PUBLIC & ASSISTED HOUSING OCCUPANCY TASK FORCE

Report to Congress and to the Department of Housing and Urban Development

April 7, 1994

Acknowledgements

Without the support of their colleagues and families, the members of the Task Force would not have been able to complete their task. In addition, the Task Force would like to acknowledge: Phyllis Thompson, John Hurvitz, Georgia Kazakis and Kathryn Stempien, of the Washington, D.C. law firm of Covington & Burling, for their legal research and memoranda; support and assistance from HUD's Fair Housing and Equal Opportunity staff, in particular Larry Pearl, Dana Jackson, Joyce Powell, Phyllis Edney, and Barry Anderson; and administrative support from Lynda Ose of the National Housing Partnership; Gwendolyn Bean-Armstrong, Lee Carty and Phillip Christopher of the Bazelon Center for Mental Health Law.

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April 7, 1994

The Honorable Henry Cisneros
Secretary
United States Department of Housing
and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Dear Mr. Secretary:

On behalf of the Public and Assisted Housing Occupancy Task Force, it is our pleasure to submit the attached Report and Recommendations to you. Copies of the report are also being sent to the following members of Congress: the Honorable Al Gore, the Honorable Thomas Foley, the Honorable Donald Riegle, Jr. and the Honorable Henry B. Gonzales.

Section 643 of the Housing and Community Development Act of 1992 directed the Department of Housing and Urban Development to appoint a Task Force that would issue recommendations to Congress and to HUD about occupancy and management issues in public and assisted housing. Following the statute's direction, the Department established a Task Force which included representatives of housing providers, developers and managers; advocates for elders, residents, and persons with disabilities, and the homeless; and representatives from state housing finance and social services agencies.

After working together for fourteen months, the Task Force reached consensus on a wide variety of difficult questions that housing consumers and providers face on a daily basis. We met at least once a month for three to four days at a time, from January to July, 1993; we conducted three public hearings, in Boston, San Antonio, and Seattle; and we published a preliminary report and recommendations for a ninety day comment period. Finally, we received and analyzed over 370 public comments before drafting our final report. We therefore hope that our Report and Recommendations will serve as the basis for action by the Department and by Congress.

Sincerely,

Bonnie Milstein
Chair

Greg Russ
Vice Chair

Attachment

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Executive Summary

Preface - Funding and Finance Issues

Throughout its deliberations and recommendations, one theme about which Occupancy Task Force members agreed was that low-income people should have more housing choices than they do at present. The issue of housing choice, along with many other concerns the Task Force addressed, is complicated by scarcity of resources. The Task Force therefore proposes a number of recommendations aimed specifically at funding and cost issues.

Chapter 1 - The Application Process

In preparing its report, the Occupancy Task Force decided that it would be most useful to begin by addressing the sequential tenancy process: the application process, occupancy and eviction. The first stage of this process, during which applicants are screened for eligibility and tenant selection criteria, is an extremely important one in that the applicants who are selected will become members of the resident community and those who are not selected will be denied the opportunity to live in federally assisted housing. Thus, the Task Force spent significant time considering the issues contained in the Application Process Chapter. In doing so, the Task Force balanced the rights of housing providers to choose residents who will fulfill their lease obligations and the rights of applicants to be chosen fairly.

In addition to including the Task Force's specific recommendations, Chapter One describes the application process from start to finish in order to provide a full context for the recommendations. In particular, the application process issues addressed by the Task Force include the following:

- Guiding principles for the application process;
- Accessibility of the application process and the need for plain language forms and documents;
- Marketing;
- Waiting lists;
- Occupancy standards;
- Rent reform;

- Screening applicants, including applicants with non-traditional tenant histories;
- Reasonable accommodations in the application and screening process;
- Disability-related inquiries; and
- Determinations involving alcohol and controlled substances.

Chapter 2 - Management

The application process ends when the housing provider makes the decision to admit an applicant. Next, the housing management process begins, encompassing orientation, execution of the lease, move-in, occupancy and lease compliance. The Task Force addressed the following topics within the housing management process:

- Guiding Principles for the housing management process;
- The lease;
- Preventing and addressing lease violations;
- Unit transfers; and
- Retention of housing during hospitalization or residential treatment.

Chapter 3 - Evictions

Eviction from public or assisted housing is a very serious sanction; it not only displaces the resident, it also discontinues the subsidy that makes housing affordable to that resident. Eviction is nonetheless occasionally necessary. Experience shows that some individuals are not willing to meet the essential obligations of tenancy and must be removed in order to preserve the viability of the housing development. Given the shortage of public and assisted housing, and the difficulty of preserving this housing, the Task Force also stresses the need to remove those whose conduct is destructive to the development.

An equitable eviction policy will authorize the eviction, in appropriate circumstances, of those residents whose conduct violates essential provisions of the lease, those whose conduct repeatedly violates minor provisions of the lease, and those who allow others to do so. The Task Force views the proper use of eviction as focusing generally on whether and how seriously the conduct in question adversely affects the housing community. In addition, the Task Force

recommends that except as noted, the statutes, regulations, handbooks and lease provisions regarding eviction not be changed.

The report addresses the following topics:

- Alternatives to eviction;
- Alternatives after eviction, to prevent homelessness;
- Notices;
- Drug abuse and drug related crime;
- Criminal activity as grounds for eviction;
- Former users of illegal drugs;
- Fraud;
- Minor crimes and off-premises criminal activity;
- Public housing grievance procedure;
- Residents' liability for the actions of others;
- Consideration of all the facts and circumstances;
- Criminal activity prior to admission;
- Subsidy termination - certificate and voucher programs; and
- Subsidy termination - assisted housing.

Chapter 4 - Reasonable Accommodations

Reasonable accommodation is a creative, challenging and evolving area of disability law and practice, affecting every aspect of admissions, occupancy and evictions. The Task Force believes that, despite many uncertainties as to what is required by law, it is possible to craft sound, basic, reasonable accommodation policies and procedures which will satisfy the intent of the law without subjecting either persons with disabilities or housing providers to unintended burdens.

This chapter tackles a wide range of reasonable accommodations issues with the intention of providing guidance on the procedural elements essential to achieving compliance. Specifically, the chapter is organized as follows:

- Regulatory and case-law references that provide background on the concept of reasonable accommodation followed by brief discussion of program accessibility requirements (the self-evaluation and transition plan);
- Discussion of a definition of reasonable accommodation;
- Statement of principles applicable to reasonable accommodations, drawn from current law and regulation and describing both affirmative requirements and the regulatory limits placed on the implementation of the concept;

- Examination of the regulatory limits that apply to accommodations (undue burdens and fundamental alterations);
- Recommendations on effective implementation of reasonable accommodations;
- Review of diverse reasonable accommodation issues including disagreements about types of accommodation, accommodations in the occupancy cycle, procedures related to service animals, and the use of interpreters; and
- Recommendations for HUD Technical Assistance.

Chapter 5 - Fundamental Alterations

Both Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988 anticipate that, at some level, the compliance action requested or required may exhaust available resources or so alter the housing program that the action becomes infeasible. Housing providers are required to judge the feasibility of compliance actions against two criteria: fundamental alterations in the nature of the program and undue financial and administrative burdens. This chapter frames these issues in the context of program operations and management.

Fundamental alterations in the nature of the program and undue financial and administrative burdens raise issues of resource management, capital planning, and ultimately, program funding. Many compliance actions can be absorbed with existing program funds, but the cost of making some programs accessible and responding to some requests for accommodations will require that Congress recognize the need for increased funding levels. Greater flexibility in HUD's rules governing the use of operating and capital budgets is also required. Specific changes in budget operating procedures and formula calculations are recommended. The Task Force also makes a general recommendation to increase the level of modernization funds for both public and assisted housing.

This chapter includes:

- Examples of actions that might result in fundamental alterations;
- Suggestions for evaluating fundamental alterations in light of the program purpose and any services delivered on site;
- Treatment of profit at assisted housing properties;
- Principles that explain how the undue burdens test is unique to each reasonable accommodation request and how to judge the

impact of compliance actions against available program resources;
- Use of operating and capital budgeting line items for reasonable accommodation and other compliance requirements;
- Program factors to consider when assessing undue burdens;
- Procedural frameworks for evaluating undue financial burdens in public and assisted housing; and
- A plan for identifying unfunded accessibility needs.

Chapter 6 - Certificates and Vouchers

During the course of its deliberations, the Task Force generally discussed issues that could be addressed in a unified manner for all federally subsidized housing programs, such as the need for plain language forms and communications. Thus, the Task Force wishes to make clear that all such global recommendations, such as the need for plain language and timely and adequate notice, apply in the Section 8 Certificate and Voucher programs.

However, the Task Force also dealt with issues in the public housing and project-based assistance programs, such as admissions procedures, that could not be so readily carried over into the context of the Certificate and Voucher programs; this posed a particular challenge. In those programs the housing authority does not admit an applicant to housing, is not the resident's landlord and does not evict. Instead, in a delicate balance among the three parties involved, the housing agency provides a rental subsidy to the participant and, as a *quid pro quo* to the private landlord's receipt of a portion of the market rent, enforces specific regulatory provisions incorporated into the Housing Assistance Payments contract. Between the private landlord and the resident-recipient flow another set of rights and obligations, arising from the lease, the HAP contract, federal law and regulation and state law.

In this chapter, the Task Force has addressed only those issues that were of particular concern to Task Force members or were congruent with issues raised in the project-based context. The Task Force has not attempted a wholesale critique of the Certificate and Voucher programs nor wholly rewritten any area of program administration. Nor has the Task Force, in particular, dealt with the proposed regulations to consolidate the Certificate and Voucher programs, which have not yet been implemented and so do not repre-

sent current practice. This Chapter includes recommendations concerning:

- Expirations/extensions of time;
- Exemptions to fair market rents;
- Assistance for individuals with disabilities;
- Waiting lists;
- Evictions/terminations of assistance;
- Lease terminations in the first year of the lease;
- Damage and vacancy claims;
- Housing quality standards;
- Reasonable accommodations; and
- Portability/mobility.

Chapter 7 - Support Services

This chapter examines the intersection of housing and services and makes recommendations to Congress, HUD and the Department of Health and Human Services about improving coordination, access, and delivery of services in an independent housing context. Many people who live in federally subsidized housing need, want and are eligible for services that have some form of federal subsidy or some form of federal mandate or encouragement. Services could help maintain tenancies and independence, promote economic and educational opportunity, and generally enhance the lives and opportunities of those who live in federally subsidized housing. The Task Force believes that one major problem is that the housing and service systems often do not understand one another or work in a coordinated way to help the same individual. Because issues of coordination can be addressed *only if HUD and HHS work together*, this chapter makes recommendations to HHS even though the Task Force was created to advise Congress about HUD matters.

Part A of this chapter covers general services and housing issues and recommendations to ensure the provision of services to residents. Part B reviews the planning and funding complexities of federal, state and local programs, including recommendations to HUD and HHS. Part C discusses collaborative agreements between housing and services providers.

Chapter 8 - Clearinghouse

In a number of discussions, the Task Force addressed the problems associated with the lack of effective coordination among housing providers, supportive service providers, tenant representatives and advocates. We were also troubled by the general unavailability of adequate, reliable, technical assistance on reasonable accommodation procedures and substance. .

The Task Force concluded that one way of addressing both problems was to recommend that Congress require that each state receiving federal housing assistance establish a model clearinghouse program, to be funded by the HOME and CDBG programs. This chapter discusses the scope and purposes of such clearinghouses.

Chapter 9 - Confidentiality

Because every housing file contains personal information about applicants and residents, privacy and confidentiality are persistent concerns. The civil rights and housing program laws and regulations all address some aspects of privacy and confidentiality, but they leave many questions unanswered. Thus, the Task Force recommends that HUD research the variety of questions and issues that the chapter lists, consult with interested parties, and issue prompt and responsive guidance. The questions include issues relating to law enforcement, reasonable accommodations, resident screening and eviction committees, state and local laws, and service coordinator and provider responsibilities.

Chapter 10 - NIMBY

NIMBY, the Not In My Back Yard syndrome, both contributes to and is a form of housing discrimination. Like all forms of discrimination, NIMBY has ripple effects on subsidized housing providers. When a neighborhood association successfully prevents people with disabilities, people with low incomes, and people with no homes from moving in, it not only exacerbates the pressure on subsidized housing providers to house these groups, but it reinforces the stereotype that subsidized housing exists for the purpose of keeping "the undesireables" out of "decent" neighborhoods.

NIMBY, like the dearth of affordable housing, has permeated the Task Force's deliberations. Thus, the purpose of this chapter is two-fold. It describes how community perceptions and stereotypes can limit housing opportunities for individuals and families with

low- and very low-incomes; while emphasizing that every individual and family should have an opportunity to choose from a variety of housing options, including private, public, federally-assisted, scattered site and supportive housing. Second, this chapter offers a number of specific recommendations to Congress and the Executive Agencies with regard to housing discrimination. This chapter is not an endorsement of one type of housing option over others but rather an endorsement of individual choice and empowerment. The Task Force was unanimous in its identification of discrimination as a major problem for everyone involved in the housing industry.

Closing Note on Recommendations to HUD

Most of the Task Force's recommendations for HUD action suggest that HUD develop "guidance" for housing providers. The term "guidance" means examples, models, and samples, of letters, forms, procedures, systems, etc., designed to help housing providers without imposing new requirements on them. The Task Force recommendations for guidance should not be interpreted by HUD as creating new requirements.

Introduction

Federal housing programs face a daunting array of problems that reach far beyond "bricks and mortar." Increased crime, growing numbers of persons who are homeless, economic and social trends that have swelled the ranks of individuals and families needing federal assistance, the persistence of housing discrimination, and growing numbers of applicants and residents who do not have the skills or supports to help them meet essential lease requirements, all add up to what seem like insurmountable problems in federal housing programs. In addition, the number of housing units in the private market that were affordable to poverty level individuals and families decreased by 2.9 million between 1974 and 1985 — roughly half to demolition and half to upgrading for higher income renters.

The declining private market has increased the importance of federal housing subsidy programs for renters with low- and very-low incomes. However, these programs experienced massive cuts during the 1980s. Funding levels for additional affordable housing were reduced by more than 80 percent.[1] And the nation does not have a national housing policy that meets the various needs of low- and very-low-income families and individuals. At this writing, the trend continues.

To confront these problems innovative programs and efforts have sprung up across the country to promote quality communities in public and assisted housing. Communities are using empowerment strategies to reduce drug-related crime and violence, bring educational and job related training programs into public and assisted housing programs, and implement other initiatives that create hope and opportunity among residents. Housing providers and

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1 *A Decent Place to Live*, The Report of the National Housing Task Force, 1625 Eye Street, N.W., Washington, D.C., March 1988, p. 10. In 1989, 9.7 million households were eligible for, but did not receive, HUD-funded housing assistance. *The State of the Nation's Housing, 1992* Joint Center for Housing Studies of Harvard University, Cambridge, Massachusetts, p. 18.

supportive service agencies are entering into collaborative agreements to help residents who want and need services obtain assistance. In response to still developing case law, many housing providers and advocates are working to educate themselves, each other, and applicants and residents about fair housing and reasonable accommodation laws.

It is against this background of despair and hope that the Occupancy Task Force has performed its congressional charge.

The Occupancy Task Force was created by Section 643 of the Housing and Community Development Act of 1992 (Public Law 102-550, See Appendix 1). Congress created the Task Force after hearing testimony about the complex issues raised by housing young residents with disabilities together with elderly residents. Testimony also focused on a variety of occupancy issues and the inconsistent, often conflicting, HUD instructions on the occupancy rules governing public and assisted housing.

In the context of reduced funding for existing housing programs, and an inadequate supply of affordable housing for all low income families, Congress tried to address these concerns in a number of ways. It:

(1) Authorized assisted housing providers to limit portions of or all of some properties to housing for the elderly only;[2]

(2) Authorized public housing agencies, through a HUD approved allocation plan, to designate properties for elderly residents only, residents with disabilities only, or to continue to offer mixed housing;[3]

(3) Authorized limited funds for service coordinators to be employed by public and assisted housing providers;[4]

(4) Authorized a set-aside of rental vouchers for persons with disabilities, Section 811;[5]

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2 Proposed regulations have not been issued for all assisted housing programs, especially those receiving Section 8 assistance. See PL 102-550, Subtitle D, Sections 651-658.

3 On 7 January 1994 HUD issued in the Federal Register (pgs. 1244 - 1257) proposed rules to implement this section of the 1992 housing act. See PL 102-550, Subtitle B, Section 622 (a).

4 See PL 102-550, Subtitle E, Sections 671-677. The law authorizes specific amounts for public housing ($30 million), Section 8 projects ($15 million), vouchers ($5 million) and "such sums" for old Section 202 projects, including the use of residual receipts.

5 See PL 102-550, Subtitle E, Section 623. Section 601 of the Act specifies that funding is dependent upon increases over the previous year's funding for the Section 811

(5) Created the Occupancy Task Force to review existing regulations and guidance and propose criteria for occupancy in public and assisted housing including reasonable performance and behavior standards for residents, and standards for compliance with civil rights laws.

Congress's Mandate to the Task Force

Section 643 of the 1992 Housing Act established the composition of the Task Force, defined the duties of the task force members, and described HUD's responsibilities to support the Task Force. Section 643 also requires HUD to issue a Notice of Proposed Rulemaking within 3 months of the delivery of the Task Force's final report. The act requires that HUD "take into consideration" the final Task Force report. HUD is also directed to solicit public comment on its proposed rules for at least 60 days.

The Task Force's responsibilities, as set forth in the law, are as follows:

"The Task Force shall...

(A) review all existing standards, regulations, and guidelines governing occupancy and tenant selection policies in federally assisted housing;[6]

(B) review all existing standards, regulations, and guidelines governing lease provisions and other rules of occupancy for federally assisted housing;

(C) determine whether the standards, regulations, and guidelines reviewed under...(A) and (B) provide sufficient guidance to owners and managers of federally assisted housing to—

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project-based program.

6 The term as used in the law includes public housing , project-based assistance under Section 8, section 202 as amended by section 801 of the 1990 National Affordable Housing Act, section 202 prior to the NAHA amendment, housing financed under section 221 (d) (3), housing insured, assisted or held by HUD, a State or a State agency under section 236, housing constructed or substantially rehabilitated under section 8 (b) (2) of the 1937 Act as in effect prior to 10-1-83. See PL 102-550, Subtitle C, Section 643(a)(4)(A).

(i) develop procedures for preselection inquiries sufficient to determine the capacity of applicants to comply with reasonable lease terms and conditions of occupancy;

(ii) utilize leases that prohibit behavior which endangers the health or safety of other tenants or violates the rights of other tenants to peaceful enjoyment of the premises;

(iii) assess the need to provide, and appropriate measures for providing, reasonable accommodations required under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 for persons with various types of disabilities; and

(iv) comply with civil rights laws and regulations; and

(D) propose criteria for occupancy in federally assisted housing, standards for the reasonable performance and behavior of tenants of federally assisted housing, compliance standards consistent with the reasonable accommodation requirements of the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973, standards for compliance with other civil rights laws, and procedures for the eviction of tenants consistent with sections 6 and 8 of the United States Housing Act of 1937; and

(E) report to the Congress and the Secretary of Housing and Urban Development...."

It is important to note that the statute does not ask the Task Force to revisit the decisions Congress reached regarding mixed populations. Instead, the law emphasizes the procedural and operational issues associated with adapting the occupancy cycle to accommodate Fair Housing and Section 504 obligations.

The Task Force is to inquire into "existing standards, regulations, and guidelines" that affect occupancy and tenant selection policies, lease provisions and other rules of occupancy. These are day-to-day activities for most housing providers. Additionally, the Task Force is asked to determine if sufficient guidance exists in the areas of: preselection inquiries, lease provisions that prohibit certain types of behavior, the need to provide for and the measures for providing reasonable accommodations, and compliance with civil rights laws and regulations. Again, the topics noted are operational issues affecting the manner and conduct of the business relation-

ship between the manager and the resident or applicant seeking housing.

The law asks the Task Force to produce a report that proposes criteria for occupancy that include reasonable performance and behavior criteria for residents, compliance standards consistent with reasonable accommodation requirements, standards for compliance with other civil rights laws, and procedures for the eviction of tenants. Task Force recommendations are intended to provide guidance that is "...additional to and consistent with the Department's existing Fair Housing Amendments Act regulations [and]...existing federal lease and grievance procedures."(Legislative history, Housing and Community Development Act of 1992, H. Rep. 102-760, pp. 139-140.)

Membership

The law directs the Secretary to appoint members representing the interests of "...owners, managers, and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health, and other non-profit service providers...." The law did not specify the exact number or mix of groups to be represented. These decisions were left to the Secretary's discretion.

Former HUD Secretary Kemp selected 33 individuals for the Task Force. Current HUD Secretary Cisneros appointed one additional Task Force member, bringing the total to 34. The individuals selected represent a cross-section of the interests described in the law.

The Charter

The Task Force charter, dated December 31,1992, was published in the January 7, 1993 Federal Register and is reproduced at Appendix 3. The charter was prepared by HUD and presented to the Task Force members at the first meeting on January 15, 1993. Both the charter and its publication are required by the Federal Advisory Committee Act (FACA). With respect to the purpose of the Task Force, the charter reiterates the main points of the law. The charter also includes provisions on the organization of the Task Force, such as the term of appointment for members, meeting requirements, re-

cordkeeping, HUD's estimated support costs, and reports to HUD and Congress.

The Charter specified the following operating principles for the Task Force:

- Limited the number of members to 35
- Required that the membership elect a Chairperson
- Authorized the Chairperson to appoint subcommittees
- Specified that the Task Force meet at least twice (The Task Force and its subcommittees met 9 times over 1993-94, not including 3 public hearings.)
- Required that all meetings be open to the public and that notice of Task Force and subcommittee meetings be published in the Federal Register 15 days in advance of the meetings.

How the Task Force Operated

At the first Task Force meeting, the Chairperson and Vice-chairperson were elected and the membership reviewed its charter. The Task Force decided to structure its work to reflect the occupancy cycle and created three subcommittees: admissions and screening, occupancy and management, and evictions. Each sub-committee was co-chaired by a housing provider representative and an applicant/resident representative. Several members chose to serve on more than one subcommittee which resulted in sequential, rather than simultaneous, subcommittee meetings.

Task Force members participated in an orientation and training meeting in February, followed by 3-day working meetings in March, April, May, June, and July of 1993.

Task Force subcommittee members identified the issues, regulations, policies and statutes that became the subject of working papers, which the subcommittee members drafted (the Task Force had no budget for staff or consultants). The papers circulated within the subcommittees and the Task Force for review and comment. The combination of writing, presentation, discussion, and subsequent editing of the working papers sharpened the issues for the members. The process was repeated many times. The working papers were eventually edited and combined to form the chapters in the draft report.

Task Force meetings were open public meetings announced in the Federal Register as required by the FACA. Persons in the audi-

ence often participated in the discussion, and sometimes the writing, as subcommittee working papers were reviewed and redrafted.

In order to reach agreement on the discussion and recommendations in the report, the Task Force adopted the principle of **essential consensus.** Essential consensus required that a super-majority support the issue before it could be adopted. Specifically, when four or more Task Force members disagreed with the majority, essential consensus was not achieved and further discussion ensued. The use of this principle eliminated situations where a single individual might be called upon to cast a deciding vote or where a minority report might otherwise have been recommended. It also offset any inequity in number between provider groups and applicant/resident groups.

Although the report reflects the essential consensus of the Task Force, individual members, or the organizations they represent, may not agree with every part of the report.

The Draft and Final Reports

A second important decision reached by the Task Force was to prepare a draft report prior to the public hearings and comment period required by the law. With a draft report the public comment period could be used to respond to the "product" of Task Force debate and deliberations.

The draft report was released for public comment on August 31, 1993. The comment period terminated, with a one month extension, on December 1, 1993. Over 370 public comments were received and analyzed by Task Force members. Chapter teams (one housing provider representative and one applicant/resident representative) were created to review the comments, summarize the issues and concerns of commenters, and suggest revisions to the draft report. The draft report and the comment summaries were reviewed in a four-day meeting held in January of 1994. Chapters were revised and edited based on the public comments received.

Task Force members prepared a second draft for review at the February 1994 meeting. At this meeting final language was adopted and the report authorized for submission to HUD and Congress.

The statute requires HUD to draft regulations that "take into consideration" the final report issued by the Task Force. A notice of proposed rulemaking is due 90 days after the submission of the final

report. A 60-day public comment period is required after which HUD has 60 more days to issue a final set of regulations.

Going Forward from Here

Early in our proceedings, we discovered that our different backgrounds and experiences resulted in our having very different perspectives and expectations about the rights and responsibilities of residents and providers. This final report is a first attempt to draw the issues together into a common perspective.

The recommendations contained in the report will help raise the collective understanding of how the Fair Housing Act and Section 504 must work in the field. None of us on the Task Force believe that our work is definitive, but it is an example of the collaborative efforts that must follow if the quality of life is to be improved for those families served by the public and assisted housing programs.

Preface

Funding and Financing Issues

Throughout its deliberations and recommendations, one theme about which Occupancy Task Force members agreed was that low-income people should have more housing choices than they do at present. The issue of housing choice, along with many other concerns the Task Force addressed, is complicated by scarcity of resources. The Task Force therefore proposes a number of recommendations aimed specifically at funding and cost issues. The Task Force agreed, for example, that if there were a sufficient amount of different types of housing assistance available, the current tension in 'elderly' housing developments between their elderly and non-elderly residents with disabilities would be, if not eliminated, greatly diminished. Many younger people with disabilities would, in all probability, choose voucher-type assistance over apartments in 'elderly buildings' if they were offered a choice.

