2000) (affirming verdict in favor of defendants where plaintiffs had "provided virtually no evidence to prove disparate impact and inexplicably failed to object to the district court's exclusion of statistical evidence in support of their claim").

[50] *Faith Action for Cmty. Equity,* 2014 U.S. Dist. LEXIS 58817 at *33 (Title VI challenge to Hawaii's decision to cease offering its driver's license test in eight non-English languages).

[51] 24 C.F.R. § 100.500(c)(2).

[52] *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

Whether a policy or practice is necessary to achieve a housing provider's substantial, legitimate, nondiscriminatory interest will vary by case. Many of the LEP cases in the employment context where the business justification defense has succeeded lack analogs in the housing context. Housing and employment practices differ for many reasons, including the amount and nature of the communication that they generally require.[53] Therefore, many of the business justifications that have succeeded under Title VII will not apply or will not be considered substantial, legitimate, nondiscriminatory interests under the Act.

English proficiency is likely not necessary in the seller-buyer context because it does not involve an ongoing relationship. Nor is it likely necessary in the landlord-tenant context where communications are not particularly complex or frequent or where, for example, a landlord employs a management company with multilingual staff or otherwise can access language assistance. Similarly, refusing to allow an LEP borrower to have mortgage documents translated, or refusing to provide the borrower with translated documents that the lender or mortgage broker has readily available, is likely not necessary to achieve a substantial, legitimate, nondiscriminatory interest. Likewise, restricting a borrower's use of an interpreter, or requiring that an English speaker cosign a mortgage, likely will not prove justifiable.

Some states require that if negotiations for a mortgage are conducted in a non-English language, certain mortgage documents must also be provided in that language.[54] Avoiding compliance with a state consumer protection law would not be considered a substantial, legitimate, nondiscriminatory interest that would justify refusing to serve LEP borrowers.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its language-related policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff (or HUD in an administrative proceeding) to prove that such interest could be served by another practice that has a less discriminatory effect.[55] The identification of a less discriminatory alternative will depend on the particulars of the policy or practice under challenge, as well as specifics about the housing at issue and affected population.

Allowing a tenant (or home-buyer, mortgage-borrower, etc.) a reasonable amount of time to take a document, such as a lease, to be translated, could be a less discriminatory alternative. Other less discriminatory alternatives in an LEP case might include obtaining written or oral translation services or drawing upon the language skills of staff members. Similarly, if the family has a member who speaks English or brings another person along to interpret, agreeing to communicate through these individuals could be an alternative to refusing to deal with anyone who does not speak English.[56]

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[53] *See supra* Part III discussing the reasons housing differs from employment with regards to intent claims, which apply to effects claims as well.
[54] *See, e.g.,* Cal. Civ. Code § 1632; Or. Rev. Stat. § 86A.198.
[55] 24 C.F.R. § 100.500(c)(3).
[56] For assisted housing providers, however, requiring tenants to rely on family members rather than providing language assistance may not be permissible under Title VI. *See* HUD LEP Guidance, *supra* note 2, at 2743.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Selective application of a language-related policy, or use of LEP as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics, violates the Act. Moreover, because of the close link between LEP and certain racial and national origin groups, restrictions on access to housing based on LEP are likely disproportionately to burden certain protected classes and, if not legally justified, may violate the Act under a discriminatory effects theory.

Helen R. Kanovsky, General Counsel

1/28/20 Notice FHEO 2020-01; Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

SPECIAL ATTENTION OF:
HUD Regional and Field Office Directors of Public and Indian Housing (PIH); Housing; Community Planning and Development (CPD); Fair Housing and Equal Opportunity; and Regional Counsel; CPD, PIH, and Housing Program Providers

FHEO Notice: **FHEO-2020-01**
Issued: January 28, 2020
Expires: Effective until Amended, Superseded, or Rescinded.

Subject: Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act

1. **Purpose:** This notice explains certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations. There are two types of assistance animals: (1) service animals, and (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a "support animal"). Persons with disabilities may request a reasonable accommodation for service animals and other types of assistance animals, including support animals, under the FHA. This guidance provides housing providers with a set of best practices for complying with the FHA when assessing requests for reasonable accommodations to keep animals in housing, including the information that a housing provider may need to know from a health care professional about an individual's need for an assistance animal in housing. This guidance replaces HUD's prior guidance, FHEO-2013-01, on housing providers' obligations regarding service animals and assistance animals. In particular, this guidance provides a set of best practices regarding the type and amount of documentation a housing provider may ask an individual with a disability to provide in support of an accommodation request for a support animal, including documentation of a disability (that is, physical or mental impairments that substantially limit at least one major life activity) or a disability-related need for a support animal when the disability or disability-related need for the animal is non-obvious and not known to the housing provider. By providing greater clarity through this guidance, HUD seeks to provide housing providers with a tool they may use to reduce burdens that they may face when they are uncertain about the type and amount of documentation they may need and may be permitted to request when an individual seeks to keep a support animal in housing. Housing providers may be subject to the requirements of several civil rights laws, including but not limited to the FHA, Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA). This guidance does not address how HUD will process complaints against housing providers under Section 504 or the ADA.