The Occupancy Task Force believes that the United States should devote an amount to low-income housing development, operation and preservation that is at least equal to the amount of tax expense of the higher-income mortgage interest subsidy. While all Task Force members recognize the need to cut federal expenditures, we believe the budget ax has fallen too heavily on those Americans least able to bear it.

The Occupancy Task Force also believes that in an era of limited funding, it is necessary to support existing assisted housing resources before developing and funding new, perhaps more glamorous, programs.

Specifically, the Task Force recommends the following:

1 **In each of the past fourteen years, HUD's budget has proposed less money for public housing operating subsidies than PHAs were eligible for under law. Public housing operating subsidies should**

be funded at 100% of eligibility without OMB's assumptions about illusory savings.[1]

The Performance Funding System's allowable expense level should be raised to reflect increased costs for fair housing and Section 504 requirements, as well as costs for service coordination for residents[2].

2 **Section 8 Existing Fair Market Rents and housing Voucher Payment Standards should be fine-tuned with respect to sub-market areas and set at levels high enough to reflect increased costs for fair housing and Section 504 requirements and so that they do not have the effect of limiting recipients' choices of the neighborhoods in which they can live.**

3 **Section 8 New Construction and Substantial Rehabilitation Rents should be adjustable to reflect increased costs for fair housing and section 504 requirements, as well as costs for service coordination for residents and necessary expenses for security beyond that provided by local law enforcement.**

4 **The Community Partnerships against Crime (COMPAC) should be authorized and funded at a level sufficient for housing authority programs of prevention, treatment and law enforcement in public housing neighborhoods beyond that required to be provided by the locality.**

5 **Many public housing developments are in poor condition today because of years of deferred funding for maintenance. The modernization needed for viable public housing developments should be completed over the next ten years. This will require funding at a level of at least $4.2 to $4.5 billion per year for the combination of the Comprehensive Grant, CIAP (Comprehensive Improvements Assistance Program), MROP (Major Reconstruction of**

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1 For example, illusory savings are those which are due to increases in resident incomes (when, in fact, resident incomes are decreasing), IRS matching (when such matching merely increases move-outs and vacancies rather than income) and vacancy reductions.

2 The assumption is that services would, in most cases, be delivered by others, but that without the housing provider helping residents find and use services, that such services will not benefit all residents who need and are eligible for them.

Obsolete Projects) and Severely Distressed programs. HUD should manage the assisted housing programs so that their maintenance needs are funded as they accrue.

6 Non-viable public housing developments should be replaced unit-for-unit with a combination of region-wide project-based units and permanent tenant-based assistance as determined by the PHA and its democratically elected resident association.

Project-based units should be in scattered site developments. Total Development Cost ceilings must be high enough to permit building appropriately sized units designed to foster family living, compatible with all neighborhoods.

7 Current levels of tenant-based assistance (certificates and vouchers) should be preserved by renewing expiring instruments.

8 The HUD-assisted housing stock should be preserved through the variety of mechanisms found in Title II of the 1987 Act, Title VI and Title VIII of the 1990 Act and Title IV of the 1992 Act. Owners should be provided with the appropriate mixture of Loan Management Set-Aside Section 8 and Flexible Subsidy Capital Improvement loans. When preservation is not viable, residents of subsidized units should be provided with tenant-based subsidies.

All reasonable steps should be taken to renew expiring project-based assistance, and when renewal is not feasible, residents of subsidized units should be provided with tenant-based subsidies.

9 When viable developments are located in distressed neighborhoods, Community Development funding should be provided to revitalize the neighborhood.

10 Receipt of CDBG (Community Development Block Grant)and HOME funds should be predicated upon the locality's submission of a credible Fair Housing Plan and compliance with the Plan once approved.

11 When Congress authorizes new programs, such as Family Self Sufficiency, HOPE for Elderly Independence, and the myriad of resident empowerment programs, they should analyze the cost to housing providers and resident associations to administer the

programs. Participation in such programs should not be mandated unless additional administrative funding is provided.

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The Application Process

Background

In the application process all providers of federally assisted housing execute a series of steps – some required by the federal government as a condition for receiving subsidy, and others dictated by good management practice – before admitting applicants to the housing they own or manage.

Every owner of federally assisted housing, whether a public agency such as a housing authority, a non-profit corporation or a for-profit investor-owner is bound to both a broad standard of non-discrimination and to program-specific technical requirements in the admission process. The federal government's right to demand compliance is based on the law of the land (as it has changed and evolved) and the terms of the specific contracts with HUD that housing providers signed prior to development.

The term "application process" means the methods used to take applications, determine eligibility, conduct screening, verify information provided by applicants, compute rent, manage waiting lists, select tenants, offer them units and ultimately, execute leases. The term "housing provider" means the owner/manager of federally assisted housing and includes housing authorities, non-profit, limited-profit and for-profit entities.

In preparing all its material on admissions, the Occupancy Task Force has attempted to balance two sets of rights:

- The rights of all applicants to be treated fairly and judged on their individual merits according to performance and behavior-based standards derived from the requirements of tenancy; and
- The rights of owners to establish performance and behavior-based standards for admission that will protect the rights of residents and the physical and financial integrity of the property.

Many of the recommendations of the Task Force involve action by HUD. In a few of the recommendations the Task Force suggests that HUD adopt or revise regulations. These regulations would create or amend requirements for housing providers.

Most of the Task Force's recommendations for HUD action suggest that HUD develop 'guidance' for housing providers. The term 'guidance' means examples, models, and samples of letters, forms, procedures, systems and other materials designed to help housing providers without imposing new requirements on them. Such guidance should take into account variations among housing providers based upon size, location and availability of other services and service providers. The Task Force recommendations for guidance should not be interpreted by HUD as creating new requirements for housing providers.

Principles Governing Admission to Federally-Assisted Housing

The dual goals of admitting to federally assisted housing only eligible applicants who can comply with appropriate selection criteria while ensuring that the admission process is open and non-discriminatory require housing providers to exercise a high level of judgment and sensitivity. Housing providers need clear and objective policies to guide their staff as they review and weigh each application on its merits. The eleven principles listed below already exist in federal law and regulation, but are not found in any one location.

12 The Occupancy Task Force recommends that HUD issue guidance incorporating the principles listed below to help housing providers, applicants, advocates and service providers to understand the balance required between the individual rights of applicants and residents and the need to maintain a quality living environment.

1. The essential commandment of the anti-discrimination laws is that each individual be treated on his or her merits, without presumption of abilities based on race, color, religion, sex, age, national origin, disability, handicap or familial status, recognizing that specific program requirements may limit participation under the law.

2. At the time of initial application, housing providers

may properly confirm the presence of an applicant's disability as a condition of statutory eligibility in the context of rent computation, qualifying for specific developments or units or reasonable accommodations.

3. Housing providers should require all residents to meet performance-based standards for the occupancy of an assisted unit as stated in the tenant/resident obligations section of the lease.

4. Housing providers must employ "performance and behavior" admission requirements defined by the provider's lease. Admission requirements may not be defined by the resident's presumed needs nor by the biases of other residents. Specifically, as currently required by the §504[1] and Fair Housing rules, a housing provider may not consider "ability to live independently".

5. Applicant Screening methods should be targeted toward determining the likelihood that any applicant will be able to meet the essential requirements of tenancy as expressed in the lease. These essential requirements may be summarized as follows:

- **to pay rent and other charges under the lease in a timely manner;**
- **to care for and avoid damaging the unit and common areas, to use facilities and equipment in a reasonable way, to create no health or safety hazards, to report maintenance needs;**
- **not to interfere with the rights and enjoyment of others, and not to damage the property of others;**
- **not to engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of other resi-**

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1 Federal Register Vol.53, No. 106, June 2, 1988: On page 20218, the preamble to the §504 regulations states, "After carefully considering the comments received regarding the phrase 'capable of independent living' in §8.3 of the proposed rule the Department has determined to delete the phrase from the definition. Instead, the definition as revised focuses upon an occupant of multifamily housing being capable of complying with all obligations of occupancy either without supportive services or with supportive services provided by persons other than the recipient."

dents or staff; and not to engage in drug-related criminal activity on or near the premises; and

- to comply with necessary and reasonable rules and program requirements of HUD and the housing provider; to comply with health and safety codes.

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

7. If any applicant with a disability or handicap cannot satisfy the requirements of tenancy because of previous rental history, housing providers must, if requested by the applicant:

- consider whether any mitigating circumstances related to the disability could be verified to explain and overcome the problematic behavior;[3] and
- make a reasonable accommodation that will allow the applicant to meet the requirements.

8. A reasonable accommodation allows the applicant with a disability to meet essential requirements of tenancy; it does not require reducing or waiving essential requirements. Applicants and providers are each responsible for working together to identify the specific accommodation that each accepts as reasonable.

9. Accommodations are not reasonable if they require fundamental alterations in the nature of a program or impose undue financial and administrative burdens on the housing provider. Likewise, providers may not be required to make specific accommodations or physical modifications if equally effective alternatives permit full program participation.

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2 See development-specific eligibility on page 20.

3 Public housing authorities are required to consider mitigating circumstances for all applicants.

10. If an applicant with disabilities who would otherwise be rejected based on objective screening criteria asserts that mitigating circumstances would overcome or outweigh the negative information obtained in screening, the provider may not dismiss the assertion but instead may require the applicant to verify the mitigating circumstances.

If the applicant's claim of mitigating circumstances is based on a disability, the housing provider may make inquiries about the applicant's assertions, but only to the extent necessary to confirm the applicant's claim.

11. If an applicant with disabilities, who would otherwise be rejected based on objective screening criteria, asserts that he or she could meet the requirements of tenancy with assistance that the housing provider is not obliged to offer, the provider may require verification that the assistance will be provided and accepted and will allow the applicant to comply with essential lease requirements.

Lease addenda or conditional leases requiring the continuation of such assistance after admission are not permitted by Fair Housing Laws[4] and are not necessary, since the issue after admission is lease compliance, not receipt of services. A resident who fails to comply with the lease is subject to lease enforcement, up to and including eviction, when warranted.

If the assistance to be provided includes treatment, verification may include inquiries only to the extent necessary to confirm the applicant's assertions.

In developing policies and procedures guided by these principles, housing providers must not only establish documents that are fair and clear, but must also ensure that staff are trained in current methods.

Many housing providers already operate according to the principles stated above, and most who do not already do so want to comply. It must be recognized, however, that carrying out these

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4 Different lease terms are prohibited by 24 CFR § 100.65 (a) and §100.65 (b)(1).

principles increases the operating costs of housing , not just initially, but on a continuing basis. Materials, procedures and systems must be adjusted to take into account the needs of individual applicants and residents for reasonable accommodations. The application process and the housing management process may be more deliberate as staff respond to families' individualized needs. Existing staff must be trained and better qualified staff must be hired in the future.

13 The Occupancy Task Force recommends that HUD budget for and Congress appropriate funding sufficient to offset the costs of housing provider compliance with Fair Housing and §504 requirements.[5]

The lesson that all housing providers should take from *Cason vs. Rochester Housing Authority*[6] is that practices will be found to be discriminatory if they have a discriminatory **effect**, regardless of the housing provider's stated intentions to the contrary. In particular, housing providers are no longer permitted to screen for "ability to live independently" because such screening will have the (illegal) effect of denying admission to otherwise qualified applicants with disabilities.

In the remaining sections of this chapter the Occupancy Task Force has attempted to explain and give examples of how these principles would be implemented.

Nondiscrimination Requirements

All providers of federally assisted housing must comply with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968 (as amended by the Community Development Act of 1974 and the Fair Housing Amendments Act of 1988), Executive Order 11063, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Titles II and III of the Americans with Disabilities Act (if applicable) and any legislation protecting the individual rights of tenants, applicants or staff that may subsequently be enacted.

This means that housing providers must not discriminate be-

5 See the Preface discussion of Funding and Financing Issues.
6 748 F. Supp. 1002 (W.D.N.Y 1990).

cause of race, color, age, sex, religion, familial status, disability, handicap or national origin in the leasing, rental, or other disposition of housing or related facilities, including land, included in any project or projects under its jurisdiction or in the use or occupancy thereof.

Under specific conditions described in the Fair Housing Amendments of 1988, housing providers are permitted to limit occupancy of certain developments to 'older persons' (including elderly people with disabilities) and are exempt from the familial status provisions. (Regulations are found at 24 CFR § 100.303 and 304.)

Not all 'elderly housing' covered by the Housing Act of 1992 can meet the tests prescribed in the FHAA and, thus, although permitted to limit occupancy to elderly families will not be permitted to bar elderly families that include children.

In addition to the classes protected under Federal Law, housing providers must be aware of protections that may be provided by state law or local ordinance. Many localities and some states, for example, forbid discrimination on the basis of sexual preference or sexual orientation.

Current HUD rules require each housing provider to have a written policy on non-discrimination which must state that the housing provider will not, on account of race, color, sex, age, religion, disability, handicap, national origin or familial status:

1. Deny to any family the opportunity to apply for housing, nor deny to any qualified applicant the opportunity to lease housing suitable to its needs;

2. Provide housing which is different from that provided others;

3. Subject a person to segregation or disparate treatment;

4. Restrict a person's access to any benefit enjoyed by others in connection with the housing program;

5. Treat a person differently in determining eligibility or other requirements for admission;

6. Deny a person access to the same level of services; or

7. Deny a person the opportunity to participate in a plan-

ning or advisory group which is an integral part of the housing program.

The housing provider must not automatically deny admission to a particular group or category of otherwise eligible applicants (e.g., families with children born to unmarried parents, elderly pet owners, or families who receive welfare). Each applicant in a particular group or category must be treated on an individual basis in the normal processing routine.[7]

Housing providers must identify and eliminate situations or procedures that create a barrier to equal housing opportunity for all. In accordance with Section 504, housing providers must make physical or procedural changes to permit people with disabilities to take full advantage of the housing program. The prohibition against disparate treatment is the legal basis for the prohibition against lease addenda and conditional leases for persons with disabilities.[8]

Applicant screening criteria must be related to an applicant's ability to meet essential lease requirements. Housing providers could not, for instance, insist that applicants be registered voters before being admitted to their housing. Some registered voters will pay their rent and care for their units – others will not. Thus, the use of such a criterion in the screening process would be pointless and unfair.[9]

Waiting list administration, in particular, may be subject to a considerable amount of political and personal pressure. Accepting an applicant from a lower waiting list position before one in a higher position violates policy, federal law, and the civil rights of the other families on the waiting list.[10]

Discussion

The above-listed requirements are neither new nor revolutionary, but the Occupancy Task Force felt they warrant re-emphasis. Housing providers need to ensure that their application processes are open and intelligible[11] to applicants with disabilities.

7 HUD Handbook 7465.1 REV-2, ¶ 4.1.a(5) and HUD Handbook 4350.3 ¶ 2-27 (b).
8 Different lease terms are prohibited by 24 CFR § 100.65 (a) and §100.65 (b)(1).
9 HUD Handbook 7465.1 REV-2, ¶ 4.1.a(5) and HUD Handbook 4350.3 ¶ 2-27 (b).
10 But see HUD Section 504 regulations, 24 CFR § 8.27(a)(2).
11 The term 'intelligible' means effective communication with persons with disabilities required of all housing providers by 24 CFR § 8.6(a). If housing providers ask all

Nondiscrimination is of critical importance in the operation of a housing development, both because compliance is essential to the programs' purposes and because illegal discrimination is subject to very severe civil penalties (including punitive damages) usually not covered by general liability insurance

Accessibility and Plain Language

14 The Occupancy Task Force recommends that HUD make clear the requirement that the application facility and process be accessible and intelligible to applicants with disabilities.

15 The Occupancy Task Force recommends that HUD develop sample application materials in 'plain language' versions. HUD should clarify the affirmative requirement for housing providers to communicate with applicants with disabilities in a manner intelligible to them.

Discussion

Most housing providers are well aware that programs used by residents must be made accessible. Application and management offices, hearing rooms, community centers, laundry, crafts and bingo rooms and so on must be available for use by residents with a full range of disabilities. If these facilities are not already accessible (and located on accessible routes), they must be made so or be relocated, subject only to the undue financial and administrative burden test.

As housing providers are also aware, documents intended for use by applicants and residents must be presented in accessible formats for those with vision or hearing impairments, but, equally importantly, they should be written simply and clearly to enable applicants with learning or cognitive disabilities to understand as much as possible.

The issue of "plain language" is significant because federally assisted housing, like many government programs, uses a significant

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applicants and residents how to communicate with them, the method designated by persons with disabilities would be considered 'intelligible.' Examples include: using auxiliary aids, sign language interpreters, large type, or plain language written materials, oral communication or communication with a third party designated by the persons with disabilities.

amount of jargon that staff tend to overlook because they are so familiar with it. In addition, because of increasing levels of litigation, many housing documents are excessively legalistic. This is counterproductive because not only applicants and residents, but also staff will have difficulty comprehending such materials.

It is true that some of the concepts that must be described relative to eligibility, rent computation, applicant screening, reasonable accommodations, and lease compliance are complicated, but offering examples will help applicants and residents understand the issues involved.

In writing materials to be used by applicants and residents, housing staff should keep in mind that mental retardation, learning disabilities and other cognitive disabilities may affect the applicant's ability to read or understand – so rules and benefits may have to be explained verbally – perhaps more than once.

16 **The Occupancy Task Force recommends that HUD require all housing providers to ask all applicants at the point of initial contact whether they need a form of communication other than plain language paperwork. Some alternatives include but are not limited to sign language interpretation, having materials explained orally by staff, either in person or by phone, providing large type materials, offering information on tape, or having some third party representative, (a friend, relative or advocate, named by the applicant) accompany the applicant to receive, interpret and explain housing materials and be present at all meetings and discussions.**

As a general rule, the following information should be prepared in plain language accessible formats:

- Marketing and informational materials
- Information about the application process
- The application form
- All form letters, notices etc. to applicants and residents
- General statement about reasonable accommodation

- Orientation materials for new residents[12]
- The lease and house rules (if any)[13]
- Guidance or instructions about care of the housing unit
- Information about opening, updating or closing the waiting list
- All information related to applicant rights (to hearings, etc.)

In addition to written materials, housing providers need to think about the way the development's signs indicate how to get around. Signs that use color or pictures may be easier for everyone to follow.

Housing providers may be able to provide referrals to agencies or individuals who help applicants with the application process. This third party assistance could range from baby-sitting or transportation to interpretation or broader advocacy. Small PHAs or owners might wish to contact other local agencies that advocate for persons with disabilities for their sources for interpreters, architects who understand Section 504 and the ADA and other professionals who will be needed to comply fully with HUD's requirements.

For further information about how housing providers can connect with agencies and individuals who serve the same clientele, see the section of this report on the Clearinghouse.

Marketing

Marketing or outreach requirements are very different in public housing and assisted housing. In the Section 8 project-based assistance programs current law requires that an Affirmative Fair Housing Marketing Plan, approved[14] by HUD, outline the housing provider's strategy to reach those eligible families least likely to apply for housing, but this plan is applicable primarily at initial lease-up. In public housing no marketing at all is required, although having vacant ready-to-rent units has led many PHAs to begin marketing. In addition, the Fair Housing Law requires all housing providers to "affirmatively further the goals of Fair Housing". For example, all marketing materials must comply with Fair Housing Act requirements with respect to wording, logo, size of type, etc.

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12 An exception to this suggestion would be materials mandated by state or local law.

13 The Model Lease for Assisted Housing should be made available in a plain language version.

14 See HUD Handbook 4350.3 ¶ 2-20 and Appendix 4 to this Handbook.

A series of issues are germane to any housing provider considering a marketing campaign.

17 The Occupancy Task Force recommends that HUD offer guidance and sample materials[15] to housing providers on marketing materials and techniques:

- Marketing should accurately describe the housing units, application process, waiting list and preference structure.
- Marketing should be "plain language" and may use more than strictly English-language print media.
- An effort should be made to target all agencies that serve and advocate for potentially eligible applicants (e.g. persons with disabilities, to ensure that accessible/adaptable units are used by people who can best take advantage of their features).
- Marketing materials should make clear who is eligible: individuals and families, people with both physical and mental disabilities.
- Housing providers' responsibility to provide reasonable accommodations to people with disabilities should be made clear.

Small housing providers may be able to reduce their costs by using a clearinghouse as described in Chapter 8.

HUD grants housing providers wide latitude in designing application methods and forms to meet their needs so long as tests of fairness and accessibility are met. At some stage in the application process, all housing providers are required to obtain written applications with all the information needed to determine whether an applicant can be admitted, what kind of unit is needed, whether a preference should be granted, and what rent will be paid.

18 The Occupancy Task Force recommends that HUD make it clear that housing providers are not permitted to require that all applicants complete a written application form without assistance, since such a requirement will have a disparate impact on applicants with disabilities who cannot read, write or understand written materials. Housing providers must, if requested, provide or obtain help for such applicants to complete their applications.[16]

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15 For assisted housing, see HUD Handbook 8025.1.

16 Some housing providers may wish to contract with an individual or agency to provide

The application form can and should tell staff everything needed to determine whether the applicant family is eligible, whom to contact to perform tenant screening, and how to compute rent. There are many other types of information that may be requested on the application form, but no data should be obtained that will not actually be reviewed and used. The more complex the application form, the more time staff will spend reviewing it and explaining it to applicants.

19 **The Occupancy Task Force recommends that HUD issue guidance for housing staff to explain to all applicants what screening standards will be used and how screening information will be verified.**

Waiting List

Waiting List Structure

The organization of the waiting list, the method by which applicants will be chosen from the waiting list and offered available dwelling units, and the circumstances in which a transfer would take precedence over a new admission must all be incorporated into the housing provider's admission and selection policy. For PHAs the Tenant Selection and Assignment Plan (typically a part of the PHA's Admission and Occupancy Policy), which must be submitted to HUD for review and approval before implementation, covers the PHA's policy on offering units and transfers. Any changes being made to a Tenant Selection and Assignment Plan must likewise be reviewed and approved by HUD. For providers of assisted housing the document that describes waiting list structure and administration is the Resident Selection Plan, for which HUD approval is not required.

Housing providers maintain a chronological list of applicants that notes the date and time of each application. In one sense this document is the waiting list, but, in reality, a housing provider with units of different sizes and types, or a PHA with many different locations will sort applications into sub-lists, first by the unit size(s) and type of units for which applicants qualify. For example, hous-

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ing providers typically maintain a special waiting list for units that have special features to accommodate persons with disabilities. This helps ensure that the units go to families that really need them and that the units are not inadvertently offered to families without members who have the disabilities for which the units are designed.

After applications are sorted into sub-lists by size and unit type, they will be divided into Federal Preference and non-Federal Preference categories, any local preferences in effect would be considered and each category would be sorted by date and time of application.

Occupancy Standards

All the sorting, dividing and categorizing described above must take into account the new interpretation of occupancy standards required by the 1988 Fair Housing Amendments Act. Housing providers are no longer permitted to simply assign households to unit sizes based on the age, sex and relationship of family members as was done in the past, because such methods have a disparate impact on families with children. Now, most households will qualify for more than one unit size. For example, a single person household will qualify for both an efficiency and a one bedroom unit, while a family composed of a mother, two daughters and a son might qualify for a two or a three bedroom unit.

HUD has never had explicit occupancy limits, although the guideline had always been two persons per bedroom.

20 **The Occupancy Task Force recommends that HUD establish (by regulation) either maximum occupancy standards based on the square footage of the habitable area in the entire unit or in each of the dwelling unit's bedrooms, or, at a minimum, some sort of occupancy guidance that will hold housing providers harmless.**

21 **The Occupancy Task Force recommends that HUD issue guidance to assist housing providers in determining the minimum occupancy standards taking into account unit size, age, gender and relationship of applicant family members.**

Relationship Between HUD-Established Standards or Guidelines and Local Codes

When maximum occupancy limits are established by HUD un-

der a national standard, housing providers can compare them to the occupancy requirements under local housing codes. If the local housing code were equivalent to or not more restrictive than HUD's national standard, housing providers could safely use the local code. If, on the other hand, the local code were more restrictive than HUD's national standard, the housing provider could contact HUD's Office of Fair Housing and Equal Opportunity to request an investigation into whether the local code is discriminatory and, unless HUD's investigation finds the local code nondiscriminatory, should use the HUD standard. Legal research suggests that the housing provider is not fully protected by complying with a discriminatory local code.

Occupancy Task Force Member Points of View on Occupancy Standards

At the present time members of the Occupancy Task Force are not in agreement about square footage limitations or whether they should be applied to the entire unit or just to the bedrooms. Some members favor the BOCA Code, which requires 120 square foot minimum for a bedroom for two people. Others feel the limit should be 50 square feet per person, which would permit two people in a 100 square foot bedroom. Still others like the Uniform Housing Code, which permits two people in a 70 square foot room and an additional person for each additional 50 square feet of habitable space. Habitable space does not include closets, halls, stairs, mechanical rooms, bathrooms or kitchens.