2. **Applicability:** This notice applies to all housing providers covered by the FHA.[1]

3. **Organization:** There are two sections to this notice. The first, "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act," recommends a set of best practices for complying with the FHA when assessing accommodation requests involving animals to assist housing providers and help them avoid violations of the FHA. The second section to this notice, "Guidance on Documenting an Individual's Need for Assistance Animals in Housing," provides guidance on information that an individual seeking a reasonable accommodation for an assistance animal may need to provide to a housing provider about his or her disability-related need for the requested accommodation, including supporting information from a health care professional.

Questions regarding this notice may be directed to the HUD Office of Fair Housing and Equal Opportunity, Office of the Deputy Assistant Secretary for Enforcement and Programs, or your local HUD Office of Fair Housing and Equal Opportunity.

_____

Anna María Farías, Assistant Secretary for
Fair Housing and Equal Opportunity

[1] The Fair Housing Act covers virtually all types of housing, including privately owned housing and federally assisted housing, with a few limited exceptions.

Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act[2]

The Fair Housing Act (FHA) makes it unlawful for a housing provider[3] to refuse to make a reasonable accommodation that a person with a disability may need in order to have equal opportunity to enjoy and use a dwelling.[4] One common request housing providers receive is for a reasonable accommodation to providers' pet or no animal policies so that individuals with disabilities are permitted to use assistance animals in housing,[5] including public and common use areas.

Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities.[6] There are two types of assistance animals: (1) service animals, and (2) other animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a "support animal").[7] An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and the housing provider's rules and policies. A housing provider may exclude or charge a fee or deposit for pets in its discretion and subject to local law but not for service animals or other assistance animals.[8]

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[2] This document is an integral part of U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity Notice FHEO-2020-01, dated January 28, 2020 (sometimes referred to as the "Assistance Animal Notice").

[3] The term "housing provider" refers to any person or entity engaging in conduct covered by the FHA. Courts have applied the FHA to individuals, corporations, partnerships, associations, property owners, housing managers, homeowners and condominium associations, cooperatives, lenders, insurers, real estate agents, brokerage services, state and local governments, colleges and universities, as well as others involved in the provision of housing, residential lending, and other real estate-related services.

[4] 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204. Unless otherwise specified, all citations refer to those authorities effective as of the date of the publication of this guidance.

[5] For purposes of this guidance, the term "housing" refers to all housing covered by the Fair Housing Act, including apartments, condominiums, cooperatives, single family homes, nursing homes, assisted living facilities, group homes, domestic violence shelters, emergency shelters, homeless shelters, dormitories, and other types of housing covered by the FHA.

[6] *See* 24 C.F.R. § 5.303(a).

[7] Under the FHA, a disability is a physical or mental impairment that substantially limits one or more major life activities. *See* 24 C.F.R. § 100.201.

[8] *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act ("Joint Statement"), Q and A 11 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf; *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt*., 778 F. Supp. 2d 1028 (D.N.D. 2011). HUD views the Joint Statement as well-reasoned guidance on some of the topics addressed in this guidance. The Joint Statement, available to the public since 2004, has been cited from time to time by courts. *See, e.g., Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1286 (11th Cir. 2014); *Sinisgallo*

As of the date of the issuance of this guidance, FHA complaints concerning denial of reasonable accommodations and disability access comprise almost 60% of all FHA complaints and those involving requests for reasonable accommodations for assistance animals are significantly increasing. In fact, such complaints are one of the most common types of fair housing complaints that HUD receives. In addition, most HUD charges of discrimination against a housing provider following a full investigation involve the denial of a reasonable accommodation to a person who has a physical or mental disability that the housing provider cannot readily observe.[9]

HUD is providing this guidance to help housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability who simply wants to have a pet or avoid the costs and limitations imposed by housing providers' pet policies, such as pet fees or deposits. The guidance may also help persons with a disability who request a reasonable accommodation to use an assistance animal in housing.

While most requests for reasonable accommodations involve one animal, requests sometimes involve more than one animal (for example, a person has a disability-related need for both animals, or two people living together each have a disability-related need for a separate assistance animal). The decision-making process in this guidance can be used for all requests for exceptions or modifications to housing providers' rules, policies, practices, and/or procedures so persons with disabilities can have assistance animals in the housing where they reside.