Some Occupancy Task Force members recommend permitting the greatest possible number of people to occupy a housing unit because this maximizes the limited assisted housing stock. Also, these members feel that the choice of unit size is appropriate to meet each family's needs is best made by the family. The importance of this choice is heightened because it is informed by the cultural standards, traditions and mores of the family. Occupancy standards that recognize the family's choice avoid imposing inappropriate cultural standards.

Other Occupancy Task Force members disagree with this view because they note that wear and tear increases with population density and excessive population density throughout an assisted housing site increases the degree of management difficulty as well as the

stress under which the residents live and interact. They favor a smaller maximum number of occupants to avoid wearing out their units, thus preserving them for assistance to future applicants.

The comments received on the Preliminary Report of the Occupancy Task Force reflect the same divergence of views as those expressed by Task Force members.

Limitations on Occupancy in Certain Developments

There will be rare instances when over-riding considerations of health and safety will mandate a lower maximum occupancy standard than that suggested by the local code or a HUD-mandated national standard. Examples would be developments with on-site water or waste-water systems of limited capacity, developments with narrow halls or doors or insufficient exits to permit maximum occupancy due to the Fire and Life Safety Code, etc. In such cases, the housing provider must be prepared to defend any limitations on occupancy that fall below those suggested by the standard HUD adopts.

Placing Applicants on Waiting Lists

Housing providers may take two approaches to placing applicants on sub-lists. Those who have the capacity may place applicants on sub-lists for all the unit sizes for which they qualify and then permit the families to accept or reject the units when they come to the top of the first list. Another alternative is to ask families to declare a unit size preference. At this writing both these options may not be practical for providers that have very long lists or possible for those with automated waiting list systems that do not permit families to be placed on multiple lists, so families must (at least until the software is modified) declare a unit size preference. The approach of asking families to declare a unit size preference will work only if it is administered fairly.

22 **The Occupancy Task Force recommends that HUD require families to be given full information on the sizes of units on the sub-lists and the length of the probable wait on all lists,[17] and permit families to change their designation if their circumstances change (e.g., they have another baby or formerly had housing and they become homeless).**

23 **The Occupancy Task Force recommends that HUD permit housing providers to require families to sign a statement agreeing to remain in the unit they initially accept until a change in their family circumstances justifies a transfer.**

This provision prevents families from accepting a unit that is smaller than they really want and then immediately requesting a transfer to a larger unit (which is very costly to the housing provider and unfair to other applicants who wait longer for a larger unit).

The Waiting List and the Tenant Selection and Assignment Plan (Public Housing)

Even after waiting list software is modernized, many applicants for public housing will probably **wish** to declare a unit size preference rather than to take their chances and wait for the first offer, particularly if they strongly prefer a larger unit rather than the smallest for which they qualify. This is because HUD's model Tenant Selection and Assignment Plans A and B permit families to be offered only one choice or three choices of units after which they are placed at the bottom of the waiting list.

Families will rarely be in the same position on sub-lists for different sizes of units, and sub-lists for smaller units tend to move more quickly than those for larger units, so a family that prefers a larger unit should ask not to be listed on the smaller unit sub-list. Otherwise, they will probably rise to the top of a list for a small unit size they do not want, be offered one or three units, reject them all and be moved to the bottom of all the sub-lists.[18]

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17 The information provided on the probable wait can be no more than a good faith estimate, since a host of factors beyond the control of the housing provider will contribute to the actual length of time families spend on the list.

18 Because assisted housing is not subject to the Tenant Selection and Assignment Plan

Waiting Lists for Special Units

Some units have special features to accommodate the needs of families with specific disabilities (e.g. mobility impairment, vision or hearing impairment). Under existing Section 504 regulations housing providers must target these units first to current residents and then to applicants who want and can verify the need for such features.

24 **The Occupancy Task Force recommends that HUD require all providers to have lease clauses that require persons who are initially admitted to units with special features for persons with disabilities (because no one on the waiting list needs such a unit) to move to another unit when someone already in residence or on the waiting list needs the special features of the unit.**

Public housing units that may be designated for the elderly and near elderly pursuant to the 1992 Housing Act and units for persons with disabilities will have separate waiting lists, composed of persons who want and need such housing, though any such units ready for sixty or more days must be offered to non-elderly persons. In some privately owned assisted housing (such as Section 202 and 811 programs), occupancy may be limited to persons who are elderly or have disabilities.

Federal Preferences

Existing federal law gives applicants who live in substandard housing (including those who meet the narrow definition of homelessness), who are displaced through no fault of their own, or who are paying more than 50% of their monthly income for shelter a special preference for admission. These federal preferences have different regulatory requirements in public vs. assisted housing and do not apply to Section 236 or Section 221 housing without Section 8 assistance.

Under the 1990 National Affordable Housing Act providers of assisted housing are permitted to allocate 30% of their new move-ins each year to families who do not qualify for the federal preferences. For public housing the statutory ceiling has been raised (in

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limitations, these considerations do not apply.

the 1992 Act) to 50% of those admitted. As of March 1994 the Final Preference Rule had not yet been issued.

At present, the definitions of homelessness used in the federal preferences often have the unintended consequence of forcing individuals and families who have been in transitional housing, institutions or temporarily living as guests in homes not their own (rather than simple overcrowding) to take the very destabilizing step of going to the streets or a shelter in order to qualify as homeless. This system is inhumane for the persons involved and unnecessarily costly to the housing and service systems.

25 **The Occupancy Task Force recommends that HUD revise the definitions of homelessness throughout its programs to correct the problems described regarding federal preferences.**

Local Preferences

Regulations permit housing providers to employ local preferences for admission to housing. Among applicants who qualify for both Federal and local preferences, the federal preferences will usually take precedence over local preferences, including those mandated by state law. Local preferences may be used to determine order of housing offers or to select among federal preference holders.

26 **The Occupancy Task Force recommends that HUD issue the final rule on preferences to clarify that local preferences are subject to the Fair Housing Law, and, therefore, may not have a disproportionate effect on a protected class.**[19]

Updating the Waiting List

When the waiting list is updated an applicant is usually contacted and given a reasonable period in which to contact the housing provider to indicate a desire to remain on the waiting list. Most providers will withdraw the applications of families that fail to contact them, or whose letters requesting contact are returned because the applicant has moved. This practice is acceptable so long as the provider reinstates applicants who can show a good reason for fail-

19 For the assisted housing programs, HUD has already done this in Handbook 4350.3 ¶ 2-28 (d) and (e).

ing to contact the provider within a reasonable time beyond the time originally specified (e.g. being in the hospital, attending a funeral out of town).

27 **The Occupancy Task Force recommends that HUD clarify the requirement that housing providers grant reasonable accommodations by reinstating applicants with disabilities who fail to respond within the reasonable time frame,** ***but only for reasons that are related to their disabilities.***

Examples would include the provider's mailing a written notice to an applicant with disabilities who already indicated that he could not be reached by mail but should, instead, be contacted by telephone, or the provider's correctly notifying the advocate of an applicant with disabilities (because the applicant had requested such a notification) at a time when the advocate was out of the office for a prolonged period, or the provider's mailing a written notice to an applicant with mental illness at a time when the applicant's illness made it impossible for her to respond. In all these cases the applicants' failure to respond in a timely fashion is related to a disability and not the fault of the applicant. Thus, all these applicants should be reinstated.

Determining Eligibility

Programmatic Eligibility

Since the 1990 National Affordable Housing Act's provisions are fully implemented, the only program-wide eligibility criterion for most assisted and public housing programs is income.[20]

In public housing built and assisted before October 1, 1981 twenty-five percent of those admitted may be Low Income families. The remaining families must be Very Low Income.[21] Section 8 certificates and vouchers are limited to families of Very Low Income.

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20 The Task Force points out the distinction between being eligible (i.e., meets the housing program's statutory and regulatory requirements) and being qualified (i.e., meets the housing provider's nondiscriminatory resident selection criteria). Also, some programs require "family" status as a condition for eligibility, but it is housing providers, not HUD, who define the term "family". Many housing providers define a family as "two or more persons who will live together in the assisted dwelling unit."

21 In general, Low Income families are those with incomes between 50% and 80% of the

Development-Specific Eligibility

In addition to these overall eligibility standards based on income, certain assisted developments have development-specific eligibility requirements. For example, Section 202 developments were permitted by statute to limit occupancy to elderly persons, people with specific types of disabilities or some mix of these two, depending on the 202 sponsor's original contract with HUD.[22]

Some assisted housing is specifically designated for people over age 62 plus, for example, people with mobility impairments. In this example, families whose head, spouse or sole member was 62 or older (including such families with any type of disabilities), plus families whose head, spouse or sole member was under 62 and had a mobility impairment (in addition to any other disability) would be eligible. The housing provider in this example would be permitted to verify that applicants under age 62 had a mobility impairment, but would not be permitted to verify other disability-related information except with respect to rent or reasonable accommodation. The reader should keep in mind that the term "mobility impairment" is a broad one and embraces not only people using wheelchairs, but also people using crutches or walkers, people with artificial limbs or any condition that limits their mobility.

Eligibility for Specific Units

Assisted developments now have or will have (as a result of future renovations) at least five percent of their units accessible to or adaptable for persons with mobility impairments[23]. These units are supposed to be used by families that need the units' special features. Accordingly, housing providers are permitted to ask all applicants whether they need such features or other accommodations such as a unit with no stairs, or an extra bedroom for a live-in-aide or for

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area median income, while Very Low Income families are those whose incomes are below 50% of the area median income.

22 In 1990 Congress divided the old 202 program into a new 202 program limited to elderly families and the 811 program for persons with disabilities and handicaps. The 811 program is authorized with both a project-based component (equivalent to 202) and a tenant-based component (equivalent to Section 8 Certificates and Vouchers).

23 See 24 CFR § 8.22 (b). New units are covered now, others if and when they are renovated. New assisted housing developments must also have at least 2 percent of their units accessible to or adaptable for persons with hearing or vision impairments.

large medical equipment. If applicants indicate a need for special unit features, they will be required to verify such need.

Should no current residents or no one on the waiting list need specially adapted units, housing providers are permitted to lease them to families who do not need the special features. The housing providers must, however, have a lease provision that requires these families to transfer to another suitable unit when in the future someone can document a need for the special unit.

Computing Rent and Rent Reform

Rent Formula and Deductions

At this time the formula for rent computation is established in statute. Families in public housing or Section 8 programs pay the highest of:

- 30% of adjusted monthly income;
- 10% of monthly income (minimum rent); or
- Welfare rent (not applicable in most states).

Annual income is anticipated income for the twelve months following certification or recertification. Adjusted income is determined by deducting certain amounts from annual income.

Two deductions are available only to "elderly families": families whose head, spouse or sole member is 62 years of age or older or disabled or handicapped:

- a flat deduction of $400 per year; and
- a deduction of unreimbursed medical expenses to the extent that they exceed 3% of annual income.

The other deductions are available to all families that qualify for them:

- A deduction of $480 for each dependent, which includes family members other than the head or spouse who are under age 18 or full time students, disabled or handicapped;
- A deduction of child care expenses for children under age 13; and
- A deduction of expenses for care of or apparatus for handicapped family members to permit a family member (including the handicapped member) to be employed.

Screening Applicants

Establishing Applicant Selection Criteria

In many ways, the single most important thing a housing provider can do to control the quality of life and protect the physical and financial integrity of a development is to perform thorough and thoughtful screening before admitting applicants. Such screening helps ensure that the families admitted will pay their rent, care for their units, and respect the rights of their neighbors.

30 The Occupancy Task Force recommends that HUD's guidance on screening include and reflect all aspects of the discussion in this Report.

While the leases of different housing providers will vary, sometimes in significant ways, the *essential* obligations for all leases will be the same. Screening policies and methods should be designed to ensure that all applicants can meet the five essential obligations of lease compliance summarized as: timely payment, care of the premises, respect for the rights of others, avoiding criminal activity, and complying with other reasonable requirements.

Stating this concept does not mean it is easy to accomplish. Housing providers must be thoughtful, thorough and creative to develop and implement policies and methods to ensure both that all applicants meet relevant standards and that no applicants who are eligible and able to meet the standards are rejected because of unconventional tenancy histories.

As recently as ten years ago, the average applicant for assisted housing was living in other rental housing, often substandard housing, but rental housing with a landlord who could verify tenant history. This is no longer true. A sizable proportion of applicants today are living in shelters, are doubled or tripled up with family members or friends, are living in institutions because no suitable housing is available, or are living on the street. Clearly the standard questions staff ask applicants are not all relevant in this case and others must be developed.

What Screening May Not Do

Screening must not discriminate against applicants illegally; i.e., it may not have the effect of rejecting applicants on the basis of their race, religion, sex, age, familial status, handicap, disability or

national origin. Such discrimination is prohibited by federal law. In addition, screening on the basis of membership in a socio-economic class, such as unwed mothers, or public assistance recipients, has been prohibited by case law. Screening also may not employ criteria that are unrelated to an applicant's desirability as a resident.[25]

Screening may not be conducted by using unverifiable information as the basis for rejection of an applicant. Any information used in forming the decision to reject an applicant must be verified so that the provider can defend its decision.

History of Previous Tenancy

Housing providers review an applicant's housing history to predict future compliance with essential lease obligations. Most providers check housing history for three to five years prior to certification. This is a logical approach, since conduct (whether favorable or unfavorable) that took place longer ago than five years is not as reliable a predictor of future conduct as more recent actions. The questions housing providers need to answer about all applicant households relate directly to the five essential obligations of lease compliance:

- Will the applicant pay rent and other charges under the lease in a timely manner?
- Will the applicant care for and avoid damaging the unit and the common areas, use facilities and equipment in a reasonable way, create no health or safety hazards, and report maintenance needs?
- Will the applicant avoid interfering with the rights and enjoyment of others, and avoid damaging the property of others?
- Will the applicant not engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and staff and not engage in drug-related criminal activity?[26]

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25 See, e.g., *Thomas v. Housing Authority of Little Rock*, 282 F. Supp. 575 (E.D. Ark., 1967) (unwed mother); *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (rational relationship between the selection criteria and purpose of the program is necessary).

26 Most housing providers ask all applicants whether they are current users of illegal drugs, since such persons potentially bring problems to the development. This question is legal because such persons have been specifically excluded from protections under the Fair Housing Act.

- Will the applicant comply with necessary and reasonable rules and program requirements of HUD and the housing provider, and comply with health and safety codes?

In addition to the above aspects of tenancy, housing providers may examine other types of behavior that relate to specific lease provisions. For example, in a development with tenant-paid utilities, staff would check each applicant's history of utility payment and whether the applicant could obtain utility service.

Under existing rules, housing providers are not permitted to pass through costs of screening to applicants, since this would have the effect of discouraging people of very low income from applying for the very housing designed to assist them.

Answering the questions about ability to comply with essential lease provisions is comparatively straightforward for applicants who have been living in private rental housing. Housing providers can make inquiries of all the applicant's landlord(s) for the past three to five years. A second method of investigating probable lease compliance is a home visit to the current rental unit. When permitted by state law, most housing providers check applicants' criminal histories. Other options are credit checks or services that check court records for lease enforcement actions or judgments.

It is more difficult to obtain information about housing history when applicants have less conventional housing backgrounds. Such applicants may have no landlords or no credit history, and sometimes have no place where the housing provider can do a home visit. Those who have been homeless or institutionalized for some or all of the period being reviewed, may need assistance in reconstructing their housing histories or finding alternative ways to demonstrate future lease compliance. Providers should be prepared for lengthy interviews to assist such applicants. Suggestions are offered in the verification section of this chapter about the kinds of questions housing providers can ask when applicants have non-traditional housing histories.

Simple fairness and good judgment suggest that housing providers limit all forms of investigation to issues specifically related to past housing history and future lease compliance, and look very carefully into contradictory findings. For example, if the current landlord gives an applicant a poor reference, but two previous landlords are quite positive, there are at least two possibilities: the applicant's lease compliance has deteriorated in current housing (a bad

sign) or; the present landlord, perhaps for reasons unrelated to tenancy, does not like the applicant. Until the housing provider investigates the situation more fully, it is not possible to make a decision.

31 The Occupancy Task Force recommends that HUD issue guidance permitting applicants with disabilities who have spent some or all of the past three to five years in medical or other facilities[27] receiving treatment to provide only third-party verification of the dates (beginning to end) when they were receiving treatment and were not living in housing.

Persons in this situation may not be required to document the nature of the condition for which they were being treated, nor may they be required to divulge any other medical information, including the name of the medical treatment facility.[28] For example, the verification of the dates during which the applicant was in a resident facility might come from a credible third party such as an attorney or a case worker.

32 The Occupancy Task Force recommends that HUD issue guidance permitting housing providers to require an applicant to provide other verification of ability to comply with the essential provisions of the lease, if the applicant verifies only the dates during which the applicant was in a medical facility and the period covered by the medical treatment is recent or of significant duration.

Since medical treatment facilities are not equivalent to housing, there being no rent charged, no responsibility for unit maintenance, no opportunity to engage in criminal conduct, and no lease in effect, the housing provider loses nothing by not being able to verify future lease compliance through medical facilities.

Other verification of ability to comply with the essential provisions of the lease might include proof of some form of financial re-

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27 The term "medical facilities" means hospitals, clinics, or other institutions whose primary purpose is medical or clinical care. In addition, the term might include half-way houses, group homes or transitional living facilities whose primary purpose is to provide treatment. Inquiries about lease compliance would be permitted of such facilities if their primary function is housing.

28 In some instances the applicant may wish to use a medical facility as a reference for some aspect of lease compliance, but such a choice rests with the applicant.

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sponsibility (making a regular monthly payment other than rent), some demonstration of ability to care for property or proof of training in how to care for an apartment, verification that the applicant is not engaged in criminal activity, and other documented evidence that the applicant can comply with sensible rules or the housing provider's lease. A housing provider need not offer housing to an applicant who can provide no documentation of ability to comply with the essential obligations of the lease.

Medical History vs. Verification of Mitigating Circumstances

Currently, HUD's rules will not permit housing providers to make inquiries into the nature or extent of disabilities, but nothing in this guidance would prohibit the housing provider from seeking verification of medical information presented by an applicant with disabilities who would otherwise be unable to comply with the tenant selection criteria. Such medical information is usually offered either to explain mitigating circumstances or in seeking a reasonable accommodation.

For example, if an applicant had a poor rental history but stated that the previous history was caused by a disability that is now being successfully treated, the housing provider would be permitted to verify:

- that the applicant did, in fact, have a disability; and
- that the former problems were caused by the disability; and
- that the present treatment can reasonably be expected to prevent the recurrence of the problems.

If an applicant's former housing problems were due to the applicant's resisting or refusing treatment, the housing provider would be justified in verifying whether the applicant would be reasonably likely to continue with the current treatment. In this instance it still would not be necessary for the housing provider to obtain medical information beyond verifying the applicant's assertions about the reasons for past problems, the likelihood of continuing treatment and that the treatment will remedy the problem. Further discussion on this topic continues under the heading of Mitigating Circumstances, Reasonable Accommodations and Verifications.

Current Use of Illegal Drugs and Former Users of Illegal Drugs[29]

One of the areas on which housing providers have sought better guidance relates to illegal drug use. No housing provider wants to admit a current user of illegal drugs because of the potential for attracting drug related crime. The Fair Housing Act explicitly states that current users of illegal drugs are not a protected class and permits providers to reject such applicants.

Likewise, 24 CFR § 966.4 (l)(5)(I), the lease rule governing eviction for criminal activity, states, "A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to remain in the unit." At the same time housing providers may not engage in screening that has a disparate impact on former users of illegal drugs,[30] since such persons are members of a protected class — persons with disabilities. Former users whose housing histories reveal no problems that would point to future lease compliance problems are typically admitted without fanfare because, very often, screening staff are never aware of the applicants' status as former substance abusers.

The point when the issue becomes most delicate is when either problems with housing or criminal histories emerge during screening or the applicant's own disclosures indicate that the applicant may be a *current* user of illegal drugs but the applicant claims to be a *former* user of illegal drugs. The issue here is not that a person who is a former user of illegal drugs is guaranteed admission to assisted housing — she must still meet all aspects of the tenant selection criteria — but that a person who is a former (rather than current) user of illegal drugs is a person with a disability and thus eligible for consideration of mitigating circumstances and reasonable accommodations.

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29 In this section and elsewhere in this report the terms "illegal drugs" and "illegally used controlled substances" are used interchangeably, as are the terms "drug abuser", "current user of illegal drugs", and "current illegal user of a controlled substance".

30 A former user of illegal drugs is defined by ADA and §504 as "an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use, or is participating in a supervised rehabilitation program and is no longer engaging in such use...."

33 The Occupancy Task Force recommends that HUD issue guidance permitting housing providers to require an applicant to document, in a manner that would convince a reasonable person, that he or she is not a current user of illegal drugs if objective evidence[31] raises a question about the issue. Documentation that an applicant is not a current user of illegal drugs could include:

- Verification from a reliable[32] drug treatment counselor or program administrator indicating that the applicant is/has been in treatment, that there is a reasonable probability of success in refraining from use of illegal drugs, is complying with the requirements of the treatment program and that the applicant is not currently a user of illegal drugs;
- Verification from a self help program indicating that the applicant is/has been participating in their program, that there is a reasonable probability that the applicant will be successful in refraining from use of illegal drugs, and, that the applicant is not currently a user of illegal drugs;
- Verification from a probation or parole officer that the applicant has met or is meeting the terms of probation or parole and with respect to illegal use of a controlled substance;[33]
- A voluntary interview with a substance-abuse screening team made up of local professionals who will indicate that the applicant has a reasonable probability of success in refraining from use of illegal drugs; and
- Voluntary drug testing. Testing should be an option, not a requirement and several parameters must guide a housing provider's use of the option:
  - Drug tests must be conducted at facilities that use the National Institute of Drug Abuse Guidelines; and
  - The test must screen for illegal drugs only and applicant's

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31 Objective evidence could include, but is not limited to, information obtained in screening such as statements of the applicant or landlord, home visit reports, police reports, or claims by the applicant seeking consideration of mitigating circumstances.

32 The term "reliable" is used solely to address the concern that housing providers should not have to rely on the expertise of persons who have demonstrated a pattern of providing inaccurate or unreliable information.

33 If applicants have been arrested for drug-related crimes, the terms of their probation or parole very often require drug testing, so such a verification is quite worthwhile.

use of prescription drugs that contain controlled substances must be taken into account; and

- The housing provider must pay for all costs associated with drug testing unless the costs are otherwise reimbursed as HUD guidance already requires. Such cost is an allowable project expense.[34]

The Occupancy Task Force notes that when an applicant has a history of treatment followed by recidivism, or is in treatment as opposed to having completed treatment, more documentation may be necessary to convince a reasonable person that the applicant is not a current user of illegal drugs. The applicant may be required to show in what ways his/her current situation and claim to be considered a 'former user of illegal drugs,' and his/her ability to comply with the essential terms of the lease are different from previously unsuccessful efforts to stop using illegal drugs.

Alcohol Abuse and Applicant Screening

The questions about alcohol abuse and screening are different from those posed by illegal drug use. First, alcohol is a legal drug, so simple use or even abuse of alcohol is not grounds for rejecting an applicant. Further, applicants who are alcoholics are, by definition, disabled, and thus entitled to the protections afforded to all applicants with disabilities and residents. Does this mean that housing providers are, therefore, unable to exercise any discretion in screening applicants whose histories include alcohol abuse?

The answer should be obvious. An applicant who is an alcoholic must meet the same screening criteria as any other applicant. If an applicant's housing history demonstrates behavior that would be a lease violation, screening staff would have grounds to reject the application, even if the behavior were related to the applicant's alcoholism.

On the other hand, if screening revealed past tenancy problems, but the applicant asserted that those problems had been caused by alcohol abuse that was no longer occurring, staff would verify the applicant's assertions. This would entail several steps: first, verifying that the negative behavior was, in fact, caused by alcohol abuse,

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34 See Handbooks 4350.3 ¶ 2-25 and 7465.1 REV-2 ¶ 4-1 (a)(6).

next, documenting (using methods similar to those described above for former users of illegal drugs) that the applicant was no longer abusing alcohol, and, finally, looking at the applicant's housing history since entering recovery to ensure that no other screening problems still exist.

The point here is that alcoholism must be treated like every other disability – screening must look at each applicant's behavior, not his or her condition. Some alcoholics never engage in behavior that would violate the lease.

For further information on drug and alcohol abuse and their relationship to screening, please read *Admission Issues Related To Individuals With a History of Illegal Drug Use, Conviction(s) for a Drug Related Crime, or Alcohol Related Lease Violations* by Debbie Piltch of the Disability Law Center. (Appendix 9)

Mitigating Circumstances

Mitigating circumstances are verifiable facts that overcome or outweigh negative information obtained during the screening process and are sufficient to convince the housing provider that the applicant will comply with the lease. If the evidence presented by an applicant does not convince the housing provider that the applicant will comply with the lease, the provider would reject the applicant.

34 The Occupancy Task Force recommends that HUD clarify the current statutory requirement that housing providers consider mitigating circumstances for applicants with disabilities.[35]

Reasonable Accommodations in the Screening Process

35 The Occupancy Task Force recommends that housing providers notify all applicants, at least at the time that final screening begins, that applicants with disabilities may request an opportunity

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35 Considering mitigating circumstances for applicants with disabilities is a reasonable accommodation, and thus a requirement. HUD's guidance on this issue is both confusing and erroneous. (Handbook 4350.3, Chapter 2, ¶ 2-25h, which incorrectly states that the housing provider is not required to consider "extenuating circumstances" for applicants with disabilities.)

to discuss and verify any reasonable accommodation, including considering mitigating circumstances, that will enable the applicant to overcome the negative screening information and to comply with essential lease provisions.

Many types of reasonable accommodations for disabled applicants, most aimed at ensuring full access to the process, have been discussed earlier in this chapter. One particular form of reasonable accommodation is specifically applicable to the screening process – granting applicants with disabilities who do not pass initial screening an opportunity to discuss whether there are: (1) mitigating circumstances that might explain and overcome the negative information obtained during screening; or (2) any other reasonable accommodations that would enable the applicant to be lease compliant in assisted housing even though the applicant was not lease compliant in prior housing.[36] The discussion recommended by the Occupancy Task Force would take place **before** a rejection letter is sent.

The applicant may bring an advocate to help explain the circumstances of the former problem and the likelihood of improved future performance, or the applicant could simply explain to the housing provider why he or she believes that former problems will not arise if the applicant is admitted. Any assertions made by the applicant, including those related to medical conditions or disabilities, must be verified before the housing provider could rely upon them, as described in the next section of this chapter.

Some applicants may have disabilities, but will have had no reason to disclose or have chosen not to disclose their disabilities. Because these applicants would be eligible for the same discussion of reasonable accommodations, the rejection letter must contain a statement asking applicants with disabilities who are being rejected to contact the office to request a reasonable accommodation discussion if they have not already had one.

Disability-Related Inquiries in the Application Process

As a general rule the law does not permit housing providers to

36 This interview was mandated for the housing provider in the *Cason* decision.

make inquiries into the nature or extent of the disabilities or handicaps of applicants for housing. In practice there are a few limited exceptions to this prohibition. This section of the chapter explains the instances when such inquiries are permissible, what may be asked and what should be avoided.

36 **The Occupancy Task Force recommends HUD clarify that limited inquiries be made : to determine that an applicant meets the HUD definition of "disabled" or "handicapped" for eligibility,[37] or in order to qualify for allowances available only to persons who are elderly, disabled or handicapped, or to qualify for a unit with special features, or to verify assertions made by an applicant with a disability claiming mitigating circumstances or seeking reasonable accommodations.**

Demonstrating Eligibility

Chapter 2 of 4350.3, applicable to providers of assisted housing, makes clear that all income-eligible single persons meet the test of basic eligibility, although there may be disability-related project-specific eligibility requirements. Thus, for these programs it would not be necessary for applicants to document that they met the broad definition of disabled or handicapped, although it might be necessary for them to demonstrate a specific type of disability or handicap to qualify for housing limited to such persons.

For example, some assisted housing includes units limited to persons with mobility impairments, and some Section 202 projects are limited to persons with chronic mental illness. In both of these instances, applicants must show that they meet the definition of the specific, targeted disabilities, although they need not provide specific medical data about their diagnoses or the nature or extent of their disabilities.

Since HUD has issued its Final Rule on eligibility of single persons, applicants for public housing and tenant-based Section 8 will not have to demonstrate eligibility on the basis of disability or handicap, although they will still have to show that they qualify for the admission preference granted for admission to 'elderly' housing.

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37 In this case "eligibility" refers to an applicant's being programmatically eligible, or qualifying for certain developments or certain units.

Verifications

Receipt of SSI or Social Security disability payments is a sufficient demonstration that an applicant is disabled. In the absence of such income, in both HUD-assisted and public housing, a simple verification form that quotes the relevant definition (e.g. disabled, handicapped, mobility impaired, etc.) and asks a qualified individual to confirm whether or not applicants meet the definition is sufficient verification.

It is not necessary that this form be completed by a physician, if there are other professionals who might be able to provide such verification. Examples include social workers, rehabilitation centers, service agencies, self-help groups, clinics and others. Housing providers should note that it is also not necessary for the verifier to state the nature or extent of the disability to complete such a form – what is required at this stage is a confirmation of the **presence** of either a general condition (for public housing) or a disability that meets the definition required for program participation (for the project-specific HUD-assisted programs).

Qualifying for Allowances

$400 deduction and medical expense allowance: In public and assisted housing non-elderly applicants must demonstrate the presence of a disability or handicap to qualify for two allowances that reduce their rent – the $400 allowance for elderly, disabled and handicapped families, and the allowance for unreimbursed medical expenses in excess of three percent of annual income. The medical expenses allowance, particularly, can be significant for applicants who do not qualify for Medicaid. All that is necessary for the housing provider to verify eligibility for these two allowances is documentation that applicants are disabled or handicapped and not the nature or extent of disability as described above. Anticipated medical expenses for the coming twelve month period must be separately documented before a deduction can be granted.

Handicap assistance allowance: A third allowance for which households that contain a disabled or handicapped member may qualify is the handicap assistance allowance. This allowance is available to pay unreimbursed costs (in excess of three percent of annual income) incurred on behalf of a disabled family member to permit someone in the family, including the disabled member, to be em-

ployed. The allowance granted can never exceed the amount earned by the family member freed to work.

Verifications needed for this allowance are somewhat more complex than those required for the $400 and the medical expense allowances – applicants must document (1) the presence of a disabled or handicapped family member, (2) the necessity to incur certain costs to permit a family member to be employed, (3) the amount of those costs, and finally, (4) the amount earned by the family member freed to work. Verifying the presence of a disabled/handicapped family member can follow the simple procedure described above, but verifying that certain expenses are necessary to permit employment may require information from an employer as well as medical data. In assembling the necessary documentation to support granting such an allowance, the housing provider should ask the least invasive questions necessary to determine that the allowance is warranted.

For example, if the applicant household includes an adult who cannot be left alone, the household may wish to claim the cost of adult daycare. The housing provider would then need to verify the presence of a handicapped person, the fact that the person could not be left alone, the cost of the adult daycare, and the amount earned by the family member released to work. It would not be necessary to verify the specific diagnosis of the person receiving daycare, or the nature or severity of the disability.

Another example would be an applicant with disabilities who had to take special transportation and use special equipment in order to work. The housing provider could properly require the applicant to verify disability, that the expenses claimed were necessary for employment, the annual anticipated amount of the expenses, and the anticipated earnings. Again, it would not be necessary for the housing provider to inquire about the nature or extent of the disabling condition, any details of medical treatment, or any other expenses incurred by the applicant beyond those to support employment.

Deduction for dependents: A fourth allowance for which a household that contains a disabled or handicapped member may qualify is the $480 deduction for dependent family members. The definition of dependent includes persons, other than the head or spouse, who are 18 years of age or older and handicapped or disabled. (The definition also includes persons under 18 and persons who are full-

time students regardless of age.) Verifications needed to claim this deduction are similar to those described for the $400 deduction discussed above.

Qualifying for a Unit with Special Features

Housing providers offer units that have been modified or constructed with special features designed to assist persons with specific disabilities, and providers are permitted to target occupancy of these units to applicants with the specific disabilities the units are supposed to assist. The housing provider would be wise to ask every applicant whether or not he or she needs a barrier free unit, a unit without stairs, a unit modified for the vision or hearing impaired or an extra bedroom to accommodate a live-in aide or bulky equipment for reasons related to a disability. Then, for applicants who indicate a need for such features (or other features not listed here), the housing provider would verify through a qualified source that the applicant's condition did, indeed, warrant the special unit features. Once again, it is not necessary for the housing provider to have details about the applicant's condition or treatment, but simply to verify that the applicant's needs match the unit features.

Verifying Assertions Made by Applicants with Disabilities Claiming Mitigating Circumstances or Seeking Reasonable Accommodations

In all federally assisted housing programs housing providers have an obligation to make reasonable accommodations to permit participation by applicants with disabilities. This requirement to make reasonable accommodations does not require providers to waive screening criteria that are based on the likelihood that applicants can comply with the essential provisions of the lease, but it does require the provider to consider whether:

(a) previous behavior that would otherwise cause an applicant to be rejected can be shown to be related to the applicant's disability and that there are reasonable future prospects for lease compliance; or

(b) in spite of previous history that would otherwise cause

an applicant to be rejected, the applicant asserts that he or she could meet the requirements of tenancy with assistance.

Mitigating circumstances: If an applicant with a disability claims that negative behavior verified in screening occurred because of a disability and that some change in the applicant's circumstances warrants the housing provider's reconsideration, the provider may require documentation that: (a) the previous unacceptable behavior (which must be defined specifically) did, in fact, occur **because of** the applicant's disability; and, that (b) in future the applicant could reasonably be expected to be lease compliant because of a change in circumstances. Put most simply, the housing provider has the authority to verify the accuracy of the assertions the applicant is making, but not to make broad medical inquiries into the applicant's diagnosis, condition or treatment.

Depending on the facts of individual cases, such verification might be provided by a doctor or other medical professional, or it might come from a peer support group, a non-medical service agency or some other individual or entity. Even when the specific information the housing provider must verify is medical in nature, the verification inquiry should be narrowed to asking only the questions necessary for the particular application under review.

For example, an applicant with a previous tenant history of serious damage to the current apartment would ordinarily be denied admission. If, however, the applicant had a verified disability and volunteered that the damage occurred during episodes of hallucinations which have now stopped because the applicant is taking a new medication, the housing provider must, as a reasonable accommodation, pursue the applicant's claim.

First the housing provider would ask the applicant who could verify the claims. The applicant might suggest a physician or other medical professional as a source for such information. Then the housing provider may properly approach the person named with a narrow and specific verification request: Can you verify that the damage caused by the applicant in the current apartment was a result of the applicant's disability, and that the applicant can be reasonably expected to refrain from causing such damage in the future? The housing provider may not ask the verification source to reveal the applicant's diagnosis or any details of treatment.

An appropriate form for such an inquiry might be to ask the verification source to confirm the applicant's specific assertions.

The verification letter should also request that confidential medical information not be provided.

If part of the poor tenant history of an applicant with disabilities in current or prior housing relates to failure to comply with treatment, the housing provider may properly inquire about the reasonable expectation that the applicant will comply with current treatment.

Reasonable accommodations: In addition to consideration of mitigating circumstances that may be medical in nature, housing providers may also be called upon to make limited medical inquiries into other accommodations requested by applicants. To permit occupancy, an applicant with disabilities may request a housing provider to waive a rule that is not an element of essential compliance with the lease, such as requesting permission to have a companion animal (not a service animal) in a complex where pets are normally prohibited. Before granting this request the housing provider may verify that the companion animal is needed because of the applicant's disability.

Likewise, a housing provider may be asked to admit an applicant who would otherwise fail to meet the screening criteria because the applicant asserts that he can meet the formerly failed screening criteria with assistance that he/she will have if admitted. Such assistance might be medical (or it might be completely non-medical) but the housing provider may verify: (1) that the assistance will overcome the otherwise unacceptable aspect of tenant history; and, (2) that the assistance will be provided and accepted if the applicant is admitted to assisted housing. Again, the housing provider's permissible inquiry is limited to verifying the applicant's assertion that there is a way for the applicant to be lease compliant.

If an applicant is being admitted by virtue of such a reasonable accommodation, the housing provider is not permitted to make continued receipt of the assistance (or any assistance) a requirement of the lease. The reason for this prohibition is simple – once an applicant is admitted, the standard for remaining in occupancy is lease compliance.

An example of this type of accommodation would be the admission of an applicant whose housekeeping in previous housing was so poor as to disqualify the applicant for admission, but who has been verified to have contracted with a chore service to keep the assisted housing unit up to the housing provider's standards.

In the example in the paragraph above, the applicant who had such poor housekeeping might be admitted because of having contracted with a chore service, but after admission might fire the chore service. At this point the question that is germane is not, can we evict this resident for firing the chore service, but is the resident keeping the unit clean? If the resident has found another, less expensive way to ensure that the unit remains clean and sanitary, it is irrelevant that the chore service was fired.

Likewise, if the resident fires the chore service and the apartment lapses into conditions that are unsafe, unsanitary or violate health and safety codes, the resident is subject to eviction – not because the chore service was fired, but because the resident is violating the lease.

Verification and Documentation

In general, the Task Force agreed with HUD's guidance on verifications: that all information used to determine eligibility, compute rent, apply preferences and screen applicants be verified, that the most reliable form of verification is a third party written documentation,[38] and that verifications should be current as of the certification date.

The points upon which the Task Force makes recommendations deal with two aspects of verifications: the veracity or reliability of information tendered by applicants and ways that applicants with non-traditional housing histories can document their ability to comply with the essential provision of the lease.

Reliability of Verifications

37 The Occupancy Task Force recommends that HUD guidance include the principle that the housing provider must be the final judge of what constitutes adequate and credible documentation.

If housing staff have reasonable doubts about the veracity or reliability of information received, the provider should pursue alterna-

38 Third party written verification is not always possible. Third party telephone verifications and affidavits from applicants are acceptable if they are the only methods possible.

tive methods of verification until satisfied that documentation is accurate and complete.

Every admission creates potential liabilities for housing providers. Verification of information helps ensure that at least some of these liabilities are mitigated. Applicant eligibility can be assured by verifying income. Ensuring that the correct rent is charged is enhanced by documenting income and allowances. Verifying Federal and local preferences ensures that applicants are admitted in the proper order. Finally, documenting applicants' housing histories helps ensure that they will comply with the lease if admitted.

Sometimes the documentation provided by applicants is inadequate or is unconvincing. The verification form may be incomplete, contain internal inconsistencies, or be contradicted by other documentation received. Another problem is verification sources that the housing provider has already found to be unreliable. This is the "some people will sign anything" problem.

When verifications are not acceptable, the housing provider should explain to the applicant what is needed to complete the application package and request the applicant to sign additional releases or contact other sources of information. The goal is to assemble a complete, consistent and convincing application file, not to put applicants on hold or reject them because of problems with verifications.

Verifying Future Lease Compliance for Applicants with Non-Traditional Housing Histories

38 The Occupancy Task Force recommends that HUD offer broader and more helpful guidance on ways applicants can demonstrate and housing providers can verify that applicants with non-traditional housing histories can comply with essential lease provisions.

As stated earlier in this chapter, fewer and fewer applicants for Federally assisted housing come from traditional rental housing backgrounds. Because there is so little assisted housing relative to the need, consistently higher percentages of very low income applicants have never lived or not lived recently in rental housing. Instead, they are living with friends or relatives, in shelters, cars or on the street, or in institutions, half-way houses, group homes and transitional housing, not because they necessarily need or want the serv-

ices provided in such institutions, but because they cannot find affordable housing elsewhere.

Applicants who came from such housing situations cannot be screened the same way housing staff have traditionally screened applicants living in rental housing. There is no landlord to send a verification form to and no way to do a home visit if an applicant is bouncing between homeless shelters and living on the street. It might not be appropriate to ask the same kinds of questions of an applicant's mother or boyfriend that staff would typically ask a landlord, since, in most cases, the applicant does not have a lease or perhaps even a formal rental payment in such situations.

This does not mean that it is impossible for housing providers to verify that applicants without leases and landlords can comply with the essential provisions of the providers' leases. It does mean the providers will have to be more creative and flexible than they have been in the past. Documentation sources include but are not limited to:

Ability to pay rent and other charges in a timely manner

- Consumer loans, credit cards or layaways
- Utilities, telephone or cable TV
- Making any kind of regular payment
- Vendor payment or a protective payee
- Co-signer
- No outstanding debts, liens or defaults or other bad payment history
- Payments for alimony or child support
- Completing a residency training program acceptable to the housing provider

Ability to care for and avoid damaging the apartment

- Caring for one's room or space (living with someone else or in a shelter or group home)
- Maintaining any physical space (perhaps related to a job)
- Chore service or other assistance with care of unit
- Live-in or other aide
- Successfully answering the housing provider's questions about how to care for an apartment
- Completing a residency training program acceptable to the housing provider

Respecting the rights of others

- Others with whom the applicant lives

- Institutions, shelters, transitional housing, group homes
- Administrators or other participants in treatment programs
- Ongoing social interactions
- Schools or work relationships
- Completing a residency training program acceptable to the housing provider
- School records, if recent

Criminal activity

- Police records (but only to the extent that arrests or convictions would be lease violations in housing)
- Court records (see note above)

Compliance with other program requirements

- Any rule compliance (shelters, other programs in which applicant is participating)
- Job or school references
- Current housing provider (if not actually homeless)
- Completing a residency training program acceptable to the housing provider
- School records, if recent

For all these sources, the housing provider would need to use a simple form that asked clear questions related to the applicant's ability to comply with essential lease provisions. The form should explain why the information is needed and should have a release section in which the applicant gives permission for release of the information.

Rejecting Applicants

39 The Occupancy Task Force recommends that HUD require housing providers to include in all letters rejecting applicants a notice asking applicants with disabilities who are being rejected to request an interview to determine whether a reasonable accommodation would enable them to comply with essential lease provisions.[39]

There are existing requirements in both public and assisted housing that letters rejecting applicants include the reason for the

39 This interview may be conducted as part of the meeting offered to all applicants at the time of rejection.

rejection, and offer rejected applicants an informal meeting to discuss the reasons for the rejection with someone other than the person who made the decision to reject.

Pre-occupancy Training or Orientation

40 **The Occupancy Task Force recommends that HUD encourage all housing providers to offer at least an orientation for new residents that should cover the rights and responsibilities of the owner and resident, how rent is calculated, the program's benefits and obligations, security issues, recertification requirements, the lease, the move-in inspection, care of the unit and how to request maintenance, and reasonable accommodations.**

In addition to these minimum contents, some housing providers explain services available in or near the development and describe the resident association, if any. Others offer much more thorough pre-occupancy training that covers such material as how to care for the unit, how to conserve utilities and read a utility bill, family budgeting, and many other topics residents find helpful. The best of these training programs have been designed with input from residents and may use residents as trainers.

Any pre-occupancy orientation or training must be accessible, and presented at times when applicants can attend. In family developments housing providers are encouraged to facilitate provision of daycare. Housing providers must be prepared to offer reasonable accommodations for applicants who cannot attend a typical session for some reason related to a disability.

2

The Housing Management Process

Introduction

The application process ends when the housing provider makes the decision to admit an applicant. Next, the housing management process begins, encompassing orientation, execution of the lease, move-in, occupancy and lease compliance. The Task Force has decided to address the following topics within the housing management process:

- Guiding Principles for the housing management process.
- The lease.
- Preventing and addressing lease violations.
- Unit transfers.
- Retention of housing during hospitalization or residential treatment.

Orientation of prospective residents is discussed in Chapter 1 as the final step in the application process. These topics are addressed in the following pages, in the order listed above.

Guiding Principles

The Task Force determined that a number of guiding principles are implicit in current law and regulations governing the housing management process.

41 The Task Force recommends that HUD issue guidance which adopts the following guiding principles regarding the housing management process:

(a) Federal housing programs are based on the mutual obligations of all parties (applicants, residents, housing providers, and regulatory agencies) involved in the process. These obligations are spelled out in laws, regulations,

leases, regulatory contracts, and in the generally accepted principle of mutual respect between and among individuals. Ensuring that all parties understand and fulfill their obligations establishes the groundwork for a successful housing program.

(b) The essential commandment of anti-discrimination laws is that each individual be treated on his or her own merits, without presumption of his or her abilities based on race, sex, religion, gender, age, national origin, disability, or familial status, (state and local anti-discrimination laws may also protect individuals based on sexual orientation), recognizing that specific housing program requirements may limit eligibility under the law.

(c) Lease terms, house rules and other policies governing behavioral-based tenancy standards must be reasonable and applied uniformly to all residents.

(d) Housing providers have three essential obligations:

- **to provide decent, safe and sanitary housing;**
- **to comply with applicable legal and regulatory requirements; and**
- **to comply with the requirements of its lease with each resident. If housing providers fail to adhere to these requirements, residents may avail themselves of appropriate remedies for redress, such as grievance procedures, contained in the lease or provided under the law.**

(e) Housing providers have the right to enforce essential, performance-based lease requirements and may seek appropriate remedies up to and including evictions.

(f) Housing providers must make reasonable accommodations in lease and other policy requirements when requested by a qualified resident with disabilities (see Chapter 4). The concept of reasonable accommodation involves helping a resident meet essential lease requirements; it does not require the lowering or waiving of essential requirements. Accommodations are not reasonable if they require a fundamental alteration in the nature

of the program or impose undue financial and administrative burdens on the housing provider (fundamental alterations and undue burdens are discussed in Chapter 5).

(g) Housing providers must provide timely, effective and adequate notices[1] and an appropriate opportunity for review of their decisions affecting residents, including responses to resident requests for reasonable accommodations.

(h) Housing providers are permitted to seek information necessary to meet program requirements in the least intrusive manner possible. Housing providers are encouraged, and in some instances obligated,[2] to protect confidentiality of information provided by residents and to respect the individual privacy of residents consistent with program requirements.

(i) Residents have five essential lease requirements:

- **to pay rent and other charges under the lease in a timely manner;**
- **to care for and avoid damaging the unit and common areas, to use facilities and equipment in a reasonable way, to create no health or safety hazards, to report maintenance needs;**
- **not to interfere with the rights and enjoyment of others, and not to damage the property of others;**
- **not to engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents or staff; and not to engage in drug-related criminal activity on or near the premises; and**
- **to comply with necessary and reasonable rules and**

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1 The provider's obligation includes the requirement that notices be in accessible and intelligible format in compliance with the provisions of the Fair Housing Act and §504 concerning persons with disabilities. See Chapter 1.

2 Some housing authorities are subject to state law provisions which impose confidentiality requirements. See Chapter 9 of the report for a more complete discussion of confidentiality.

program requirements of HUD and the housing provider; to comply with health and safety codes.

If residents fail to comply with these obligations or repeatedly fail to comply with other lease requirements, the housing provider may avail itself of appropriate remedies for redress contained in the lease or provided under the law, up to and including eviction.

The Task Force believes that HUD's adoption of the foregoing principles reflecting current requirements will advance the goals of furthering fair housing, balancing rights with responsibilities for both housing providers and residents, and clear communication between HUD and those who implement the Department's programs.

The Lease

There are significant HUD requirements governing the leases used in the various housing programs. In public housing HUD regulations require certain types of lease provisions, prohibit others, but otherwise allow housing authorities to draft their own lease provisions so long as such provisions are reasonable.

In assisted housing, all programs use a model lease specified by HUD except where a HUD field office authorizes changes to the Model Lease. In the certificate and voucher program, private landlords may use their own lease with a standard addendum provided by the PHA or a standard lease required by the PHA. The addendum and the standard lease both include the HUD requirements specific to the certificate and voucher programs. (Lease provisions for the Section 8 program are found in 24 CFR § 882.209 (j), 882.215, and Appendix I to Subpart B.)

The Task Force generally supports the continuation of the existing provisions for HUD regulation of leases. However, in Chapter 3, Evictions, the Task Force makes certain recommendations to improve clarity and fairness. In addition, we make the following specific recommendations regarding leases and the housing management process:

42 The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the Public Housing lease requirements [24 CFR §966.4] as follows:

(a) To require that, to the maximum extent feasible, leases

be in plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting of sample lease provisions for all programs.

(b) To change subparagraph (l) which now reads: "The lease shall set forth the procedures to be followed by the PHA and by the resident in terminating the lease" to read:

The lease shall set forth the procedures to be followed by the PHA and by the resident in terminating the lease. In terminating the lease of any qualified resident with a disability,[3] the PHA has two obligations in addition to the others that are listed:

(i) To provide the required notices to the resident, and any third party designated by the resident, in a form and manner[4] that is accessible and intelligible[5] to the resident; and

(ii) to the extent that the resident's assertions that his or her failure to comply with the essential obligations of the lease is the result of the resident's disability, to determine whether the resident can propose a reasonable accommodation which, if implemented, would result in compliance with essential lease requirements. The PHA may require verification of the proposed accommodation.

It must be recognized that not every lease violation can be cured by a reasonable accommodation. For example, if the resident is engaged in criminal activity that has no connection to that resident's disability, there is no reason to suppose a reasonable accommodation would solve the problem or prevent its recurrence.

43 The Task Force recommends that the Assistant Secretary for Housing revise the assisted housing Model Lease as follows:

(a) To convert the Model Lease, to the maximum extent

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3 As the term is defined under Section 504.

4 In making this recommendation, the Task Force recognizes that state or local law may provide that some notices are served by third parties (for example, the sheriff or constable), and the Task Force does not intend that the housing provider be responsible for such third parties' communications with residents.

5 See Chapter 1, footnote 11.

feasible, to plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting process.

(b) In terminating the lease of any resident with a disability, the housing owner has two obligations in addition to any others listed:

(i) To provide the required notices to the resident, and any third party designated by the resident, in a form and manner that is accessible and intelligible[6] to the resident; and

(ii) to the extent that the resident's assertion that of his or her failure to comply with the essential obligations of the lease is the result of the resident's disability, to determine whether the resident can propose a reasonable accommodation which, if implemented, would result in compliance with essential lease requirements and prevent termination. The housing owner may require verification of the proposed accommodation.

44 The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the lease requirements in the certificate and voucher programs as follows:

(a) To require that, to the maximum extent feasible, the lease and HAP Contracts be in plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting process.

45 The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the public housing notice requirements [24 CFR §966.14 (k)] which now read: "(2) If the resident is visually impaired, all notices must be in an accessible format" to read as follows:

(2) It is the PHA's responsibility to notify residents with disabilities in an accessible and intelligible[7] manner.

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6 See footnote 1, p. 2-3.
7 Id.