This guidance is provided as a tool for housing providers and persons with a disability to use at their discretion and provides a set of best practices for addressing requests for reasonable accommodations to keep animals in housing where individuals with disabilities reside or seek to reside. It should be read together with HUD's regulations prohibiting discrimination under the FHA[10] —with which housing providers must comply— and the HUD/Department of Justice (DOJ) Joint Statement on Reasonable Accommodation under the Fair Housing Act, available at https://www.hud.gov/sites/documents/huddojstatement.pdf. A housing provider may also be subject to the Americans with Disabilities Act (ADA) and therefore should also refer to DOJ's regulations implementing Title II and Title III of the ADA at 28 C.F.R. parts 35 and 36 , and DOJ's guidance on service animals, *Frequently Asked Questions about Service Animals and the ADA* at https://www.ada.gov/regs2010/service_animal_qa.html and *ADA Requirements: Service Animals* at https://www.ada.gov/service_animals_2010.htm. This guidance replaces HUD's prior guidance on housing providers' obligations regarding service animals and assistance animals.[11] Housing

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v. Town of Islip Hous. Auth., 865 F. Supp. 2d 307, 336-42 (E.D.N.Y. 2012). However, HUD does not intend to imply that the Joint Statement is independently binding statutory or regulatory authority. HUD understands it to be subject to applicable limitations on the use of guidance. *See* "Treatment as a Guidance Document" on p.5 for a citation of authorities on permissible use of guidance.

[9] *See, e.g.*, *HUD v. Castillo Condominium Ass'n*, No. 12-M-034-FH-9, 2014 HUD ALJ LEXIS 2 (HUD Sec'y, October 02, 2014) aff'd, 821 F.3d 92 (1st Cir. 2016); *HUD v. Riverbay*, No. 11-F-052-FH-18, 2012 HUD ALJ LEXIS 15 (HUD ALJ, May 07, 2012), aff'd, 2012 ALJ LEXIS 19 (HUD Sec'y June 06, 2012).

[10] 24 C.F.R. Part 100.

[11] FHEO-2013-01.

providers should not reassess requests for reasonable accommodations that were granted prior to the issuance of this guidance in compliance with the FHA.

Treatment as a Guidance Document

As a guidance document, this document does not expand or alter housing providers' obligations under the Fair Housing Act or HUD's implementing regulations. It should be construed consistently with Executive Order 13891 of October 9, 2019 entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13892 of October 9, 2019 entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," the Office of Management and Budget Memorandum M-20-02 entitled "Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents,'" the Department of Justice Memorandum of January 25, 2018 entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," and the Department of Justice Memorandum of November 16, 2017 entitled "Prohibition on Improper Guidance Documents."

Part I: Service Animals

The FHA requires housing providers to modify or make exceptions to policies governing animals when it may be necessary to permit persons with disabilities to utilize animals.[12] Because HUD interprets the FHA to require access for individuals who use service animals, housing providers should initially follow the analysis that DOJ has determined is used for assessing whether an animal is a service animal under the ADA.[13] The Department of Justice's ADA regulations generally require state and local governments and public accommodations to permit the use of service animals by an individual with a disability.[14] For support animals and other assistance animals that may be necessary in housing, although the ADA does not provide for access, housing providers must comply with the FHA, which does provide for access.[15]

[12] 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204. See also Pet Ownership for the Elderly and Persons with Disabilities – Final Rule, 73 Fed. Reg. 63833 (Oct. 27, 2008).
[13] 24 C.F.R. § 100.204(b).
[14] 28 C.F.R. §§ 35.136(g); 36.302(c)(7).
[15] Specifically, under the Fair Housing Act, housing providers are obligated to permit, as a reasonable accommodation, the use of animals that work, provide assistance, or perform tasks that benefit persons with disabilities, or provide emotional support to alleviate a symptom of effect of a disability. Separate regulations govern airlines and other common carriers, which are outside the scope of this guidance.

What is a service animal?

Under the ADA, "*service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability."[16]

As a best practice, housing providers may use the following questions to help them determine if an animal is a service animal under the ADA:[17]

1. Is the animal a dog?

   - If "yes," proceed to the next question.
   - If "no," the animal is not a service animal but may be another type of assistance animal for which a reasonable accommodation is needed.[18] Proceed to Part II below.

2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?

   - If "yes," further inquiries are unnecessary and inappropriate because the animal is a service animal.[19]
   - If "no," proceed to the next question.

It is *readily apparent* when the dog is observed:

- guiding an individual who is blind or has low vision
- pulling a wheelchair
- providing assistance with stability or balance to an individual with an observable mobility disability[20]

3. It is advisable for the housing provider to limit its inquiries to the following two questions:

   - The housing provider may ask in substance: (1) "Is the animal required because of a

[16] 28 C.F.R. §§ 35.104; 36.104 (emphasis added).
[17] 28 C.F.R. §§ 35.136; 36.302(c).
[18] Although a miniature horse is not a service animal, DOJ has determined that the same type of analysis is applied to determine whether a miniature horse should be provided access, although additional considerations, beyond the scope of this guidance, apply. *See* 28 C.F.R. §§ 35.136(i); 36.302(c)(9).
[19] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).
[20] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).

disability?" and (2) "What work or task has the animal been trained to perform?"[21] Do not ask about the nature or extent of the person's disability, and do not ask for documentation. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.

- If the answer to question (1) is "yes" and work or a task is identified in response to question (2), grant the requested accommodation, if otherwise reasonable, because the animal qualifies as a service animal.
- If the answer to either question is "no" or "none," the animal does not qualify as a service animal under federal law but may be a support animal or other type of assistance animal that needs to be accommodated. HUD offers guidance to housing providers on this in Part II.

Performing "work or tasks" means that the dog is trained to take a specific action when needed to assist the person with a disability.

- If the individual identifies at least one action the dog is trained to take which is helpful to the disability other than emotional support, the dog should be considered a service animal and permitted in housing, including public and common use areas. Housing providers should not make further inquiries.
- If no specific work or task is identified, the dog should not be considered a service animal but may be another type of animal for which a reasonable accommodation may be required. Emotional support, comfort, well-being, and companionship are not a specific work or task for purposes of analysis under the ADA.

For more information, refer to the ADA rules and service animal guidance on DOJ's ADA Home Page at www.ada.gov[22] or call the ADA Information Line at 1-800-514-0301.

Part II: Analysis of reasonable accommodation requests under the Fair Housing Act for assistance animals other than service animals

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 equal opportunity to use and enjoy a dwelling, including public and common use spaces.

Remember: While it is not necessary to submit a written request or to use the words "reasonable accommodation," "assistance animal," or any other special words to request a reasonable accommodation under the FHA, persons making a request are encouraged to do so in order to avoid

[21] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).
[22] See *Frequently Asked Questions About Service Animals and the ADA* at https://www.ada.gov/regs2010/service_animal_qa.html; *ADA Requirements: Service Animals* at https://www.ada.gov/service_animals_2010.htm.

miscommunication.[23] Persons with disabilities may also want to keep a copy of their reasonable accommodation requests and supporting documentation in case there is a later dispute about when or whether a reasonable accommodation request was made. Likewise, housing providers may find it helpful to have a consistently maintained list of reasonable accommodation requests.[24]

A resident may request a reasonable accommodation either before or after acquiring the assistance animal.[25] An accommodation also may be requested after a housing provider seeks to terminate the resident's lease or tenancy because of the animal's presence, although such timing may create an inference against good faith on the part of the person seeking a reasonable accommodation. However, under the FHA, a person with a disability may make a reasonable accommodation request at any time, and the housing provider must consider the reasonable accommodation request even if the resident made the request after bringing the animal into the housing.[26]

As a best practice, housing providers may use the following questions to help them make a decision when the animal does not meet the definition of service animal.[27]

4. Has the individual requested a reasonable accommodation — that is, asked to get or keep an animal in connection with a physical or mental impairment or disability?

Note: The request for a reasonable accommodation with respect to an assistance animal may be oral or written. It may be made by others on behalf of the individual, including a person legally residing in the unit with the requesting individual or a legal guardian or authorized representative.[28]

- If "yes," proceed to Part III.
- If "no," the housing provider is not required to grant a reasonable accommodation that has not been requested.

Part III: Criteria for assessing whether to grant the requested accommodation

As a best practice, housing providers may use the following questions to help them assess whether

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[23] See Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[24] See Joint Statement, Q and A 13 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[25] *See* Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[26] *See* 24 C.F.R. § 100.204(a).
[27] *See Janush v. Charities Hous. Dev. Corp.*, 169 F.Supp.2d 1133, 1136-37 (N.D. Cal., 2000) (rejecting an argument that a definition of "service dog" should be read into the Fair Housing Act to create a rule that accommodation of animals other than service dogs is per se unreasonable, instead finding that "the law imposes on defendants the obligation to consider each request individually and to grant requests that are reasonable.").
[28] *See* Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

to grant the requested accommodation.

5. Does the person have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?

    - If "yes," skip to question #7 to determine if there is a connection between the person's disability and the animal.
    - If "no," continue to the next question.