46 The Occupancy Task Force recommends that HUD require State Housing Finance Agencies and others who administer applicable HUD programs to adopt lease requirements equivalent to Recommendations 42-45 above.

In making the above recommendations on lease revisions and communications, the Task Force suggests that all communications by the housing provider, up to and including service of notice required by the lease, be intelligible[8] to residents with disabilities. The Task Force recognizes that housing providers *are not* responsible for notices provided by Courts, constables, or others.

Preventing and Addressing Lease Violations

The Task Force discussed at some length the interaction between lease violations, potential lease violations, unusual behavior, and residents' right to peaceful enjoyment. In general, the Task Force cautions housing providers against intervening in residents' lives without their permission, *except in the contexts of lease violations or clear safety or health hazards*. In the following discussion, the Task Force sets forth in some detail its rationale, in the hope that housing providers will reexamine their key assumptions and day-to-day practices in order to properly balance the sometimes competing concerns discussed above while observing fair housing requirements. (Also see Appendix 8 for further discussion, case studies and forms.)

Housing providers have authority over one of the resident's most basic needs, shelter. The housing provider may initiate eviction or terminate the federal subsidy.[9] This type of relationship mandates caution on the part of the housing provider before it takes any action outside of the rights and obligations between the parties, as evidenced by the lease.

However, the relationship between housing provider and resident frequently extends beyond the purely commercial context.

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8 Id.

9 In the assisted housing programs, the housing provider may terminate the subsidy if the resident fails to recertify timely or if the household's income exceeds program maximums (see Chapter 3). In the certificate and voucher program, the PHA (not the private landlord) may terminate the subsidy in a more extensive list of circumstances (see Chapter 6). Termination of subsidy is not applicable to the public housing program.

Many housing providers either contract for, offer directly, or provide space for non-housing services. Resident participation in these programs is voluntary and when residents choose to participate they may be expressing a preference for interaction with housing and service providers beyond that implied in the landlord-tenant relationship.

The Task Force acknowledges that some resident-provider relationships are such that there is an implicit permission for the provider to take action when he or she believes that the resident needs assistance; in these relationships, such action would be intended, and interpreted, as a natural part of the relationship, and thus would be appropriate. *However, the Task Force cautions that these situations are the exception and should be considered in light of this discussion.*

Housing providers, especially on-site staff, often have an ongoing, long-term relationship with their residents; these relationships differ from resident to resident. In addition, housing providers want to maintain the quality of life in their properties. On the other hand, residents have a right to privacy and to live a life-style of their choice, subject to the requirements of the lease. These legitimate concerns sometimes are in conflict:

- What happens when a housing provider perceives a deterioration in the well-being of a resident? Can or should the housing provider intervene without the resident's permission? That is, may a housing provider contact a family member? A mental health provider? May the housing provider discuss the perceived problem with the resident?

The housing provider's goals are two-fold: to help the resident and to prevent the resident from committing lease violations. Housing providers seek ways to avoid lease violations and to minimize the various costs of lease enforcement; early intervention can often avoid time-consuming, expensive and traumatic action later on.

However, the fair housing laws require that protected classes be treated no differently from other residents:[10]

- Would the housing provider be more likely, or less likely, to want to intervene if the resident in question had a disability? What if the resident were a member of another race?

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10 Except in the limited circumstance when a reasonable accommodation is required to "level the playing field" for a resident with disabilities.

If the answer is "yes", then *the intervention risks being a discriminatory action.* There is additional risk of discriminatory conduct when the housing provider's concern is about deterioration in a resident's "personality" or behavior:

- Would the housing provider intervene if a resident starts dating someone known to be "bad", but who hasn't yet done anything to harm the property?
- In a similar situation, but in a disability context, would intervention be considered when a resident is heard mumbling strange phrases but hasn't harassed or bothered anyone?

It is the personal experience of several members of the Task Force that when we consider the types of questions listed above, we often discover that we would be more likely to intervene where the resident has a disability. Generally, this is an indication that we hold well meaning but nonetheless inappropriate views to the effect that persons with disabilities are not capable of caring for themselves. Where housing provider actions are taken based on these often unconscious views, there is a distinct risk that the actions will be discriminatory. In this regard, the Task Force notes that disparate treatment of persons with disabilities,[11] however benign, is still prohibited conduct under the Fair Housing laws.

When a housing provider is not sure whether to take action, it is useful to ask "Would I respond this way for any other resident in the same situation?" This is a useful method for determining whether there is a risk of discriminatory conduct. Housing providers seek guidance on these issues in order to be good citizens, to protect their property and residents and to avoid liability for civil rights violations. Therefore:

47 **The Task Force recommends that HUD and industry groups incorporate the preceding topic into Fair Housing training and into HUD handbook or other guidance.**

Lease Violation Notices

Before proceeding further, it is appropriate to discuss the Task Force's views regarding lease violation notices and lease termina-

11 The same principles apply when the protected status is race, religion, national origin, gender, age or familial status.

tion notices. Housing providers must give prompt, complete and adequate notice[12] of lease violations. (See Appendix 6 for a sample lease violation letter and notes for its use.)

The purpose of a lease violation notice[13] is two-fold:

- it places the resident on notice that if the behavior occurs again it will be grounds for termination; and
- for curable violations, it tells the resident what corrective action is necessary to bring the tenancy into compliance with the lease.

The Task Force wishes to emphasize the importance of specific, factually based notices with clear expectations. Everything that is known about adult learning tells us that people do not make changes unless such information is given. The experience of Task Force members shows that a lease violation notice which is based on a check-off list or conclusionary language (e.g. "disturbing neighbors") is usually ignored and resented.

The lease violation notice can also be an opportunity to provide the resident with information about services. The lease violation notice might contain language such as:

> Some residents have been able to get help from local agencies or groups to stop problems from happening again or getting worse. We have a list of all local agencies and groups we know about, such as chore services and family services, on our bulletin board in the lobby.

Such language would help all residents find the help they need to comply with the lease.

All lease violation notices must also have language concerning reasonable accommodations or be accompanied by an attached form or flyer telling the resident of the right to and the way to request a reasonable accommodation.

It would also be good business practice to provide residents with the opportunity to meet with management to discuss and respond to the lease violation notice. The resident should have the right to

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12 The notice must be intelligible (see fn. 1, p. 2-3) to the resident. Where requested by the resident, the housing provider must give a copy of the notice to a person designated by the resident.

13 That is, a notice to the resident that there has been a lease violation which is not grounds for eviction but which, if repeated, might become grounds for eviction by constituting "repeated minor violations" of the lease. If the violation is grounds for eviction, the housing provider would send a notice of lease termination.

explain any possible misunderstandings or mistakes that might have resulted in the notice, to place in his or her file any relevant facts or circumstances and to fully understand the nature of and the way to cure the lease violation.

This approach will provide the resident with all the knowledge necessary to voluntarily cure the violation and to obtain any help necessary to do so. Where minor violations are repeated and rise to the level of substantial violation of the lease, lease termination is in order.

Unit Transfers

Transfers within a development are sometimes needed in order to match the housing needs of residents with available dwelling units; however, these transfers also involve significant costs and administrative workload for the housing provider. Most frequently, transfers are made in order to cure overcrowding or underutilization. For a related discussion see Chapter 1, The Application Process, Occupancy Standards.

- Overcrowding (i.e. too many occupants) is undesirable because the household's privacy is compromised, and because of undue wear and tear on the apartment.
- Underutilization (i.e. too few occupants) is undesirable because it uses scarce housing resources in a less than optimal way.

Sometimes, transfers between developments (for instance, between two developments owned and operated by the same Housing Authority) are needed, in order to accommodate a disability or for other reasons:

- The new location may be closer to a treatment facility.
- The new location may be closer to the resident's new place of employment.
- The resident may have been a victim of domestic violence, or may have received credible threats of violence (perhaps as a result of testifying in a criminal or eviction case).
- The resident may be especially sensitive to an environmental factor (such as lead paint, or an allergenic plant) which is present in the old location but not in the new location.

There are, in addition, other reasons why a transfer may be appropriate:

- For modernization of the unit, especially in an older development.

- To match an accessible unit with a household which needs the accessibility features.
- Emergency conditions in the unit or the development.

The Task Force sees a need for improved guidance, to balance the competing needs regarding transfers.

48 The Task Force recommends that HUD issue guidance in all programs that, as a result of a disability condition, granting a unit transfer within a development, or agreeing not to require a transfer, is a reasonable accommodation; further, such guidance shall provide that HUD may not withhold subsidy or otherwise penalize the resident or housing provider as a result of such a reasonable accommodation.

The Task Force is also sympathetic to the national goal of making optimal use of scarce affordable housing (and scarce HUD subsidy funds). In making the preceding recommendation, the Task Force intends that HUD recognize that housing providers will be in situations where not requiring a transfer is a reasonable accommodation. In these situations HUD should also encourage alternatives (incentives), such as granting extra time to make the transfer, that might make the transfer more appealing to the resident with disabilities.

49 The Task Force recommends that HUD issue guidance in all programs that expressly permits housing providers to approve residents' unit transfer requests whenever the housing provider determines that to do so is consistent with the goals of the housing program; and to prioritize such unit transfers in any reasonable manner vis-a-vis admissions from the waiting list.

In making the preceding recommendation, the Task Force recognizes that the housing provider needs flexibility in order to respond to the unit transfer needs of the individual development and its residents.

Retention of Housing During Hospitalization or Residential Treatment

Residents who face long term hospitalization or who enter residential treatment centers often face the loss of their subsidized housing. This may result for two reasons:

- The housing provider may determine that the unit is no longer the primary residence, and conclude that a lease violation has occurred; or
- The resident may be unable to pay the rent because of a loss of income.

In order to address these issues, and to ensure that people who need and obtain necessary treatment are not inappropriately deprived of housing assistance:

50 The Task Force recommends that HUD issue guidance providing that, where the tenant of record is temporarily hospitalized or in a residential treatment facility, such temporary absence of the tenant of record shall not, in and of itself, constitute a lease violation.

The Task Force intends that, so long as the resident is likely to return to the unit, *so long as the resident pays the rent and does not otherwise violate the lease,* the resident may retain the unit and should be treated as residing in the unit. The Task Force also intends that the resident's stated intention to return is sufficient, at least initially.[14]

The Task Force also notes that, under the Section 8 and public housing programs, the resident would be eligible for a rent reduction if the hospitalization or treatment resulted in a lower income or increased allowances against income.

If a housing provider decides, in accordance with Recommendation 50, to allow a temporarily absent resident to retain the unit, the Task Force intends that this decision not result in any adverse action by HUD against the provider, including, e.g., subsidy termination.

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14 Thus, there is no immediate need to verify that the resident is likely to return. Verification would not be required until a normal treatment period has elapsed; in this regard, the Task Force has learned that there may be a tendency on the part of treatment professionals to underestimate the likelihood that the resident will return to the unit.

3

Evictions

Introduction

Eviction from public or assisted housing is a very serious sanction; it not only displaces the resident, it also discontinues the subsidy that makes housing affordable to that resident. Eviction is nonetheless occasionally necessary. Experience shows that some individuals are not willing to meet the essential obligations of tenancy and must be removed in order to preserve the viability of the housing development. Given the shortage of public and assisted housing, and the difficulty of preserving this housing, the Task Force also stresses the need to remove those whose conduct is destructive to the development.

An equitable eviction policy will authorize the eviction, in appropriate circumstances, of those residents whose conduct violates essential provisions of the lease, those whose conduct repeatedly violates minor provisions of the lease, and those who allow others to do so. The Task Force's views on the proper use of eviction are discussed in more depth below; in general, the focus of the decision should be upon whether and how seriously the conduct in question adversely affects the housing community.

51 **The Occupancy Task Force recommends that the statutes, regulations, handbooks and lease provisions regarding eviction not be changed, except as noted hereafter.**

The existing law and policy on these matters are included in an Appendix. We do, however, have a few, specific recommendations to make the rules more clear and fair.

Those specific topics, which are discussed below, include: (1) alternatives to eviction; (2) alternatives after eviction, to prevent homelessness; (3) notices; (4) drug abuse and drug related crime;

(5) criminal activity as grounds for eviction; (6) former users of illegal drugs; (7) fraud; (8) minor crimes and off-premises criminal activity; (9) public housing grievance procedure; (10) residents' liability for the actions of others; (11) consideration of all the facts and circumstances; (12) criminal activity prior to admission; (13) subsidy termination - certificate and voucher programs; and (14) subsidy termination - assisted housing.

Alternatives to Evictions

52 The Occupancy Task Force recommends that housing providers, at their discretion, use alternatives to eviction if there is a reasonable expectation that the resident will comply with essential lease provisions.

Alternatives to eviction are facilitated when housing staff are aware of specialized services and other resources available in the community to support successful residency. The Task Force believes that to the extent housing staff are well trained, have manageable workloads, and are operating financially and physically viable housing developments, housing staff will be more likely to be aware of, and pursue successfully, creative courses of action that will result in fewer evictions. Service coordinators if fully funded could help substantially in identifying alternatives to evictions and in making linkages necessary to achieve lease compliance. See Chapter 7 on Support Services.

One alternative to eviction is for residents, with or without assistance from the housing provider, to acquire services, pursue treatment, or participate in peer support groups where such actions provide needed support to help the resident comply with essential lease provisions. The Task Force notes, however, that housing providers may not require such actions as a condition of initial or continued occupancy.

53 The Occupancy Task Force recommends that HUD issue guidance to clarify the existing requirement that housing providers are not permitted to require residents to enter treatment programs or to obtain or continue supportive services.[1] Housing

1 However: "In deciding to evict for criminal activity, the PHA shall have discretion to

providers may verify assertions by residents that they are receiving assistance which would allow them to comply with essential lease provisions. The housing provider would not be barred from seeking an eviction if the resident does not comply with essential lease provisions.

The concern of the housing provider is that the resident comply with essential lease provisions; the housing provider may not specify the method by which compliance is achieved.

Because evictions are traumatic for the resident and costly for the housing provider, it may be cost effective and feasible to create a program whose goal would be the prevention of evictions for non-payment of rent. Many public commenters noted that various kinds of programs for paying rent arrearages have worked. One suggested that payment should be conditioned upon participating in a budget counseling program. One suggestion was that HUD convene a working group to review and disseminate prevention models. Another was that HUD run a demonstration program.

Alternatives After Eviction, to Prevent Homelessness

While recognizing that eviction is a necessary sanction, the Task Force also is concerned that eviction not lead inevitably to homelessness. Nonetheless, housing providers are not responsible to rehouse evicted families. Housing providers are encouraged to provide information about any programs of which they are aware. See also Chapters 7 and 8 of this Report.

Notices

Clear and effective communication with residents is essential to a fair process. Applicants should be asked how to best communicate

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consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit." 24 CFR 966.4(1)(5)(i). See also the discussions of drug-related crime in this Chapter and in Chapter 1.

with them and all subsequent communications should use the method designated. Such methods could include providing notices in plain language, having a sign language interpreter, making materials available on tape or to a third party designated by the resident, or explaining things in person as many times as necessary for comprehension. Lease violation notices, lease termination notices and eviction notices given to residents with disabilities must be in an accessible format.[2]

54 The Occupancy Task Force recommends that, in addition to the various notice requirements already included in HUD program guidance, all such notices must:

(a) Be given in writing and in an accessible format;[3]

(b) Include a clear description of the offense, including how it violates the lease;

(c) Describe what, if anything, the resident can do to cure the problem and prevent the eviction; and

(d) Describe the reasonable accommodation procedure.[4]

It is also good business practice to use plain language and to issue the notices promptly after the housing provider determines that a lease violation has occurred.

Housing providers who are members of the Task Force report that evictions can often be prevented by proactive management action at the time of the first lease violation. Where residents understand clearly the violation, what (if anything) they can do to cure the violation, and how they can avoid similar violations in the future, in many instances residents will change their behavior so that eviction can be avoided. An effective lease violation notice is the first step in this proactive management process. See also the sample lease violation notice in Appendix 6.

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2 By "accessible format", the Task Force means that the information is in compliance with requirements of Section 504 and the Fair Housing Act regarding persons with disabilities. See the more detailed discussion in Chapter 1.

3 See footnote 2, *supra*.

4 Also see Chapter 4 of this report on Reasonable Accommodations.

Drug Abuse and Drug -Related Crime

Eliminating the influence of illegal drugs, drug abuse, and drug-related criminal activity from public and subsidized housing requires a multifaceted approach, including:

- Screening applicants to reduce the presence of drug related activities in public and assisted housing communities.
- Supporting residents so they can help plan and implement the security program and reclaim developments where drug-related criminal activity is taking place.
- If feasible and appropriate, providing positive activities for residents (especially youth) such as peer support groups, youth recreation programs and education offered on-site.
- Increasing security. Local law enforcement must take responsibility for the areas under their jurisdiction and housing providers must be funded to secure the areas not controlled by local law enforcement.[5]
- Making physical alterations to developments to improve their ability to be secured and to make them a less attractive place in which to conduct drug trafficking. Examples of alterations include improved exterior lighting, access control measures such as parking lot gates, and the addition of video camera surveillance systems in areas where drug-related crime has occurred.
- Eliminating drug havens, whether in vacant units, occupied units or common spaces.
- Using alternative strategies, employment programs and treatment programs to counteract the hold that drugs have on people, although we do not suggest that those be funded and operated by housing providers.

In appropriate cases, the judicious use of the eviction process is necessary to remove offenders from the properties for the benefit of the larger community.

55 The Occupancy Task Force recommends that Congress appropriate sufficient funding for the following programs:

(a) The Public Housing Drug Elimination Program, or a successor program, for public and assisted housing;

(b) Special additional adjustments for security costs in

5 Examples of areas for which local law enforcement would typically not be responsible would include vertical patrols in high-rise buildings and security in large courtyards or quadrangles not adjacent to local streets.

the Section 8 New Construction and Substantial Rehabilitation program.

56 The Occupancy Task Force recommends that Congress authorize and appropriate funding for drug treatment on demand.

57 The Occupancy Task Force recommends that HUD clarify that housing providers may make space available for treatment programs, without having to secure HUD approval.[6]

Criminal Activity as Grounds for Eviction

Legislation and the public housing regulations authorize Housing Authorities to assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit. 24 C.F.R. 966.4 (f)(12).

This language creates two grounds on which a lease may be terminated for criminal activity:

- activity which threatens other residents (regardless of where it occurs); or
- drug-related criminal activity on or near the premises.

Thus, drug-related activity which does not threaten other residents is still a ground for eviction if it takes place on or near the public housing.

HUD includes a provision in the Model Lease (but not the regulations) for assisted housing programs that is similar to the public

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6 A housing provider's decision not to make space available for treatment programs should not be a defense to an eviction.

housing provision cited above, but which does not contain the provision regarding employees.

58 **The Occupancy Task Force recommends that HUD amend the regulations and Model Lease for assisted housing to conform with 24 CFR 966.4(f)(12) as cited above. The provision, as modified, should also be added to the regulations for the certificate and voucher programs, specifying this as a required provision in each dwelling lease.**

The certificate and voucher programs have criminal activity language in the provisions for termination of assistance, but not in the regulations governing leases.

Criminal activity that threatens others or which, by its frequency and duration, has a serious negative impact on the housing community must be prohibited and must be a basis for eviction in appropriate cases.

The Task Force discussed whether to recommend that HUD define "threatens" in the regulations and agreed that from a practical standpoint, it would be impossible to define this term since it turns on the facts in every given situation. Examples of criminal activity that threatens others include, but are not limited to: distribution of or trafficking in illegal substances, assault, robbery, murder, rape, carjacking, and illegal possession or discharge of weapons. Examples of repeated criminal offenses that, because of their frequency and duration, have a serious negative impact on a housing community include, but are not limited to: prostitution, selling alcohol to minors, minor destruction of other residents' property and minor vandalism.

Former Users of Illegal Drugs

Under the Fair Housing Act, §504 and the ADA, a former user of illegal drugs (now in recovery) is considered to be a person with disabilities and is protected against discriminatory treatment, but persons engaged in current illegal use of controlled substances are not protected. HUD's regulations for the certificate and voucher programs permit the PHA to terminate the subsidy for drug-related criminal activity, except that:

> Drug-related criminal activity does not include [felonious] use or possession, if the Family member can demonstrate

that he or she (1) has an addiction to a controlled substance, has a record of such an impairment, or is regarded as having such an impairment; and (2) has recovered from such addiction and does not currently use or possess controlled substances [24 CFR 882.118(b)(4)(i)(B)].

This provision implements the statutory protection of former illegal users of drugs who are now in recovery.[7] Following is a discus-

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7 The ADA's Subchapter V amends §504 as follows:

"(C)(i) For purposes of title V, the term 'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use. (ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who - (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure than an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs" 42 U.S.C. § 12211, which also defines "drug" and "illegal use of drugs".

The ADA's Title II regulations discuss "has recovered":

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) Health and drug rehabilitation services. (1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) Drug testing. (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs. 28 CFR §35.131.

See also the Fair Housing Act, 42 U.S.C. § 3602(h)(West Supp 1993); *United States v. Southern Management Corp*, 955 F.2d 914 (4th Cir. 1992).

sion of how the question of recovery and reasonable accommodation might arise and be handled in the eviction context:

> A resident is convicted of a drug-related crime which occurred on or near the premises. The housing provider is unaware of the criminal activity until after the activity occurred. The housing provider sends a notice of lease termination, and the resident requests a meeting to discuss the lease violation. At the meeting, the resident asserts: (a) that she is a former illegal user of a controlled substance; (b) that the lease violation is a result of her disability; (c) because she will soon begin participating in a drug abuse treatment program, it is unlikely that the criminal activity will be repeated; and (d) that as a reasonable accommodation, the housing provider should not pursue the eviction.
>
> First, it must be established whether the resident is entitled to the statutory protections due to a former user. At this stage, the burden is upon the resident to demonstrate that she "has recovered" and "does not currently use or possess controlled substances". The decision process will consider: whether the resident can demonstrate that she has been accepted for the treatment program; whether she can demonstrate that she has maintained a drug free status; the question of the length of time since the offense; and evidence (if any) of further drug-related criminal activity since the offense for which she was convicted. If the housing provider waited an inordinately long time before pursuing the eviction, the resident's arguments would be stronger than if the housing provider had sent the lease violation notice soon after determining that there was sufficient evidence to determine that a lease violation had occurred.
>
> If the housing provider is not convinced by the resident's arguments, the housing provider will decide that the resident is not an "individual with disabilities", in which case the housing provider will be under no obligation to consider a reasonable accommodation request. If the resident does not accept the housing provider's decision, the resident could contest the eviction, file a Fair Housing complaint, and/or bring suit under the Fair Housing Act.

If the housing provider (or the enforcement process) decides that the resident is an "individual with disabilities", the housing provider must then decide whether the lease violation was a result of the disability. If not, reasonable accommodation is not applicable. Again, the resident could contest an adverse decision in the eviction process, and/or utilize the Fair Housing Act enforcement process.

If the resident is an "individual with disabilities", the housing provider must evaluate the reasonable accommodation request (see also Chapter 4). Factors to consider would include, as a minimum, the likelihood that the reasonable accommodation would result in lease compliance (e.g. not using illegal drugs, paying rent on time, respecting the rights of others, etc.), the seriousness of the lease violation, and whether the requested accommodation does in fact overcome the lease violation; also, the Task Force notes that these factors are interrelated. See also the discussion below regarding reasonable accommodation and lease violations.

Where, on the other hand, it is clear that the resident "has recovered" and is thus an "individual with disabilities", the housing provider must consider requests for reasonable accommodations.

When an individual claims recovery, the regulations for all programs should authorize the housing provider to require the person to present evidence of recovery from a qualified, neutral third party to be admitted (in the case of an applicant) or allowed to continue to reside in the unit (in the case of a resident). For further discussion of this issue, see the section on Current Users of Illegal Drugs and Recovering Substance Abusers in the Application Process, Chapter 1. See also 24 CFR 966.4(1)(5)(i):

A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

Fraud

Fraud related to the housing programs is a participant's intentional misrepresentation or withholding of material facts in order to secure housing assistance or a higher level of assistance.

59 **The Occupancy Task Force recommends that HUD issue guidance that housing program fraud has taken place only if (a) there is intentional misrepresentation and (b) the misrepresentation conferred some gain on the resident or applicant who made the misrepresentation.**

The Task Force has learned that some mental health consumers omit from rental applications information concerning periods of hospitalization (or participation in residential treatment programs), in the belief that either: (a) this does not constitute a change of residence and thus does not need to be listed on the application; or (b) that the housing provider might (illegally) discriminate on the basis of the information. The preceding recommendation is intended to clarify that this omission does not constitute housing program fraud. In addition, the Task Force understands that, because such institutions are not residences, it is not misrepresentation to omit the institution as a previous residence. See also the discussion on Resident History in Chapter 2.

Fraud related to the housing program is an independent ground for eviction, whether or not it is criminal. Since it is an independent ground for eviction, it should not be governed by the rules on evictions for criminal activity. Fraud related to the housing program clearly violates the lease.

Minor Crimes and Off-Premises Criminal Activity

The public housing statutes and regulations make criminal activity grounds for eviction only if:

- it threatens the health, safety or right to peaceful enjoyment of the housing premises by other residents or employees of the PHA; or
- it is drug related and takes place on or near the premises.