Observable and Non-Observable Disabilities

Under the FHA, a disability is a physical or mental impairment that substantially limits one or more major life activities. While some impairments may seem invisible, others can be readily observed. Observable impairments include blindness or low vision, deafness or being hard of hearing, mobility limitations, and other types of impairments with observable symptoms or effects, such as intellectual impairments (including some types of autism), neurological impairments (*e.g.*, stroke, Parkinson's disease, cerebral palsy, epilepsy, or brain injury), mental illness, or other diseases or conditions that affect major life activities or bodily functions.[29] Observable impairments generally tend to be obvious and would not be reasonably attributable to non-medical causes by a lay person.

Certain impairments, however, especially including impairments that may form the basis for a request for an emotional support animal, may not be observable. In those instances, a housing provider may request information regarding both the disability and the disability-related need for the animal. Housing providers are not entitled to know an individual's diagnosis.

6. Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability?[30]

    - If "yes," proceed to question #7. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.
    - If "no," the housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the person requesting the accommodation has not provided this information until the requester has been provided a reasonable opportunity to do so.[31] To assist the person requesting the

[29] *See* 24 C.F.R. § 100.201.
[30] *See* Joint Statement, Q and A 17 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[31] This would not permit the housing provider to require any independent evaluation or diagnosis specifically obtained for the housing provider or for the housing provider to engage in its own direct

accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. Referring the requester to that Guidance will also help ensure that the housing provider receives the disability-related information that is actually needed to make a reasonable accommodation decision.

Information About Disability May Include . . .

- A determination of disability from a federal, state, or local government agency.
- Receipt of disability benefits or services (Social Security Disability Income (SSDI)), Medicare or Supplemental Security Income (SSI) for a person under age 65, veterans' disability benefits, services from a vocational rehabilitation agency, or disability benefits or services from another federal, state, or local agency.
- Eligibility for housing assistance or a housing voucher received because of disability.
- Information confirming disability from a health care professional – *e.g.*, physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse.

Note that a determination that an individual does not qualify as having a disability for purposes of a benefit or other program does not necessarily mean the individual does not have a disability for purposes of the FHA, Section 504, or the ADA.[32]

Disability Determination

Note that under DOJ's regulations implementing the ADA Amendments Act of 2008, which HUD considers instructive when determining whether a person has a disability under the FHA, some types of impairments will, in virtually all cases, be found to impose a substantial limitation on a major life activity resulting in a determination of a disability.[33] Examples include deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, muscular dystrophy, multiple sclerosis, Human Immunodeficiency Virus (HIV) infection, major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia.[34] This does not mean that other conditions are not disabilities. It simply means that in virtually all cases these conditions will be covered as disabilities. While housing providers will be unable to observe or identify some of these impairments, individuals with disabilities sometimes voluntarily provide more details about their disability than the housing provider actually needs to make decisions on accommodation requests. When this information is provided, housing providers should consider it.

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evaluation. *See* Joint Statement, Q and A 17-18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[32] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[33] *See* 28 C.F.R. §§ 35.108(d)(2); 36.105(d)(2).

[34] *See* 28 C.F.R. §§ 35.108(d)(2)(iii); 36.105(d)(2)(iii).

Documentation from the Internet

Some websites sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee. Under the Fair Housing Act, a housing provider may request reliable documentation when an individual requesting a reasonable accommodation has a disability and disability-related need for an accommodation that are not obvious or otherwise known.[35] In HUD's experience, such documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.

By contrast, many legitimate, licensed health care professionals deliver services remotely, including over the internet. One reliable form of documentation is a note from a person's health care professional that confirms a person's disability and/or need for an animal when the provider has personal knowledge of the individual.

7. Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability?[36]

   - If "yes," proceed to Part IV. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.
   - If "no," the housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the person requesting the accommodation has not provided this information until the requester has been provided a reasonable opportunity to do so. To assist the person requesting the accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. Referring the requester to that Guidance will also help ensure that the housing provider receives the disability-related information that is actually needed to make a reasonable accommodation decision.

[35] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[36] *See Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028 (D.N.D. 2011) (determining that, in housing, a broader variety of assistance animals may be necessary as a reasonable accommodation, regardless of specific training).

Information Confirming Disability-Related Need for an Assistance Animal. . .

- Reasonably supporting information often consists of information from a licensed health care professional – *e.g.*, physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse – general to the condition but specific as to the individual with a disability and the assistance or therapeutic emotional support provided by the animal.
- A relationship or connection between the disability and the need for the assistance animal must be provided. This is particularly the case where the disability is non-observable, and/or the animal provides therapeutic emotional support.
- For non-observable disabilities and animals that provide therapeutic emotional support, a housing provider may ask for information that is consistent with that identified in the Guidance on Documenting an Individual's Need for Assistance Animals in Housing (*see Questions 6 and 7) in order to conduct an individualized assessment of whether it must provide the accommodation under the Fair Housing Act. The lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation.