The Task Force has recommended that these same provisions be adopted in the other programs. There are some difficult issues where a resident or household member has engaged in criminal ac-

tivity, but where it may not be clear whether the activity constitutes grounds for eviction:

60 The Occupancy Task Force recommends that HUD issue guidance to clarify that:

(a) criminal activity which threatens the health, safety or right to peaceful enjoyment of the housing premises by other residents or staff constitutes grounds for eviction.

(b) drug-related criminal activity which takes place on or near the premises constitutes grounds for eviction.

(c) The "on or near" language applies only to drug related crime. Crimes which pose threats to residents or management staff are grounds for eviction regardless of where they occur. For example, one resident may assault another or vandalize another resident's car, away from the housing development. Eviction could be appropriate in those instances.

(d) Other activities, whether or not they are criminal, are grounds for eviction if they constitute material noncompliance with the lease (or if they constitute repeated minor violations of the lease). For example, damages to the property of the housing provider (which may be criminal) will often be grounds for eviction as a violation of a lease provision requiring residents to refrain from destroying, defacing, damaging or removing any part of the dwelling unit or project.

(e) One-time occurrences of some minor criminal activities do not pose a threat but, if engaged in with frequency or duration, can have a very serious impact on individual residents or the housing community as a whole.

Public Housing Grievance Procedure

Residents being evicted from public housing are entitled to a grievance hearing except if the eviction involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises [42 U.S.C.A. §1437(k)].

The Task Force believes that the public housing grievance procedure should be preserved for all other types of evictions in public housing.

Residents' Liability for the Actions of Others

Residents are generally liable for actions of family members and guests. However, there are some situations in which a resident does not know and could not have foreseen that another household member or a guest is involved in criminal activity. An example would be a teenage child who engaged in drug dealing when the parent or parents were at work and who left no grounds for suspicion of what he was doing. In other instances, a resident may know, but be so intimidated or exploited by the criminal party that he or she did not take action. An example might be a teen or adult son or daughter or boyfriend dealing drugs who threatens or takes advantage of the leaseholder's lack of awareness.

Some members of the Task Force have personal experience of times when the resident does not want to know that a family member or guest is engaging in activity which violates the lease. These members do not want to establish a national policy that will create any incentive for parents not to know what their children are doing.

Some Task Force members believe that it is desirable to have, as an alternative to eviction, the ability to remove from the housing environment a household member who has violated the lease, while leaving the remaining household members in residency. However, the landlord-tenant law in some states does not permit removal of any resident except the head of household. HUD has the authority to preempt State law provisions and authorize the eviction of offending household members. Leases could then be drafted to authorize removal of offending household members.

There is no consensus among Task Force members, or among commenters, on this difficult topic.

Consideration of All the Facts and Circumstances

It is not possible to establish detailed and absolute rules that determine whether an eviction or subsidy termination is appropriate in any particular case. The facts vary too much and the principles indicating what is appropriate are too complex. Thus it is important

for the housing provider to exercise responsible discretion on a case-by-case basis.

The public housing regulations for eviction for criminal activity contain the following specific provision:

> In deciding to evict for criminal activity, the PHA shall have the discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity [24 CFR §966.4(1)(5)].

There is similar language at 24 CFR §882.216(c) regarding subsidy termination in the certificate and voucher programs. There are no such regulatory provisions for eviction in assisted housing or in the certificate and voucher programs.

If the resident presents mitigating circumstances, the housing provider can require the resident to demonstrate that they are true. In addition, the housing provider (and, for evictions, the court) must decide whether the verified information does in fact overcome the offense.

The Task Force debated this issue. At its heart are these points:

- As a matter of basic fairness, some housing providers in practice do take facts and circumstances into account in many situations.
- By definition, mitigating circumstances decisions are difficult. At issue is whether the mitigating circumstances do in fact outweigh the unfavorable information. Well informed professionals with good intentions and balanced perspectives might well disagree on any given decision.
- Under present assisted housing guidance, judges in eviction cases often do not permit residents to raise mitigating circumstances in defense against the eviction. In public housing evictions for criminal activity, however, judges typically do allow residents to raise mitigating circumstances, because of the existence of the "discretion" regulation.

A series of options could change the current rules on consideration of all facts and circumstances. Neither the Occupancy Task Force, nor public commenters, reached consensus on a recommendation.

Regardless of whether or not current rules or guidance are changed, housing providers must consider mitigating circumstances when terminating the leases of residents with disabilities. In

order to prevent the eviction, the resident would have to document to the housing provider's satisfaction that the behavior causing the lease termination was related to the resident's disability, and that, because of some change in treatment, services or other verified facts, the behavior will not recur.

Criminal Activity Prior to Admission

Criminal activities that occurred before the resident's participation in the housing program cannot fairly be considered grounds for eviction, unless such activities were unknown to the housing provider at the time of application and would have been cause for rejection had they been known (taking into account mitigating circumstances where applicable).

61 **The Occupancy Task Force recommends that HUD limit the grounds for eviction to activities that have occurred since the resident was admitted to the housing. An exception should be made for situations where an applicant deliberately concealed information and the information withheld would have been grounds for rejecting the applicant.**

62 **The Occupancy Task Force recommends that in the certificate and voucher programs, a regulatory provision should be added limiting the grounds for termination of subsidy to activities that have occurred since the resident was admitted to the subsidy program. An exception should be made for situations where an applicant deliberately concealed information and the information withheld would have been grounds for rejecting the applicant.**

For further discussion of certificate and voucher issues, see Chapter 6.

Subsidy Termination - Certificate and Voucher Programs

The certificate and voucher programs involve three parties: a private housing owner, the resident, and the PHA which provides a housing subsidy on behalf of HUD. The housing owner and resident execute a lease, and the housing owner and PHA execute a Housing Assistance Payments (HAP) Contract.

In the certificate and voucher programs, there are several poten-

tial grounds on which the PHA can terminate the subsidy: drug-related criminal activity, violent crime, fraud in the housing programs, failure to repay a debt to the PHA as agreed upon, or breach of program obligations. Although the PHA must provide the resident an informal administrative hearing, decisions on whether the alleged grounds are true, whether an allegation of fraud is actually erroneous, whether the criminal activity occurred, whether the resident was liable for it and whether termination is appropriate, are often too complex to be fairly resolved in a PHA's informal hearing process, where the hearing officers are not lawyers or familiar with criminal law and where the ordinary rules of evidence do not apply.

A problem arises if the PHA wrongly terminates the subsidy. The resident is usually unable to pay the full rent, and thus the landlord will pursue eviction for nonpayment of rent. In the court hearing, the judge often is unwilling to consider whether the subsidy termination was proper (or determines that, because the PHA is not a party to the eviction action, there is no jurisdiction to consider this). As a result, there may be a lack of due process, because there is no opportunity to review the determination made by the PHA's informal administrative hearing.

A second problem arises when the housing owner violates program rules. In these instances, the regulations provide that the PHA may suspend or terminate the subsidy, and the resident is allowed to remain in occupancy so long as he or she continues to comply with the lease (including paying the resident's share of the rent). Sometimes in these circumstances, however, the private housing owner will (illegally) pursue eviction, and the eviction will be successful whenever the judge declines to consider the circumstances surrounding the termination of assistance.

63 The Occupancy Task Force recommends that HUD issue regulations to provide for a 30 day stay of the subsidy termination, for certificate/voucher holders to affirmatively seek state court review of the PHA's decision to terminate subsidy.

Subsidy Termination - Assisted Housing

Under the assisted housing programs, owners are allowed to terminate subsidies only if the resident fails to recertify or has an increase in income that eliminates the need for the subsidy. Those grounds are satisfactory and should be retained.

If an owner terminates a resident's subsidy for grounds other than those specified above or because of a mistaken understanding about the relevant facts, the resident should be permitted to raise the impropriety of such a termination as a defense if the owner should seek to evict for nonpayment of rent:

64 **The Occupancy Task Force recommends that, to ensure that this defense will be available in state courts, the Model Lease should be modified to permit the resident to raise the impropriety of a termination of assistance as a defense, if the owner should seek to evict for nonpayment of rent after previously terminating the assistance.**

65 **The Occupancy Task Force recommends that, where assistance is terminated, if the housing provider brings an eviction action for nonpayment of rent, and the court finds that the subsidy termination was improper, HUD's Handbook 4350.3 and the Model Lease should:**

(a) require restoration of the subsidy retroactively; and

(b) bar the housing provider from evicting the resident on the ground of failure to pay the subsidy portion of the rent; but

(c) permit eviction, however, for any additional ground for eviction, such as engaging in drug-related or criminal activity, or nonpayment of the resident's portion of the rent.

The Task Force recognizes that the foregoing recommendations may result in spurious challenges to proper terminations of subsidy, in defense of the eviction for nonpayment of rent. The Task Force recommends:

66 **Where assistance is terminated, if the housing provider brings an eviction action for nonpayment of rent, and the court orders the eviction, HUD's Handbook 4350.3 should require the retroactive payment of the subsidy for the period through the date the resident vacates the unit.**

In closing, the Task Force hopes that the above recommendations, and the recommendations in other areas, will result in greater lease compliance and fewer evictions, throughout the public and assisted housing inventory.

4

Reasonable Accommodations

Introduction

Reasonable accommodation is a creative, challenging and evolving area of disability law and practice, affecting every aspect of admissions, occupancy and evictions. The Task Force believes that, despite many uncertainties as to what is required by the laws, it is possible to craft sound basic reasonable accommodation policies and procedures which will satisfy the intent of the laws without subjecting either persons with disabilities or housing providers to unintended burdens.

Because the Task Force is composed of experts in fair housing practice, housing management and related areas, because we have a wide variety of points of view, and because we have had the benefit of extensive public comment, we feel that the guidance in this Chapter represents the best available information on how to implement the reasonable accommodation provisions of the laws. However, we are not legislators, judges nor juries, and we point out that definitive resolution of the various open issues will come only through ongoing legislation and case law. Housing providers must use their best judgment in deciding how to implement the reasonable accommodation procedures. There is no guarantee that housing providers who follow the Task Force's guidance will be found to be in compliance with the law.

This Chapter tackles a wide range of issues surrounding reasonable accommodations with the intention of providing guidance in the procedural elements essential to achieving compliance. Specifically, the Chapter is organized as follows:

First, regulatory and case law references that provide background on the concept of reasonable accommodation. A brief discussion of program accessibility requirements (the self-

evaluation and transition plan) that exist in addition to requirements for reasonable accommodations follows.

Second, we discuss a definition of reasonable accommodation.

Third, we provide a statement of principles applicable to reasonable accommodations. These principles are drawn from current law and regulation and describe both the affirmative requirements and the regulatory limits placed on the implementation of the concept.

Fourth, we examine briefly the regulatory limits that apply to accommodations (undue burdens and fundamental alterations). A fuller discussion of fundamental alterations and undue burdens is found in Chapter 5 of the report.

Fifth, in addition to the specific requirements of current law and regulations, we provide further recommendations that the Task Force developed through discussion and deliberation on this issue. The Task Force recommendations flow from the law and are directed toward establishing the procedural framework needed to implement effective reasonable accommodation practices in the field.

Sixth, we discuss and review diverse procedural issues that consider reasonable accommodation in the context in which it is most likely to be used — that is, as part of the standard operating procedures of a housing authority or assisted housing owner. Topics include dealing with disagreement regarding the type of accommodation, accommodations in the occupancy cycle, procedures related to service animals, use of interpreters versus alternative methods.

Seventh, we provide a detailed discussion and review of reasonable accommodations and lease violations so that both providers and persons with disabilities have realistic and accurate expectations of what may or may not be possible once negotiations for an accommodation commence.

Eighth, we discuss other recommendations and recommendations for HUD Technical Assistance.

In addition, Appendix 8 includes: a sample procedure for responding to requests for accommodation; model, plain language forms to be used in the accommodations process; and actual examples of how the accommodation process can work to the benefit of both the housing provider and the individual with disabilities.

The Appendix is intended to illustrate how accommodations might work in practice and give providers an opportunity to review language that addresses implementation in the real world of housing management. The Task Force analyzed the nature and purpose of reasonable accommodations in the context of the assisted and public housing programs. Task Force members, drawing on practical experience, then developed these model policies and documents which are consistent with Section 504 and the Fair Housing regulations.

Finally, the Appendix is intended to be a valuable tool for moving from the "theory" of reasonable accommodations to the "practice of compliance".

Regulatory References

504 — Section 504 of the Rehabilitation Act of 1973. The regulations are found at 24 CFR Part 8, Subparts A-E. The preamble to the 504 regulations, published 2 June 1988 is also referenced in this chapter.

FHAA — Fair Housing Amendments Act of 1988, amends Title VIII of the Civil Rights Act of 1968. The regulations are found at 24 CFR, Subchapter A, Part 100, Subparts A-F and Appendix I to Subchapter A, the preamble to the regulations published in the Federal Register 23 January 1989.

Case Law

The cases listed are not exhaustive but illustrate issues discussed in this chapter.

The Supreme Court has ruled that participation by an individual with a disability may not be terminated if reasonable accommodations can eliminate the risk that the person's handicapping condition causes others. *School Board of Nassau County v. Arline*, 475 US 1118 (1987) (a school board cannot dismiss a teacher with tuberculosis if reasonable accommodations could eliminate the risk the infection could pose to others.) The legislative history of the Fair

Housing Amendments Act makes clear that this standard is to be applied in the context of housing as well. [House report for HR 1158, 1988.]

D'Amico v. New York State Board of Law Examiner, 813 F. Supp. 212 (W.D. N.Y. 1993). A law graduate sought accommodations in the way a state bar exam is administered because of a severe visual disability. The court held that it is generally appropriate for the treating physician recommendations to be followed and where the physician recommended that the bar exam be given over four, rather than two days, the recommendation had to be followed.

The fundamental alterations concept derives from the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), where the Court ruled that a school did not have to modify its clinical nursing program by converting it into a program of academic instruction to accommodate a woman with hearing impairments.

Cason v Rochester Housing Authority, 748 F.Supp. 1002 (W.D.N.Y. 1990). Although this case does not focus on reasonable accommodation it is referenced because of its impact on the policies and procedures that govern the occupancy cycle.

Program Accessibility

Reasonable accommodation is one aspect of the compliance efforts required of providers through Section 504 and the FHAA. Compliance actions taken by a housing provider (especially under Section 504) may be divided into two general categories:

- actions taken in response to a request from a person with disabilities (reasonable accommodations); and,
- program or property-based compliance actions that are required quite apart from individual requests.

The Section 504 program or property-based actions include the general provisions against discrimination [24 CFR 8.4], communications[1] [24 CFR § 8.6] including the provision of auxiliary aids to foster program access, and all of Subpart C [24 CFR § 8.20 through 8.33].

Subpart C of the Section 504 regulations is titled "Program Ac-

1 Communications includes program-based requirements but may also include actions designed to address the specific needs of an individual with disabilities.

cessibility" and includes language on: general requirements; accessibility requirements for housing and non-housing facilities (new construction, substantial rehabilitation of the premises, other alterations, existing programs); Public and Indian Housing; distribution of accessible units; occupancy of accessible units; housing certificate & housing voucher programs; home-ownership programs; Rental Rehabilitation Program; historic properties; accessibility standards; and housing adjustments.

Within the above topics Section 504 specifies the completion of a transition plan where structural changes are required to achieve program accessibility [24 CFR §8.24 and §8.25]. An additional program requirement, a self-evaluation of housing administrative operations and policies, is specified in 24 CFR §8.33 and §8.51. The transition plan and self-evaluation complement each other. The former is focused on the accessibility of facilities (the removal of physical barriers), the later on operational or administrative changes that make the program accessible (the removal of procedural barriers).

The essential elements of the self-evaluation are described below [Reference: 24 CFR § 8.51]:

(1) Consultation with interested persons, including individuals with handicaps or organizations representing individuals is required.

(2) Policies and practices must be evaluated to determine if they meet the requirements of Section 504.

(3) Policies or practices that do not meet Section 504 requirements must be modified [See 24 CFR § 8.33, Housing Adjustments].

(4) Recipients must take corrective steps to remedy any discrimination revealed by the self-evaluation.

(5) Any recipient that employs 15 or more persons must: (a) keep the self-evaluation on file for at least 3 years and make it available for public inspection; (b) upon request, provide a list of interested persons consulted, description of areas examined, modifications made, or remedial actions taken.

(6) The self-evaluation must have been completed by July 11, 1989.

When examining documents and procedures providers must look for language or actions that have the effect of restricting the participation of a resident in functions that relate to program requirements (e.g. reexaminations) and other activities at the site (e.g. social or recreational activities).

§ 8.24 (d) of the Section 504 regulation outlines the requirements for the transition plan:

> "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 the implementation of the plan; and
>
> (5) Identify the persons or groups with whose assistance the plan was prepared."

Program accessibility is achieved through the Section 504 requirements for self-evaluation and transition plans. These affirmative steps exist in addition to the requirement that providers address individual needs. Such program-based compliance actions support a comprehensive approach to accessibility. Such actions are critical to developing an organizational culture that makes standard operating procedures sensitive to the access and communications issues that confront persons with disabilities.

67 With respect to the existing requirements for the Transition Plan and Self-evaluation, the Task Force recommends that HUD provide additional guidance on these issues to PHAs and assisted providers, specifically that HUD fund training on how best to develop and implement these program-based requirements.

68 The Occupancy Task Force recommends that HUD issue regulations providing that as common areas, dwelling units, policies and procedures are modified to promote accessibility, it may be appropriate to modify the Transition Plan; this should be done with the participation of persons with disabilities, or persons or groups representing persons with disabilities.

Definition of Reasonable Accommodation

The concept of reasonable accommodations is found in both the Fair Housing Amendments Act of 1988 and Section 504 of the Rehabilitation Act of 1973. Accommodations affect the operational, managerial, and budgetary requirements of public and assisted housing.

The Fair Housing Amendments Act regulations at 24 CFR § 100.204 (a) discuss reasonable accommodation in the following manner:

> "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."

Note that the FHAA definition of accommodations does not mention structural alterations. There is no "uniform" definition of reasonable accommodations across disability regulations. For example, the Section 504 employment regulations (24 CFR § 8.11) describe reasonable accommodation as: " ...making facilities used by employees accessible to and usable by individuals with handicaps...." Thus, depending on the regulatory context, both structural and procedural changes may be included in the definition.

The term, reasonable accommodation, as used by the Task Force, includes both structural and non-structural compliance actions, such as:

- reasonable changes in policies or procedures;

- removal of communications barriers;
- reasonable structural modifications to housing units or common areas that remove architectural barriers.

Examples of procedural changes: providing additional explanation of requirements, offering information in accessible formats and in plain language, allowing the use of service animals, permitting rent payments to be mailed rather than delivered in person, and providing auxiliary aids, such as pencil and paper for those with speech difficulties.

Examples of structural modifications: installing ramps and widening doors, installing visual fire alarms, installing a Braille control panel in an elevator, or color-coding the elevator lobbies to assist persons who are easily disoriented.

Where necessary to the discussions in this report, we will make the distinction between structural and non-structural compliance actions.

The FHAA definition of reasonable accommodations requires housing providers to make accommodations. The FHAA does not establish any threshold (financial or administrative) for determining what is reasonable. The preamble to the FHAA regulations identifies a limit to accommodations by introducing the concept of fundamental alteration in the nature of the program.

A housing provider is not required "... to provide supportive services, e.g. counseling, medical, or social services, that fall outside the scope of services that the housing provider offers to residents." Further, a provider is required to make modifications "...in order to enable a qualified applicant with handicaps to live in the housing, but is not required to offer housing of a fundamentally different nature. The test is whether with appropriate modifications the applicant can live in the housing that the housing provider offers; not whether the applicant could benefit from some other type of housing that the housing provider does not offer." [Federal Register Vol 54, No. 13, January 23, 1989, p 3249]

Providers are not required to offer accommodations that alter the fundamental nature of the housing program or provide services beyond those *existing* services that are already part of the housing program. Actions up to the point of alteration are still required. The Section 504 regulations provide additional guidance on what is reasonable by introducing the concepts of undue financial *and* adminis-

trative burdens. Both the fundamental alterations and undue burdens are discussed in detail in Chapter 5 of the report.

Essential Principles

With respect to reasonable accommodations, the Task Force has identified the concepts essential to making reasonable accommodations and the limits placed on the accommodation process. The reasonable accommodation principles are divided into two categories: those based on existing law and regulations, actions *that providers must take*; and those recommended by the Task Force to enhance the procedural structure necessary for effective compliance.

The principles based on existing law or regulation represent current requirements. Providers must make accommodations in response to individual needs, provided such accommodations do not create a fundamental alteration in the nature of the program or cause undue financial and administrative burdens. Where such burdens or alterations are incurred, providers must take other actions up to the point of such alterations or burdens.

Some of the regulatory requirements associated with the reasonable accommodation principles are listed below:

- If requested, housing providers must work with qualified individuals with handicaps to develop accommodations, administrative as well as structural, that will "...afford the handicapped person equal opportunity to use and enjoy the dwelling unit, including public and common use areas" [See 24 CFR §100.204]; or provide the qualified individual with handicaps an opportunity to participate in, or benefit from the housing, aid, benefit, or service that is...equal to that afforded to others. [This reference is an affirmative restatement of prohibited actions noted in 24 CFR §8.4(b)(1)(ii).]
- Housing providers, "...shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate." [24 CFR §8.24 (b)].[2]

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2 The 504 regulations do not define " integrated setting". Other sections of 504 can be used to provide a framework for the term. Specifically, housing must be provided to qualified persons with disabilities so that "... the choice of living arrangements is, as a whole, comparable to that of other persons eligible for housing assistance under the same program." [24 CFR § 8.26] Living arrangements may also include benefits and

- "In determining what auxiliary aids are necessary, the ...[provider] shall give primary consideration to the requests of the individual with handicaps." [24 CFR Subtitle A §8.6 (a) (1) (i).]
- To facilitate communication with persons with disabilities, the housing provider, " 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." [24 CFR Subtitle A §8.6 (a) (1)]

69 The Task Force recommends that the reasonable accommodation principles adopted by the Task Force be incorporated into HUD guidance. Where these principles illustrate legal requirements, the designation '(required)' is included.

(a) (required) Reasonable accommodations are made in response to individual requests from a qualified person with disabilities; the request may be made in any manner which is convenient for the person with disabilities. Reasonable accommodations are in addition to any program- or property-based accessibility requirements specified in the Section 504 regulations.

(b) (required) The housing provider's obligation is to make an accommodation which is effective (i.e. one which overcomes barriers to equal access and facilitates the use of the housing program), provided that the accommodation also is reasonable (i.e. does not cause undue burdens or cause a fundamental alteration in the nature of the housing program).

(c) (required) Reasonable accommodations are unique to the needs of the person as a result of his or her disability, and to the characteristics of the housing environment.

(d) (suggested) In general, the person with disabilities will suggest an accommodation which he or she believes to be effective, and the housing provider will determine

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services provided at the property where the provider is obligated to afford persons with disabilities "equal opportunity" to obtain such services and benefits. [24 CFR § 8.4 (b) (2)]

whether the requested accommodation is reasonable from the provider's viewpoint. The housing provider may also suggest alternative accommodations which are less burdensome to the provider.

(e) (suggested) In general, the person with disabilities is in the best position to determine whether a suggested accommodation is effective (i.e. removes the barriers). This is analogous to the situation discussed in 24 CFR 8.6(a)(1)(i) which states that in determining what auxiliary aids are necessary, the housing provider "shall give primary consideration to the requests of" the person with disabilities. Housing providers, on the other hand, are in the best position to determine whether a suggested accommodation is reasonable (i.e. the burden on the provider is within the limits established in the law).

(f) (suggested) Effective, two-way communication is essential to the process of identifying the most appropriate accommodation; (required) this may require that the housing provider use alternate forms of communication.[3]

(g) (required) Often, reasonable accommodation will mean that persons with disabilities be treated differently, in order to ensure equal access to programs and services.

(h) (suggested) Applicants and residents with disabilities may designate a third party to receive information on their behalf.[4]

(i) (required) Section 504, the Fair Housing Act, and the Americans with Disabilities Act should be interpreted to

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3 The housing provider "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" [24 CFR §8.6(a)(1)]. "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...." [24 CFR §8.3 goes on to give examples of auxiliary aids]. However, the housing provider "is not required to provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature" [24 CFR 8.6(a)(1)(ii)].

4 The Task Force encourages readers to review HUD's proposed regulations on this subject, published in the October 15, 1993 Federal Register, pages 53461 *ff.*

require that information regarding reasonable accommodations be made available to applicants and residents during the admission and occupancy cycle, specifically: at time of application; with any notice of rejection; and with any notice of lease violation or lease termination.[5] (suggested) Such information should also be provided at other times as the housing provider deems appropriate.

(j) (suggested) Forms and other documents used for applicants and residents should be in plain, intelligible language. (required) Providers must be prepared to present documents in alternative formats, make use of auxiliary aids, or communicate with a third party designated by the applicant or resident[6] (see Appendix 8 for model plain language forms).

(k) (required) The reasonable accommodation requirement is intended to provide persons with disabilities *equal* opportunity to participate in housing programs through the modification of rules, procedures, policies and structures. Such accommodations are not intended to provide greater program benefits to persons with disabilities than to nondisabled residents or applicants.[7]

(l) (required) If the provider receives Federal financial assistance, structural reasonable accommodations must be made at the housing provider's expense (provided such accommodations do not create undue burdens or fundamental alterations; see Chapter 5 for a fuller discussion of undue burdens and fundamental alterations).