Part IV: Type of Animal

8. Is the animal commonly kept in households?

- If "yes," the reasonable accommodation should be provided under the FHA unless the general exceptions described below exist.[37]
- If "no," a reasonable accommodation need not be provided, but note the very rare circumstances described below.

Animals commonly kept in households. If the animal is a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, then the reasonable accommodation should be granted because the requestor has provided information confirming that there is a disability-related need for the animal.[38] For purposes of this assessment, reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals.

Unique animals. If the individual is requesting to keep a unique type of animal that is not commonly kept in households as described above, then the requestor has the substantial burden of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal. The individual is encouraged to submit documentation from a health care professional confirming the need for this animal, which includes information of the type set out in the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. While this guidance

[37] *See, e.g.*, *Majors v. Hous. Auth. of the Cnty. of DeKalb Georgia,* 652 F.2d 454, 457 (5th Cir. 1981) (enforcing a "no pets" rule against an individual with a disability who needs an animal as a reasonable accommodation effectively deprives the individual of the benefits of the housing).
[38] *See* 24 C.F.R. § 100.204(a).

does not establish any type of new documentary threshold, the lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation. If the housing provider enforces a "no pets" policy or a policy prohibiting the type of animal the individual seeks to have, the housing provider may take reasonable steps to enforce the policy if the requester obtains the animal before submitting reliable documentation from a health care provider that reasonably supports the requestor's disability-related need for the animal. As a best practice, the housing provider should make a determination promptly, generally within 10 days of receiving documentation.[39]

Reasonable accommodations may be necessary when the need for a unique animal involves unique circumstances …

Examples:

- The animal is individually trained to do work or perform tasks that cannot be performed by a dog.
- Information from a health care professional confirms that:
  - Allergies prevent the person from using a dog; or
  - Without the animal, the symptoms or effects of the person's disability will be significantly increased.
- The individual seeks to keep the animal outdoors at a house with a fenced yard where the animal can be appropriately maintained.

Example: A Unique Type of Support Animal

An individually trained capuchin monkey performs tasks for a person with paralysis caused by a spinal cord injury. The monkey has been trained to retrieve a bottle of water from the refrigerator, unscrew the cap, insert a straw, and place the bottle in a holder so the individual can get a drink of water. The monkey is also trained to switch lights on and off and retrieve requested items from inside cabinets. The individual has a disability-related need for this specific type of animal because the monkey can use its hands to perform manual tasks that a service dog cannot perform.

Part V: General Considerations

- The FHA does not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.[40] A housing provider may, therefore, refuse a reasonable accommodation for an assistance animal if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal (e.g., keeping the

[39] *See* Joint Statement, Q and A 15 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[40] *See* 24 C.F.R. § 100.202(d).

animal in a secure enclosure).[41]

- A reasonable accommodation may include a reasonable accommodation to a land use and zoning law, Homeowners Association (HOA) rule, or co-op rule.[42]
- A housing provider may not charge a fee for processing a reasonable accommodation request.[43]
- Pet rules do not apply to service animals and support animals. Thus, housing providers may not limit the breed or size of a dog used as a service animal or support animal just because of the size or breed[44] but can, as noted, limit based on specific issues with the animal's conduct because it poses a direct threat or a fundamental alteration.[45]
- A housing provider may not charge a deposit, fee, or surcharge for an assistance animal. A housing provider, however, may charge a tenant for damage an assistance animal causes if it is the provider's usual practice to charge for damage caused by tenants (or deduct it from the standard security deposits imposed on all tenants).
- A person with a disability is responsible for feeding, maintaining, providing veterinary care, and controlling his or her assistance animal. The individual may do this on his or her own or with the assistance of family, friends, volunteers, or service providers.
- Individuals with disabilities and housing providers may reference the best practices provided in this guidance in making and responding to reasonable accommodation requests within the scope of this guidance for as long as it remains in effect. HUD strongly encourages individuals with disabilities and housing providers to give careful attention to this guidance when making reasonable accommodation requests and decisions relating to animals.
- Failure to adhere to this guidance does not necessarily constitute a violation by housing providers of the FHA or regulations promulgated thereunder.[46]
- Before denying a reasonable accommodation request due to lack of information confirming an individual's disability or disability-related need for an animal, the housing provider is encouraged to engage in a good-faith dialogue with the requestor called the "interactive process."[47] The housing provider may not insist on specific types of evidence if the information which is provided or actually known to the housing provider meets the requirements of this guidance (except as provided above). Disclosure of details about the diagnosis or severity of a disability or medical records or a medical examination cannot be required.