(m) (required) All housing providers must allow residents to make, at the resident's expense, reasonable accessibil-

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5 See, e.g., 24 C.F.R. §8.54 (Section 504); 24 C.F.R. §100.50(3) (Fair Housing Act); 25 C.F.R. §35.106 (Americans with Disabilities Act).

6 See Chapter 1, fn. 12.

7 Housing programs, "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" [24 CFR §8.4(b)(2)].

ity modifications to their dwelling units and to the common areas (24 CFR §100.203).

(n) (required) Reasonable accommodations must be provided throughout the occupancy cycle in admissions, residency, lease enforcement and eviction. (See discussion later in this chapter on accommodations related to lease terminations. Also see Chapter 2 on interventions prior to lease violations.)

(o) For information on whether, and if so to what extent, housing providers may request information related to the nature or severity of a disability during the reasonable accommodation process, see Chapter 1.

(p) (suggested) In general, housing providers are not required to provide supportive services that they do not offer to the current resident population (see also Chapters 5 and 7).

(q) (required) A housing provider may not unilaterially discontinue a particular method of providing a reasonable accommodation. *Instead*, notice must be given to the resident with disabilities allowing the parties to agree to another effective method of providing an accommodation, including an opportunity to meet to discuss the decision to discontinue the accommodation.

Regulatory Limits to the reasonable accommodation Process

The Section 504 regulations establish limits to the reasonable accommodation process. Some limits apply to both structural and non-structural accommodations. Others apply only to structural accommodations. Under current Section 504 regulations, a housing provider is not required:

- "...to take any action that it can demonstrate would result in ...undue financial and administrative burdens [24 CFR Subtitle A §8.21 (b), §8.23 (b), and 8.24 (a) (2)]. See the separate discussion of "Undue Burdens" in Chapter 5.
- "...to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity...." [24 CFR Subtitle A §8.21 (c) (iii),and §8.24 (a) (2)]. Housing providers are generally not required to provide support

services that are not already part of their housing program. [24 CFR § 8.24 (b)] See the separate discussion of "Fundamental Alteration" in Chapter 5.

- to provide an elevator in any multifamily housing project solely for the purpose of locating accessible units above or below the grade level; [24 CFR § 8.26]
- to make structural alterations in existing housing programs when other methods can be demonstrated to achieve the same effect. [24 CFR §8.24(b)]

With respect to financial and administrative burdens, and fundamental alteration, housing providers *are required* to "...take any action that would not result in such an alteration or burdens, but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity."[24 CFR §8.24 (c) (iii) and §8.24 (a) (2)] Actions up to the point of alteration or burdens are still required.

Accessibility Standards

Under §504, the Uniform Federal Accessibility Standards govern structural changes which rise to the level of "alterations", defined as:

> 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. [24 CFR §8.3]

Alterations may be "substantial alterations"[8] or "other alterations."[9] The UFAS applies to substantial alterations and other alterations, but not to normal maintenance. Under the ADA, the

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8 "Substantial alteration. 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 [new construction] provisions of §8.22 shall apply." [24 CFR §8.23(a)].

9 Alterations that do not meet the "substantial alteration" definition, but constitute work that is beyond normal maintenance. See the extended discussion at 24 CFR §8.23(b).

ADA Accessibility Guidelines play a similar role. For properties which are subject to both §504 and the ADA, the ADA Title II regulations provide that:

> Design, construction, or alteration of facilities in conformance with [the UFAS] or with [the ADAAG] shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(j) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided [28 CFR §35.151(c)].

Under the UFAS, housing providers who are undertaking alterations are not required to take any action that results in "structural impracticability". Structural impracticality is defined by the UFAS as:

- changes having little likelihood of being accomplished without removing or altering a load-bearing structural member [See the Section 504 regulations, 24 CFR § 8.32(c)]; and/or
- incurring an increased cost of 50% or more of the value of the element of the building or facility involved. [24 CFR §40, Appendix A, 3.4 UFAS].

Procedural Framework Necessary for Implementation

In the discussion that follows reasonable accommodations are examined in light of the procedural standards required to incorporate the practice of accommodation into a housing provider's daily operating routines. The Task Force believes that the elements described below represent the basic procedural requirements needed for housing providers to establish a workable reasonable accommodation process.

The procedures described below begin with a request for accommodation from the applicant or resident and end with a decision by the housing provider. In between, the procedure encourages information-sharing and discussion between the housing provider and the person with disabilities, to ensure that sufficient information is brought forward to enable the housing provider to reach a good decision.

70 The Task Force recommends that HUD require assisted housing providers and PHAs to have written procedures for reasonable accommodation, which address the issues discussed below:

(a) Information on the availability of the provider's reasonable accommodation procedure will be posted in the rental office and will be provided at application intake, notice of rejection, notice of lease violation, and notice of lease termination.[10]

(b) The reasonable accommodation procedure is uniform but flexible. The applicant or resident may make a request for reasonable accommodation in any manner which is convenient to him or her. Thereafter, standard forms and instructions are used to drive a system for making decisions. The process is standardized but the results will be unique to the individual and the property involved.

(c) Reasonable accommodation decisions will be made in a timely manner and both denials and agreements to make accommodations will be documented in writing (plus, if applicable, notification in a format accessible to the requester). Agreements to make accommodations will include terms, conditions, performance expectations (for all parties), and, if appropriate, a schedule.

(d) The written procedure will describe: (i) the points in the occupancy cycle where information will be provided; (ii) procedures for investigating reasonable accommodation for applicants who do not pass screening; (iii) how requests for accommodations are made; (iv) the decision making process (including determination of undue burdens or fundamental alterations); (v) timely processing of accommodation requests; (vi) the manner in which the housing provider will respond to the request for accommodation; (vii) the right to an informal meeting if the decision is unfavorable; (viii) the process used to settle

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10 For assisted housing, HUD Handbook 4350.3 indicates requirements to give this notice at the time of the application interview (¶2-23j) and in the notice of rejection (¶2-30c).

differences; and (ix) timely implementation of accommodations.

(e) The procedures must allow persons with disabilities to communicate with the housing provider in an accessible manner. Communication with the applicant or resident must be provided in an accessible and intelligible[11] format (the intent is to make the process of accommodation accessible).

Requirements for the Appeal Process

The review procedure that is required depends on several factors: whether the person with disabilities is a resident or applicant; whether the housing provider is a PHA; and whether the non-PHA recipient employs fifteen or more people. 24 C.F.R. Section 8.53; *see also* FR 2 June 1988, Vol. 53, No. 106 Page 202309 (504 Preamble).

The type of review required for a denial of a reasonable accommodation breaks down as follows:

Applicants (whether PHA or non-PHA):

Applicants denied reasonable accommodations are entitled only to the informal review currently in place under program regulations for applicants denied housing in any HUD assisted housing. Housing providers should use their current review procedures.

Residents of recipients employing 15 people or more:

Section 8.53 requires that recipients employing 15 people or more adopt grievance procedures that provide appropriate due process standards for residents denied a reasonable accommodation.[12]

PHA Residents:

PHA residents, under current regulation, are entitled to a grievance procedure to dispute PHA action or failure to act involving the tenant's lease or PHA regulations which ad-

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11 See Chapter 1, fn. 11.

12 When the recipient employs 15 or more people, Section 504 also requires that employees with disabilities have access to grievance procedures .

versely affect the tenant. 24 C.F.R. Section 966.50 *et seq.* Thus, PHA's may satisfy the Section 504 requirement by using a grievance procedure that they already have in place.

Residents of non-PHA recipients employing fewer than 15 people:

These housing providers must provide some opportunity for review of denials of reasonable accommodation but such reviews need not incorporate due process procedures. For instance, the review may be a face-to-face meeting with someone on the provider's staff other than the person who made the decision.

Residents of providers subject to the ADA and employing 50 or more people:

28 CFR § 35.107 mandates that public entities which employ 50 or more persons adopt grievance procedures for resolution of complaints alleging any action that is prohibited under Title II of the ADA. They must designate at least one employee to coordinate the grievance procedures. In addition, they must publish the grievance procedures and make available the name, office address and telephone number of the designated employee(s) to whom grievances are made.

Reaching Agreement on Methods

There will sometimes be two or more potential methods for making a reasonable accommodation. In the following discussion, the Task Force suggests a conceptual framework for determining which potential methods are worthy of consideration, and how to decide among them.

The housing provider's obligation is to make an effective accommodation. To be "effective", the methods of accommodation must remove disability-related barriers to participation, so that the housing program is "equally effective" in serving persons with and without disabilities:

> For purposes of this part housing aids, benefits, and services, to be equally effective, are not required to produce identical results... 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. [24 CFR §8.4(b)(2)]

For example, a resident with a mobility impairment requests a reasonable accommodation so that s/he can gain access to the parking facilities from the sidewalk (and vice versa). Any of the following would be effective:

- making a curb cut.
- installing a ramp in an existing parking space, retaining the existing sidewalk.
- offering a transfer (to which the resident agrees) to a unit which is close to an already accessible parking area.

In a second example, a wheelchair user requests that the housing provider install a ramp at the front entrance. The housing provider offers instead to assign the resident an accessible parking space near the rear entrance to the building (which few if any residents actually used, but which was accessible to the wheelchair user). The parties settled, agreeing that the law requires the housing provider to provide the ramp, because otherwise the resident would not have an equal opportunity to participate in the program.[13] In other words, providing access to the rear entrance but not the front entrance was not *effective* because the resident would not be receiving equal treatment if he were forced to use the rear entrance.

The Task Force emphasizes that housing providers may consider only those alternatives which are effective in removing the barriers to equal participation.

In general, the person with disabilities is in the best position to determine whether a potential accommodation is effective. This is analogous to the situation discussed in 24 CFR §8.6(a)(1)(i) which states that in determining what auxiliary aids are necessary, the housing provider "shall give primary consideration to the requests of" the person with disabilities.

The Task Force believes that when the housing provider wants to offer alternatives to the accommodation the person with disabilities considers to be effective, the housing provider must meet two requirements: (1) the housing provider must establish that the alternative accommodation is effective (i.e. the housing provider bears the burden of proof); and (2) there must be a substantive reason for

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13 *Small v. Kilree, Inc.*, No. HM-93-2815 (D. Md.).

seeking an alternative. By "substantive reason," the Task Force means a potential for significantly decreasing the difficulty or expense of making the accommodation, or a potential that the accommodation could be made significantly sooner.

However, the housing provider is not required to make an accommodation which is unreasonable. A requested accommodation is unreasonable if it poses either (1) undue financial and administrative burdens or (2) a fundamental alteration in the housing program. See Chapter 5 for a detailed discussion of how these determinations are made.

When more than one method is available that is both effective, from the point of view of the person with disabilities, and reasonable, from the point of view of the housing provider, the housing provider may select among these methods, giving preference to the wishes of the person with disabilities unless there is a substantive reason to do otherwise. The following regulatory passages make reference to this issue:

> "The accommodation is reasonable because it is feasible *and practical* under the circumstances" [24 CFR §100.204(b), emphasis added].
>
> A housing provider "is not required to make structural changes in existing housing facilities[14] where *other methods are effective* in achieving compliance..." [24 CFR §8.24(b), emphasis added].[15]
>
> "In *choosing among available methods* for meeting [the existing housing requirements], recipients shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate" [24 CFR §8.24(b), emphasis added].

Thus, the housing provider may inquire into alternative, less burdensome, but effective methods of providing the accommodation that the applicant has requested: "I want to be sure I understand your needs, and I would like to find the least expensive way

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14 "Existing program" requirements are discussed at 24 CFR §8.24.

15 In situations where a property is undergoing "alterations" [see 24 CFR §8.3], structural changes must meet accessibility standards.

that will work for you". However, the Task Force points out the following cautions:

- Unless there is effective communication between the housing provider and the applicant or resident, the housing provider might assume that an accommodation is effective when in fact it is not.
- The search for alternative, less burdensome, methods for accommodating the disability should not unduly delay the accommodation process.
- The search for alternative, less burdensome, methods should not be used as an excuse for not undertaking a requested accommodation immediately which is effective, reasonable and for which there is no significantly superior alternative.

On the basis of this background, the Task Force offers the following recommendation:

71 **The Task Force recommends that HUD incorporate into guidance the following principles developed by the Task Force to reach agreement regarding reasonable accommodations:**

(a) Where two or more potential accommodations are effective from the viewpoint of the person with disabilities (i.e. each potential accommodation removes the barriers) and reasonable from the viewpoint of the housing provider (i.e. neither potential accommodation causes undue hardship on the provider), the housing provider may select from among the effective accommodations.

(b) Questions may arise regarding whether a suggested accommodation poses undue burdens or constitutes a fundamental alteration.[16] In general, housing providers are in the best position to make these determinations, although their decisions can be challenged (either informally, through the Fair Housing Act enforcement process or through the courts).

(c) Questions may arise regarding whether a suggested accommodation is effective. In general, the person with disabilities is in the best position to determine whether a suggested accommodation is effective, although his or her

16 See Chapter 5.

decision can be challenged (either informally, through the Fair Housing Act enforcement process or through the courts).

(d) Sometimes the housing provider is willing to make an accommodation which the applicant or resident maintains is not effective, and the housing provider is not willing to make the accommodation which the applicant or resident prefers. If this remains unresolved, the housing provider should make clear that its offer remains open. If the resident decides to accept the offered accommodation while continuing to maintain that more is needed, the housing provider should not refuse to provide the offered accommodation. Similarly, the resident's acceptance of the offered accommodation should not be considered a waiver of any right the resident may have to secure the preferred accommodation.[17]

(e) The Task Force suggests that if the provider and the applicant are not able to reach agreement, the provider might ask the applicant if there is a third party expert whom the person with disabilities recommends as an advisor to help the two parties reach agreement.[18]

Service Animals and Other Animals in No-Pet Communities

Since service animals are auxiliary aids, service animals are not subject to additional requirements beyond those contained in the lease.[19] Reasonable accommodations to allow other animals, in support of a disability, may be subject to reasonable rules. However, be-

17 This situation can arise where the housing provider cannot implement the preferred accommodation without incurring undue burdens; the housing provider is, however, obligated to accommodate the disability *up to the point* where undue burdens would occur. The Task Force points out that, if the housing provider's financial position improves in the future, the previous undue burden constraint may no longer apply, and the provider may well be able to implement fully the resident's preferred accommodation.

18 This is an alternative dispute resolution mechanism; disputes can always be resolved through the Fair Housing Act enforcement process or through the courts.

19 It would be a Fair Housing Act violation to refuse to permit a blind applicant to live in an apartment with a seeing eye dog [24 CFR §100.204(b) Example 1]. For assisted housing, see HUD Handbook 4350.3 ¶2-25(i), Exhibit 2-2(d) and ¶4-14(b).

cause persons with disabilities may not be required to pay for costs associated with reasonable accommodations, a pet deposit may not be required.[20]

72 The Task Force recommends that housing providers adopt the following approach for considering requests for reasonable accommodation from residents with disabilities to keep animals which are not service animals, in communities with no-pet policies:

(a) When an applicant or resident with a disability asserts and can verify that an animal is therapeutic for his/her disability, the applicant should make a request for a reasonable accommodation; specifically, to be allowed to keep the animal.

(b) The housing provider may require verification that the applicant is a "qualified individual with handicaps" as defined in the Section 504 regulations, and the housing provider can also require verification that the animal is necessary in coping with the disability.

(c) If both verifications are provided, and the animal has special training in helping the applicant cope with a physical impairment, then the animal is a "service animal" as defined under §504. Service animals are equivalent to other "auxiliary aids" such as wheelchairs and eyeglasses, and as such must be permitted.

(d) If, on the other hand, the animal does not have specific disability-related training but is necessary in coping with the disability (for instance, if the animal provides emotional support to a person with a panic disorder), the animal is a "companion animal" not a "service animal" and must be considered under the housing provider's standard reasonable accommodation procedure. The Task Force suggests that it is likely that the animal should be allowed in these instances.

(e) The resident will be responsible for the animal's care.

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20 It would be a Fair Housing Act violation to use, because of disability, "different provisions in leases ..., such as those relating to rental charges, security deposits, and the terms of a lease" [24 CFR §100.65(b)(1)].

(f) If, subsequently, the animal or its care poses a public health problem or results in a lease violation, the problem must be addressed. The provider may send the resident a notice of lease violation.

(g) Reasonable accommodations to allow animals, other than service animals, in support of a disability may be subject to reasonable rules; however, a pet deposit may not be required.

Several public commenters raised the following issue: residents without disabilities who have been denied permission to have pets will want to know why their neighbor (who is not known to have a disability) is allowed to have a "pet". The Task Force elsewhere recommends that the reasonable accommodation procedure be in writing, and that information on the provider's reasonable accommodation policy be distributed at various times during the occupancy cycle; these practices allow the provider to respond to these types of questions by saying that approval was granted in accordance with the provider's written policies.

Use of Interpreters v. Alternative Methods

Situations may arise where a person with disabilities wants an interpreter, and the housing provider thinks there is an effective and lower cost method (e.g. presenting information in written form).

73 The Task Force recommends that HUD incorporate the following items into guidance regarding disputes as to whether the housing provider must provide a sign language interpreter:

(a) An alternative to providing a sign language interpreter is effective if it removes the barrier(s) to equal participation.

(b) The person with disabilities may not be prevented from bringing his or her own interpreter.

(c) If lease violations or possible eviction are to be discussed, the housing provider will agree to provide a sign language interpreter because of the seriousness of the topic.

(d) If, however, the context of discussion is relatively routine, such as rent which is being paid on time, or a request for maintenance service which can be readily communicated despite the disability, the housing provider might reasonably provide communication in writing.

(e) The Task Force concluded that most recertifications would require a sign language interpreter. In particular, an interpreter should be provided if the recertification involves complicated issues, if the housing provider suspects under-reporting of income, if the housing provider feels that a lease violation may have taken place, if the resident indicates that he or she has something major to discuss, or if there is some equivalent reason to feel that very clear, very complete communication is needed. On the other hand, if the recertification process is limited to the simple exchange of documents, the housing provider might reasonably provide communication in writing.

(f) The Task Force points out that some persons with disabilities communicate *only* in American Sign Language, and are not able to read or write in English. Also, while American Sign Language is the most commonly used, there are other languages. Before engaging an interpreter, the housing provider must be sure that the interpreter is qualified in the communication system used by the person with the disability.

Several public commenters asked how the housing provider should select a qualified sign language interpreter. Professional interpreters are highly skilled individuals with professional rules of conduct that deal with training, certification, issues of accuracy and issues of confidentiality. A housing provider is well advised to obtain professional interpreter services when there is any concern about accuracy of the interpretation to be provided.

Other commenters were concerned that they might select a sign language interpreter who is not qualified in the particular sign language used by the applicant or resident. The Task Force elsewhere recommends that housing providers ask each applicant how the housing provider should communicate with the applicant; where providers follow this approach, they will learn immediately which sign language system is appropriate.

One public commenter offers these additional suggestions for large providers with significant populations needing American Sign Language interpreters: make an interpreter available at certain times each month; record standard information (how to apply, explanation of the lease, house rules) in ASL on video with open captioning; have staff who are fluent in ASL.

Another public commenter offers these observations concerning communication disabilities: (i) taking the time to listen and respond to an individual with a communication disability is an example of reasonable accommodation; (ii) persons with communication disabilities often use assistive devices such as alternative and augmentative communication devices ("AACs"), Communication Boards, voice synthesizers, and Touch or Light Talkers; (iii) existence of a communication disability does not imply the presence of a cognitive disability.

Lease Violations

As noted earlier in this Chapter, when issuing a notice of lease violation, the housing provider must include information on reasonable accommodations for residents with disabilities. If the resident proposes a reasonable accommodation, the housing provider must consider granting it. The obligation to consider and, where reasonable, grant accommodations to residents with disabilities ends only when residency actually terminates.

Reasonable accommodation requests must be considered even if the housing provider believes that the resident's or applicant's "tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damages to the property of others" [24 CFR §100.202(d)]. Before making a determination that a "direct threat" would exist, the housing provider must consider whether a reasonable accommodation could eliminate the threat. Citing the decision in *Arline*, the House Judiciary Committee stated:

> Thus, ...[pursuant to the FHAA] a dwelling unit need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others. If a reasonable accommodation could eliminate the risk, [housing providers] are required to engage in such accommodation...

Similarly, the ADA in Title I (Employment) §101.3 states "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation" [42 USC 12111].

It will sometimes be an appropriate accommodation to delay or cancel an eviction proceeding. An example of delay: if a reasonable accommodation request is pending, the eviction could be stayed until a decision was made. An example of cancellation: if the lease violation is subject to cure, the resident cures the violation, and a reasonable accommodation ensures that the violation will not be repeated, the eviction could be cancelled.

By contrast to the cancellation example, the simple provision of "a second chance", in the absence of any action to cure the violation or prevent a recurrence, is not likely to be an appropriate accommodation. The Task Force emphasizes, however, that each request for reasonable accommodation is an individualized assessment and, in some instances, granting a "second chance" could be reasonable.

A Systematic Approach to Lease Violations

74 **The Task Force recommends that HUD incorporate into guidance the systematic approach discussed below for connecting reasonable accommodations to lease compliance issues, for residents with disabilities.**

Reasonable accommodations for residents may effectively overcome lease violations; however, not all violations can be overcome via reasonable accommodations, and the reasonable accommodation concept does not include waiving essential provisions of the lease. This section, plus the following two sections, provide an overview of lease violation issues including behavior which neighbors find objectionable and control of conduct that violates the lease. (Also refer to the discussion Chapter 2 on Preventing and Addressing Lease Violations.)

(a) First, the provider must ask "what is the effect of the lease violation?" This is intended to determine the actual, practical impact. Once this is determined, the provider is well placed to judge whether an accommodation can ameliorate or eliminate the practical impact. For example:

— a resident might violate the lease provision prohibiting repeated late payment. The practical impact is additional administrative time to pursue, and process, the late payment. If the provider decided to accept continued late payment of the rent, the provider would shoulder an additional practical impact that if the rent were not paid at all in some future month, the eviction would not be started until relatively late in the month (which would result in additional financial loss to the provider).

— a resident might be unable to have the housing provider inspect the apartment. The practical impact is that the provider is not aware of damages which may have occurred, or of maintenance which may need to be done.

— a resident might not be able to come to the office for recertification. The practical impact is additional administrative time to devise an alternative location or technique for holding the recertification interview.

(b) Having determined the practical impact, the provider then needs to assess whether the requested accommodation eliminates, or sufficiently reduces, the practical impact, so that there is now a reasonable likelihood that the resident will succeed with lease compliance in the future.

(c) For the housing provider, *the key is to step outside the narrow point of view of administrative convenience and technical lease compliance,* **and judge whether the practical purpose of the lease requirement can be met in a creative way which will work for the person with disabilities** *and* **for the housing provider.**

Behavior that Neighbors Find Objectionable

75 The Task Force recommends that HUD incorporate into guidance the following approach to reasonable accommodations and objectionable behavior:

(a) Housing providers must distinguish between behavior which is merely irritating (and which is not in violation of

the lease), and behavior which is sufficiently destructive of the rights of other residents that it violates the lease. (See Appendix 8, Three Levels of Problematic Conduct.)

(b) Residents do not have a right to be shielded from seeing or interacting with persons with disabilities.

(c) Housing providers should take into account the degree to which behavior is involuntary; many disability conditions result in behavior which cannot be readily controlled and which some persons may consider annoying or disturbing. In these cases, housing providers should generally accept the behavior and discuss, with the disabled resident, his/her willingness to permit or participate with the provider in providing information to his/her neighbors that will allay their concerns and eliminate further conflict between the resident and his/her neighbors.

(d) Where the housing provider judges that the behavior does not constitute a lease violation, experience suggests that education of the objecting resident (ideally by a neutral, expert third party, with the goal of increasing the objecting resident's sensitivity, compassion and tolerance) may be necessary so that the situation does not escalate. (Refer to Appendix 8 on Three Levels of Problematic Conduct.)

Appendix 8 also includes the "Mr. Smith" case study regarding unusual behavior. It illustrates the above principles quite well. Additional reasonable accommodation case studies are also included in this appendix.

Lease Compliance

Lease violations may result from disability-related behavior, and frequently the resident can alter his/her behavior through supportive services, peer group support, medication, counseling or other types of "support." (In this discussion, the term "support" is used to refer to all of these techniques).

76 The Task Force recommends HUD incorporate into guidance the

following approach to reasonable accommodations and lease compliance:

(a) If an applicant has a history of behavior which, if displayed by a resident, would result in a material violation (or repeated minor violations) of the lease, the housing provider may deny the application; the notice of denial must include information regarding the reasonable accommodation procedure.

(b) If a resident commits a material violation (or repeated minor violations) of the lease, the housing provider may issue a notice of lease violation or lease termination; this notice must include information regarding the reasonable accommodation procedure.

(c) All notices of denial, lease violation and lease termination must include the opportunity for an informal meeeting (or other equivalent procedure, depending on the specific housing program), and must include the opportunity to discuss reasonable accommodations.

(d) If the applicant or resident asserts that she is a person with disabilities, asserts that the behavior was a result of her disability, asserts that the behavior is now under control, and requests a reasonable accommodation, the housing provider must consider the request and may require that the applicant or resident provide verification for her assertions.