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[41] *See* Joint Statement Q and A 4 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[42] *See Warren v. Delvista Towers Condo. Ass'n*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014).
[43] *See* Joint Statement, Q and A 11 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf; *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt*., 778 F. Supp. 2d 1028 (D.N.D. 2011).
[44] *See, e.g.*, *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277 (11th Cir. 2014) (reasonable accommodation to a housing provider's rule that all dogs must be under 25 pounds).
[45] *See* 24 C.F.R. § 100.202(d); Joint Statement, Q and A's 5 & 7 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[46] *See* "Treatment as a Guidance Document" on p.5 for a citation of authorities on permissible use of guidance.
[47] *See* Joint Statement, Q and A 7 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

If a reasonable accommodation request, provided under the framework of this guidance, is denied because it would impose a fundamental alteration to the nature of the provider's operations or impose an undue financial and administrative burden, the housing provider should engage in the interactive process to discuss whether an alternative accommodation may be effective in meeting the individual's disability-related needs.[48]

[48] For guidance on what constitutes a fundamental alteration or an undue financial and administrative burden, refer to the HUD/DOJ Joint Statement on Reasonable Accommodation under the Fair Housing Act, available at https://www.hud.gov/sites/documents/huddojstatement.pdf.

Guidance on Documenting an Individual's Need for Assistance Animals in Housing

This section provides best practices for documenting an individual's need for assistance animals in housing. It offers a summary of information that a housing provider may need to know from a health care professional about an individual's need for an assistance animal in housing. It is intended to help individuals with disabilities explain to their health care professionals the type of information that housing providers may need to help them make sometimes difficult legal decisions under fair housing laws. It also will help an individual with a disability and their health care provider understand what information may be needed to support an accommodation request when the disability or disability-related need for an accommodation is not readily observable or known by the housing provider. Housing providers may not require a health care professional to use a specific form (including this document), to provide notarized statements, to make statements under penalty of perjury, or to provide an individual's diagnosis or other detailed information about a person's physical or mental impairments.[49] Housing providers and the U.S. Department of Housing and Urban Development rely on professionals to provide accurate information to the best of their personal knowledge, consistent with their professional obligations. This document only provides assistance on the type of information that may be needed under the Fair Housing Act (FHA). The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Further, this document does not create any obligation to provide health-care information and does not authorize or solicit the collection of any information not otherwise permitted by the FHA.[50]

The Appendix to this Guide answers some commonly asked questions about terms and issues below. An understanding of the terms and issues is helpful to providing this information.

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When providing this information, health care professionals should use personal knowledge of their patient/client – *i.e.*, the knowledge used to diagnose, advise, counsel, treat, or provide health care or other disability-related services to their patient/client. **Information relating to an individual's disability and health conditions must be kept confidential and cannot be shared with other**

[49] *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act ("Joint Statement"), Q and A's 13, 16-18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[50] This guidance does not expand on the obligations under the FHA or HUD's regulations and should be construed consistently with Executive Order 13891 of October 9, 2019 entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13892 of October 9, 2019 entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," the Department of Justice Memorandum of January 25, 2018 entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," and the Department of Justice Memorandum of November 16, 2017 entitled "Prohibition on Improper Guidance Documents."

persons unless the information is needed for evaluating whether to grant or deny a reasonable accommodation request or unless disclosure is required by law.[51]

As a best practice, documentation contemplated in certain circumstances by the Assistance Animals Guidance is recommended to include the following general information:

- The patient's name,
- Whether the health care professional has a professional relationship with that patient/client involving the provision of health care or disability-related services, and
- The type of animal(s) for which the reasonable accommodation is sought (i.e., dog, cat, bird, rabbit, hamster, gerbil, other rodent, fish, turtle, other specified type of domesticated animal, or other specified unique animal).[52]

Disability-related information. A disability for purposes of fair housing laws exists when a person has a physical or mental impairment that substantially limits one or more major life activities. [53] Addiction caused by current, illegal use of a controlled substance does not qualify as a disability.[54] As a best practice, it is recommended that individuals seeking reasonable accommodations for support animals ask health care professionals to provide information related to the following:

- Whether the patient has a physical or mental impairment,
- Whether the patient's impairment(s) substantially limit at least one major life activity or major bodily function, and
- Whether the patient needs the animal(s) (because it does work, provides assistance, or performs at least one task that benefits the patient because of his or her disability, or because it provides therapeutic emotional support to alleviate a symptom or effect of the disability of the patient/client, and not merely as a pet).

Additionally, if the animal is <u>not</u> a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, it may be helpful for patients to ask health care professionals to provide the following additional information:

- The date of the last consultation with the patient,
- Any unique circumstances justifying the patient's need for the particular animal (if already owned or identified by the individual) or particular type of animal(s), and
- Whether the health care professional has reliable information about this specific animal or

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[51] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[52] *See, e.g.*, *Janush v. Charities Housing Development Corporation*, 169 F.Supp.2d 1133, 1136-37 (N.D. Cal. 2000) (rejecting an argument that a definition of "service dog" should be read into the Fair Housing Act to create a rule that accommodation of animals other than service dogs is per se unreasonable, finding that "the law imposes on defendants the obligation to consider each request individually and to grant requests that are reasonable.").

[53] 24 C.F.R. § 100.201.

[54] 24 C.F.R. § 100.201.

whether they specifically recommended this type of animal.

It is also recommended that the health care professional sign and date any documentation provided and provide contact information and any professional licensing information.

Appendix

What are assistance animals?

Assistance animals do work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.[55]

What are physical or mental impairments?

Physical or mental impairments include: 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

Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability; or

Diseases and conditions such 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.[56]

What are major life activities or major bodily functions?

They are: seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, and working.[57]

Other impairments – based on specific facts in individual cases -- may also substantially limit at least one major life activity or bodily function.[58]

What are Some Examples of Work, Tasks, Assistance, and Emotional Support?

[55] *See* 24 C.F.R. §§ 5.303; 960.705.
[56] *See* 24 C.F.R. § 100.201.
[57] *See* 24 C.F.R. § 100.201(b).
[58] *See* 24 C.F.R. § 100.201.

Some examples of work and tasks that are commonly performed by service dogs include[59]:

- Assisting individuals who are blind or have low vision with navigation and other tasks,
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds,
- Providing non-violent protection or rescue work,
- Pulling a wheelchair,
- Alerting a person with epilepsy to an upcoming seizure and assisting the individual during the seizure,
- Alerting individuals to the presence of allergens,
- Retrieving the telephone or summoning emergency assistance, or
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities.

Some other examples of work, tasks or other types of assistance provided by animals include:[60]

- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors,
- Reminding a person with mental illness to take prescribed medication,
- Alerting a person with diabetes when blood sugar is high or low,
- Taking an action to calm a person with post-traumatic stress disorder (PTSD) during an anxiety attack,
- Assisting the person in dealing with disability-related stress or pain,
- Assisting a person with mental illness to leave the isolation of home or

to interact with others,

- Enabling a person to deal with the symptoms or effects of major depression by providing a reason to live, or
- Providing emotional support that alleviates at least one identified symptom or effect of a physical or mental impairment.

What are examples of a patient's need for a unique animal or unique circumstances?[61]

- The animal is individually trained to do work or perform tasks that cannot be performed by a dog.
- Information from a health care professional confirms that:
    - Allergies prevent the person from using a dog, or
    - Without the animal, the symptoms or effects of the person's disability will be significantly increased.
- The individual seeks a reasonable accommodation to a land use and zoning law, Homeowners Association (HOA) rule, or condominium or co-op rule.
- The individual seeks to keep the animal outdoors at a house with a fenced yard where the animal can be appropriately maintained.

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[59] *See* 28 C.F.R. §§ 35.136(f); 36.302(c)(6).

[60] *See, e.g.*, *Majors v. Housing Authority of the County of DeKalb Georgia,* 652 F.2d 454, 457 (5th Cir. 1981); *Janush*, 169 F.Supp.2d at 1136-37.

[61] *See, e.g.*, *Anderson v. City of Blue Ash*, 798 F.3d 338, 360-63 (6th Cir. 2015) (seeking a reasonable accommodation to keep a miniature horse as an assistance animal).

Quiz Answer Key

Overview Quiz

1. a
2. b
3. a
4. a
5. b
6. a
7. b
8. a
9. b
10. b

Laws Quiz

1. b
2. b
3. b
4. a
5. b
6. b
7. b
8. d

General Compliance Quiz

1. a
2. a
3. a

Disability Definitions Quiz

1. a
2. b
3. a
4. a
5. b
6. b
7. b
8. a
9. a
10. a
11. b
12. a

Reasonable Accommodation Quiz

1. b
2. b
3. a
4. a
5. a
6. a
7. d
8. a
9. a
10. b
11. b
12. b
13. a
14. b
15. b
16. b
17. b
18. b
19. a

Other FH Issues Quiz

1. b
2. b
3. b
4. b
5. a
6. a
7. a
8. b
9. a
10. a
11. a
12. a
13. a

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HCV Specific Quiz

1. a
2. a
3. a
4. a
5. a
6. b
7. b

PH Specific Quiz

1. d, a, c, b
2. a
3. c
4. b
5. a
6. a
7. b
8. b
9. a

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