(e) In making these decisions, the housing provider may take into account (i) the seriousness of the conduct and (ii) the likelihood that the suggested accommodation will prevent recurrence of the unacceptable conduct. For example, if the person committed a serious offense whose repetition would be especially harmful in a multifamily setting, the housing provider would reject the reasonable accommodation plan unless the applicant or resident presented particularly credible evidence that the behavior is not likely to be repeated.

(f) If, in the future, a resident fails to comply with his or her "support" program, this does not constitute grounds for enforcement action by the housing provider. The hous-

ing provider's concern is that lease compliance be maintained; how lease compliance is maintained is solely the concern of the resident.

(g) If, after receiving a reasonable accommodation, a resident violates the lease, the housing provider may pursue enforcement of the lease, up to and including eviction (where the action constitutes material noncompliance with the lease or repeated minor violations). The Task Force points out, however, that where (i) the new lease violation is related to a disability and (ii) the previous reasonable accommodation was not intended to overcome this aspect of the disability, another reasonable accommodation may be appropriate.

The Task Force has different points of view about how providers should treat conduct involving "serious offenses" as described in the preceding paragraph. Both points of view are presented for consideration:

(1) There are some offenses which are so serious (arson, child molestation, rape, aggravated assault) that because of provider liability, housing providers are justified in denying housing regardless of mitigating circumstances.

(2) No matter how serious previous conduct was, rehabilitation and behavior change must always be considered.

Other Recommendations

77 **The Task Force recommends that HUD issue guidance to make it clear to housing providers and others that reasonable accommodations are applicable to HUD's own rules and regulations, and that HUD develop a regulatory accommodations procedure to standardize the process and allow for a decision in timely manner.**

Just as housing providers must consider changes to their policies and procedures in order to accommodate disabilities, so also must HUD consider changes to its regulations, Handbooks and other guidance in order to accommodate disabilities. Where HUD requirements interfere with or prohibit an accommodation, the

provider can request that the rule or procedure be altered to permit the accommodation to go forward.

The Task Force believes that the following example of reasonable accommodations will occur frequently enough to justify specific treatment in HUD guidance:

78 **Upon the joint request of *both* the resident and housing providers, the Task Force Recommends that HUD Field Offices permit a resident of a HUD-assisted property to transfer directly to a similar housing assistance program at another HUD-assisted property without first being placed on a waiting list.**

By "similar", the Task Force means: public housing and project-based Section 8 are similar in that both programs provide a deep subsidy to the resident. (Thus, unless there is a change in circumstances, the rent paid would not be affected by the transfer.)

Other programs where rent is not affected by the transfer are: Section 8, RAP and Rent Supplement; §236 without Section 8 and §221(d)(3) BMIR without Section 8 are similar. (See Chapter 2 of the report for a discussion on transfers.)

79 **The Task Force recommends that the Public Housing lease regulations and the assisted housing model lease be revised to include the following language (or equivalent) regarding reasonable accommodations:**

> **Upon request by a resident with a disability, the landlord will grant a reasonable accommodation to provide the resident equal access to and use of the housing program, unless to do so would cause undue burdens or constitute a fundamental alteration in the nature of the housing program.**

Reasonable accommodations should be identified as a provider obligation under the lease.

HUD's Role and Technical Assistance

80 **The Task Force recommends that HUD establish a Section 504/FHAA hotline, in order to facilitate (but not ratify or certify) reasonable accommodation decisions by housing providers. The hotline should include access to a computer bulletin board and**

provisions for linkage to the broad-based clearinghouses proposed in Chapter 8 of this report.

The Task Force emphasizes that this hot line should operate on the principle that reasonable accommodation situations are unique, and not subject to formula-based solutions. The hotline staff should be knowledgeable in fair housing law, the disability laws, the various types of disabilities, HUD's housing programs, and disability-related resources. Advice should be documented and available in an accessible format. The hotline should be equipped with a TDD (telecommunications device for the deaf).

The bulletin board should provide access to information and materials on reasonable accommodation successes, Fair Housing and Section 504 court decisions that affect providers, and general information or publications (in alternative formats) on Section 504, FHAA, and ADA.

A public commenter suggested the Job Accommodation Network as an excellent model for the hotline.

Both providers and advocates have been disappointed by HUD program personnel's lack of information and knowledge of the civil rights statutes. While our first choice is to have appropriate local and headquarters staff conversant with — if not expert in — civil rights law, the Task Force would at least like to see a core group of people (hot line staff) who are experienced *in both* housing program operations and civil rights law available to answer questions from providers, advocates and others. This core group could also act as an internal resource for other HUD staff in the development of regulations, policies and programs, etc.

81 **The Task Force Recommends that HUD provide training to staff in the field offices, or identify specific headquarters staff (perhaps part of the hot-line service) whose responsibility it will be to answer resident and provider questions about conflicts between civil rights requirements and housing program requirements.**

82 **The Task Force recommends that the Assistant Secretary for Policy Development and Research contract with a qualified third party consultant to research, develop and publish a guidebook on reasonable accommodations. As providers and advocates**

gain experience with housing related accommodations the guidebook should be updated.

Housing providers are encouraged to review the sample policies, sample forms, and sample notice language in Appendix 8 and to use this information in crafting their policy and procedures. These materials were refined in response to public comments. The Task Force does not intend that HUD adopt these materials or encourage or require their use; rather, the Task Force intends that they be utilized by individual housing providers in the development of materials appropriate for use in their communities. The Task Force believes that these materials will be useful to HUD and to housing providers in developing materials that reflect the recommendations of the Task Force. However, there is no assurance that housing providers who use these materials will be found to be in compliance with the law.

5

Fundamental Alterations, Undue Financial and Administrative Burdens

Introduction

Both the Section 504 and FHAA regulations anticipate that, at some level, the compliance action requested or required may exhaust available resources or so alter the housing program that the action becomes infeasible. Housing providers are required to judge the feasibility of compliance actions against two criteria: fundamental alterations in the nature of the program and undue financial and administrative burdens. This chapter frames these issues in the context of program operations and management.

Fundamental alterations in the nature of the program and undue financial and administrative burdens raise issues of resource management, capital planning, and ultimately, program funding. Many compliance actions can be absorbed with existing program funds, but the cost of making some programs accessible and responding to some requests for accommodations will require that Congress recognize the need for increased funding levels. Greater flexibility in HUD's rules governing the use of operating and capital budgets is also required. Specific changes in budget operating procedures and formula calculations are recommended. The Task Force also makes a general recommendation to increase the level of modernization funds for both public and assisted housing.

This chapter includes:

- Examples of actions that might result in fundamental alterations;
- Suggestions for evaluating fundamental alterations in light of the program purpose and service delivered on site;
- Treatment of profit at assisted housing properties;
- Principles that describe how the undue burdens test is unique to

each reasonable accommodation request and how to judge the impact of compliance actions against available program resources;

- Use of operating and capital budgeting line items for reasonable accommodation and other compliance requirements;
- Program factors to consider when assessing undue burdens;
- Procedural frameworks for evaluating undue financial burdens in public and assisted housing;
- A plan for identifying unfunded accessibility needs.

Relationship to Congressional Mandate

The Congressional authorization for the Task Force required the Task Force to develop, "sufficient guidance to owners and managers...to assess the need to provide, and appropriate measures for providing, reasonable accommodations under the Fair Housing Act and Section 504...." "Assessing the need to provide" reasonable accommodations requires an understanding of how far a provider must go in satisfying the request for reasonable accommodations. The discussion of reasonable accommodations is incomplete without a review of fundamental alterations and undue burdens as these two terms used to define "reasonable" in Section 504.

Fundamental Alteration in the Nature of the Program

What is a fundamental alteration in the nature of the program? There is no precise definition in either Section 504 or the FHAA. Case law on Section 504 offers the only guidance so far. Indeed the concept of fundamental alteration derives from the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979). Professor Robert L. Burgdorf, Jr., writing in his article titled "Equal Access to Public Accommodations,"[1] describes the *Davis* case this way:

> ...the Court ruled that a university did not have to modify its clinical nursing program by converting it into a program of academic instruction in order to accommodate a woman

1 Robert Burgdorf, "Equal Access to Public Accommodations," in West, Jane, ed., *The Americans with Disabilities Act, From Policy to Practice*, Milbank Memorial Fund (1991), p. 190.

> with a hearing impairment... Lower courts have further outlined the concept: reasonable accommodations are not mandated if they would endanger a program's viability; massive changes are not required; nor are modifications that would 'jeopardize the effectiveness' of the program or would involve a 'major restructuring' of an enterprise; and modifications that would so alter an enterprise as to create, in effect, a new program are not required.

Professor Burgdorf continues by offering a definition of fundamental alteration as, "(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or practical components required to achieve a program or activity's primary purpose or benefit."

The two parts of Professor Burgdorf's definition may be thought of as follows: in the first instance the program is fundamentally altered by addition (e.g. changing a "regular housing program" into an enriched program by the addition of social services); in the second instance the program is altered by subtraction. (E.g. waiving screening criteria for an applicant, eliminating essential lease provisions for a resident; for PHAs, revising the Comprehensive Grant Program or CIAP budget — the modernization budget — so that funds for critical repairs are unavailable; for assisted providers, expending limited funds so that a property is unable to make its mortgage payment.)

In considering how to apply the fundamental alterations test, it is important that providers distinguish between accommodations that may result in fundamental alterations and those that may create undue financial and administrative burdens. Accommodations that change the nature of the program are fundamental alterations. Accommodations that create changes in the administrative elements of the program, without altering the primary purpose or benefit of the program, are not fundamental alterations. The difference is significant.

Testing for fundamental alterations in the nature of the program is not cost-based; even if the provider has the resources, the provider is not required to take the action. Undue burdens must be tested every time a request is made. Requests for accommodations to procedural elements are subject to the undue burdens test.

83 The following are examples of actions that might result in a funda-

mental alteration in the nature of the program. The Task Force recommends that these examples be included in HUD guidance on this issue:

(a) actions[2] that require substantial modifications to, or elimination of, essential lease provisions or program eligibility or screening requirements based on the obligations of tenancy[3] (e.g. admission of an unqualified family);

(b) actions that require a provider to add supportive services, e.g. counseling, medical, or social services, that fall outside the scope of existing services offered by housing providers to residents at the project;

(c) actions that require a provider to offer housing or benefits of a fundamentally different nature from the type of housing or benefits that the provider does offer;

(d) actions that substantially impair the provider's ability to meet its essential obligations as a landlord, as defined in the lease (the question here is what is the program benefit delivered and how is it impaired? Essential provider obligations under the lease might include management, administrative, maintenance, or other services required for the operation of the program or upkeep of the property.)

The Task Force does not intend that the above examples serve as arbitrary standards. Rather, provider determinations with respect to fundamental alterations must be made on a case-by-case basis. Declaring a requested accommodation to be a fundamental alteration does not eliminate a provider's compliance responsibilities. Under Section 504, if an action would result in a fundamental

2 "actions" means both structural and non-structural compliance actions.

3 The Task Force has defined five essential obligation of tenancy: 1) to pay rent and other charges under the lease in a timely manner; 2) to care for and avoid damaging the unit and common areas; to use facilities and equipment in a reasonable way; to create no health or safety hazards and to report maintenance needs; 3) not to interfere with the rights and enjoyment of others and not to damage the property of others; 4) not to engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents or staff; and not to engage in drug-related criminal activity on or near the premises; and, 5) to comply with necessary and reasonable rules and program requirements of HUD and the housing provider; and to comply with health and safety codes. See Chapter 1, pp. 3-4 for a review of these obligations.

alteration, providers are still required to take any action that would not result in a fundamental alteration but would nevertheless ensure that persons with disabilities receive the program benefits and services. 24 CFR § 8.24 (a) (2).

The Task Force notes that structural alterations have little likelihood of fundamentally altering a program. Rehabilitation of a unit or common area does not change the nature of the program, rather it creates physical accessibility for program participants. In most cases, unit rehabilitation can be accomplished so that units are adaptable, thus retaining the ability to serve persons with or without disabilities.

Some structural alterations required by Section 504 are property-based compliance actions. For example, Section 504 requires that a minimum of 5% of the units in a property undergoing substantial rehabilitation are to be made accessible for people with mobility impairments.[4] These actions are not subject to the fundamental alterations test.

Statement of Program Purpose

Housing providers who prepare a statement of program purpose have taken a useful first step towards understanding what may constitute a fundamental alteration.

84 **The Task Force recommends that HUD provide guidance on the issue of fundamental alteration, suggesting that, as part of the self-evaluation process, housing providers prepare a Statement of Program Purpose and Services. The Statement of Program Purpose is intended to cover those existing services offered or paid for by the provider as part of the housing program, e.g. maintenance. (If services at the property change over time, the statement can be revised.) The statement should identify: the housing program, the eligible population group(s) served, what**

4 The Section 504 regulations establish property-based accessibility actions. These actions require the removal of physical barriers in housing and non-housing facilities. Section 504 includes a compliance target that a provider rehabilitate up to 5% of the units at a site for persons with mobility impairments, and 2% for persons with hearing and vision impairments. These property-based actions are not subject to any consideration of fundamental alteration.

housing-related or other services, if any, are provided at the site, and any aspects of the property or program that make it unique.

The statement should be drafted in plain language and be used to inform applicants or others of the nature of the program delivered at the site. Inclusion of such a statement in the self-evaluation does not indemnify a provider against legal action challenging a fundamental alteration determination.

Considering Services Delivered On-Site

In addition to housing services mandated by the lease, many housing providers coordinate or contract for third party services to be delivered on-site. Therefore, when considering fundamental alterations to the program, it is appropriate to make a distinction among the following:

- essential housing services provided by the owner or PHA and required by the lease. Such services may be provided directly or by contract (e.g. responding to work order requests, elevator maintenance, pest control, etc.).
- supportive services provided directly by the owner or by contract; and,
- supportive services provided by third parties at locations made available by the provider (e.g. daycare where a provider leases space to the operator of the daycare).

85 **The Task Force recommends that only those services provided by the property and under the direct control of the housing provider be considered when evaluating fundamental alterations.**

86 **In addition the Task Force recommends that, where on-site services are delivered by a third party, housing providers should spell out responsibility for compliance with Fair Housing and Civil Rights laws in a written agreement with the third party.**

The Task Force does not intend that housing providers add new services to sites or take on the role of supportive service provider as a result of these recommendations. See Chapter 7 of the report for further discussion on supportive services.

Fundamental Alterations and Profit Distribution in Assisted Housing

The Task Force debated whether an accommodation that caused an assisted property to fail to make a distribution (owner profit) constitutes a fundamental alteration. Considered in light of Professor Burgdorf's definition presented earlier in this chapter, the failure to make the distribution does not, on its own, represent a substantial change in the primary purpose or benefit of the program.

In any business enterprise, profit is not guaranteed. Owners may be forced to forego distributions for other reasons (e.g. major repairs required). However, there may be situations where the use of funds that would normally be distributed to the owner constitute undue financial burdens.

87 **The Task Force recommends that the issue of profit distribution is not an issue of fundamental alteration, rather, foregoing profit to make a reasonable accommodation should be considered in the context of undue financial and administrative burdens.**

Undue Burdens

Reasonable accommodations are also limited by the resources available to the provider. Compliance actions (alterations to structures as well as changes to policy) are not required if they create undue financial and administrative burdens. Undue financial and administrative burdens apply to both individual requests for accommodation as well as certain property-based compliance actions established in Section 504. See 24 CFR §§ 8.21(b), 8.23(b) and 8.24(a)(2).

88 **The Task Force recommends that HUD incorporate into its guidance on undue burdens all of the following principles:**

(a) The undue financial and administrative burden limitations apply to individual requests for reasonable accommodations and certain property-based compliance actions as defined in the Section 504 regulations. See 24 CFR §§ 8.21(b), 8.23(b), 8.24(a)(2).

(b) With respect to individual requests for reasonable accommodations, the determination of undue burdens is unique to each case. There are two primary reasons for this:

(i) An accommodation will be unique to the individual with disabilities; individuals with the same disability may not need, or desire, the same level of accommodation. There is no standard approach. What works for one person may not work for another in the same situation.

(ii) The cost of the accommodation will be measured against the resources available at the time of the request. Not only is the nature of the accommodation unique, but so is the assessment of the resources available.

(c) 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, property income and expenses, capital improvements planned or underway, prior commitments to reasonable accommodations or program accessibility, the point in the budget year at which the accommodation is requested and availability of other funds. (See more detailed discussions later in this Chapter.)

(d) For housing providers, the annual budget (income and expenses) is the best resource indicator. The budget should also be considered in light of any other resources available to the provider. Examples of other resources include: for PHAs, modernization funds through the Comprehensive Grant Program (CGP) or the Comprehensive Improvement Assistance Program (CIAP); for assisted owners, permitted use of reserves, special adjustments to the Annual Adjustment Factor (AAF); for both PHAs and assisted owners, availability of local or state funds (either directly or through the resident or applicant), help from non-profits, volunteer agencies, churches and state/local agencies.

Undue Burdens — Discussion

It is important to note that there are substantial differences in the financial management of public and assisted housing. Assisted housing uses property-based financial management. The ownership entity is unique to each property, as are the income and expenses. Current regulations require that resources from properties under common ownership not be mixed. A property will have a separate subsidy contract or regulatory agreement for assistance. Also, the subsidy can be "layered" (e.g. mortgage interest reduction plus Section 8) and the "arrangement" of subsidy is particular to the property.

Public Housing is now required to institute a system of project-based budgeting. However, the operating budget for a PHA is consolidated, that is, the budget for each property under management is folded into a comprehensive document that covers the entire agency. Subsidy is determined based on agency-wide calculations and costs are allocated over many properties.

Another difference between assisted and public housing is access to capital improvement funds for modernization. PHAs with over 250 units obtain modernization funds through the formula-based CGP. Each year, CGP funds are allocated by formula to the PHA. Amounts will vary as the formula is adjusted by HUD or program funding levels are changed by Congressional appropriations. Under the CGP, PHAs prepare a five-year plan for repairs and rehabilitation. Typically, the five-year plan includes funds for the property-based compliance actions required by Section 504 and identified in the agency's transition plan. HUD has made the provision of Section 504 accessibility a priority work item for CGP and CIAP. (See HUD Handbook 7485.3, p. 4-2, mandatory standards, and p. 6-6, work necessary to comply with Federal requirements.)

The CIAP is for PHAs with 250 or fewer units. This is a competitive program and small PHAs have no guarantee of receiving CIAP funds.

In general, for both PHAs and assisted housing, the costs associated with a unit being unoccupied during the time it is being made accessible for an applicant or tenant would not be an undue financial burden. In particular, the applicant or tenant is not responsible for rent on the unit until the unit is accessible and occupied.

Budgeting for Reasonable Accommodations

89 The Task Force recommends that HUD provide guidance specifying that public housing providers budget CIAP or CGP funds for both structural alterations and reasonable accommodations. The Task Force further recommends that HUD track Section 504 improvements by establishing a new account or subaccount in the Chart of Accounts applicable to these programs.

90 The Task Force recommends that Congress increase the level of modernization funds available to address the alterations and accommodations required by Section 504.

91 The Task Force recommends that HUD provide guidance specifying and permitting assisted providers to budget for structural alterations and reasonable accommodations including the establishment of a budget line item for such improvements. The Task Force further recommends that HUD make such costs eligible for budget-based rent increases and clarify to its field offices that providers are:

(a) permitted to seek revisions and amendments to the property budget; and,

(b) to use other funds, including replacement reserves and residual receipts, available to the property in making alterations or accommodations for persons with disabilities, and that requests for such funds be processed in an expedited manner.

In making the above recommendation for assisted housing, the Task Force recognizes that, unlike the CGP for Public Housing, assisted properties have no comparable resource for capital improvement funds. The Task Force notes that many assisted providers operate with an Annual Adjustment Factor (AAF) that limits rent increases.

92 The Task Force recommends that Congress direct HUD to add reasonable accommodations and accessibility costs to the list of special rent adjustments.

The Task Force notes that lack of funds budgeted specifically for alterations or reasonable accommodations does not relieve a provider of responsibility to respond to a request for accommodation. All requests for accommodations are subject to the undue fi-

nancial and administrative burdens tests outlined in Section 504 and described further in this chapter. The overall financial resources available to the provider must be considered in assessing undue financial burdens.

In making the above recommendations for assisted housing, the Task Force recognizes that, unlike the CGP for Public Housing, assisted properties have no comparable resource for capital improvements.

Assisted properties may undertake improvements and fund such improvements from a variety of sources: Section 241 supplemental loans; with HUD approval, an owner's loan to the property; advances by the owners to the property; flexible-subsidy or capital improvement loans for troubled properties; funds resulting from a change in ownership; with HUD approval, releases from residual receipts (if any); with a HUD approved repayment plan, advances from replacement reserves; and State and local grants.

The amounts available, and a property's eligibility to tap these sources, varies considerably. Aside from any grant funds a property may receive, the common denominator in the preceding list of sources is the ability of the property to repay the advance, the loan, or the withdrawal from replacement reserves. The assisted property stands or falls on the merits of its operating budget and the resources generated from that budget. Within the resources defined by the operating budget, each property should establish a line item for Section 504 improvements and accommodations. Use of additional funds should be considered only after budgeted amounts are exhausted.

The differences between public and assisted housing in the structure of the operating budget and access to and "financing" of capital improvements require different approaches in measuring undue burdens.

Factors to Consider when Assessing Undue Burdens for Public Housing

The factors listed below are applied on a case-by-case basis. Not every request for accommodation will trigger a PHA assessment of undue financial and administrative burdens. Rather, a PHA will consider the factors only when the circumstances and resources available at the time of the request require an assessment of undue burdens.

93 The Task Force recommends that HUD provide guidance to PHAs that includes factors for assessing whether a requested reasonable accommodation creates undue financial and administrative burdens. Such guidance should include the following factors:[5]

(a) The size of the program budget including any modernization funds available (see below).

(b) The number and availability of PHA employees.[6]

(c) In the current budget year, any serious negative impact on the PHA's financial stability.

(d) Expenditures that are beyond the PHA's financial ability (even with an operating budget revision) because of limitations in the total amount of operating funds available to the PHA and the other expenses the PHA must incur during the operating period.

(e) In the current budget year, the ability of the PHA to make a deposit to reserves where the level of reserves is at or below 25% of the required level.[7] **(Also see discussions later in this chapter.)**

(f) The requirement for additional withdrawals from reserves when, in the current budget year, the PHA is running a budget deficit and modernization funds are not available to make the accommodation;

(g) Expenditures that are beyond the amount programmed

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5 In the context of physical modifications to facilities, PHAs should also consider whether the accommodation requires alterations that are structurally impracticable as defined in the Section 504 regulations and the Uniform Federal Accessibility Standards (UFAS). In including fundamental alterations and undue burdens, Section 504 sets five limits on compliance actions. Chapter 4, p. 4-12, lists the five limits. Three, like structural impracticability, are defined by the regulations. Fundamental alterations and undue burdens, however, are described in the regulation but defined by the recipient.

6 This factor does not mean that PHAs may exclude consideration of contract services to achieve the accommodation.

7 The maintenance of adequate reserves is one the primary indicators of the financial strength of a PHA. HUD includes a reserve level indicator in its Public Housing Management Assessment Program (PHMAP). PHMAP is the standardized grading system HUD uses nationwide to evaluate PHA operations and performance.

for accommodations (including physical alterations) in the PHA's annual statement of the five-year action plan for the CGP or CIAP application, taking into account the need for the other work included in that annual statement or application;[8]

(h) A *significant* change to a critical element in a PHA's five-year plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health, or safety systems be postponed).

(i) The ability of the PHA to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe and sanitary living conditions.

(j) Substantial increases in administrative workload. For example, in the current budget year the accommodation affects program operations so that the PHA is unable to:

(i) perform essential management duties as expressed in the lease (e.g. reexaminations or required unit inspections);

(ii) perform administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance);

(iii) meet program operating requirements as expressed in the Annual Contributions Contract, other agreements, or the PHMAP performance indicators; or

(iv) respond to a court order.

(k) Negative impact on services provided by the PHA and mandated by the lease or other agreements. (Excluding services provided by third parties where such services are not under the direct control or funded by the PHA's operating budget.).

(l) Access to and availability of other funds.

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8 If an expenditure is beyond the amount programmed, the PHA must consider budget revisions and other sources of funds in its assessment of undue burdens.

Note: PHAs must be able to document both the negative financial and administrative impacts that contribute to a determination that undue burdens exist.

The Task Force wants to be clear that the above factors for PHAs and those for assisted housing do not establish national standards for undue burdens. The presence of a single factor does not automatically indicate that an undue financial or administrative burden exists. PHAs must consider all relevant factors when assessing the potential for undue burdens. How the listed factors affect a requested accommodation will be unique to the circumstances of the person with a disability and the resources available to the PHA.

For PHAs, two sources of funding are available for accommodations: the operating budget and capital improvement funds available through CGP or CIAP. To justify a claim of undue financial burden, a PHA must demonstrate that both sources of funds are unable to cover the cost of the accommodation.

When the cost of procedural or physical modifications is small, most PHAs will use operating funds to pay for reasonable accommodations because operating subsidy, though very limited, is the most flexible form of funding available. When the cost of an accommodation is too great to be absorbed by the operating budget, the chief undue administrative burden is HUD's lack of an operating subsidy appeals process.

94 The Task Force recommends that HUD issue regulations to implement existing legislation that creates a Performance Funding System (PFS) appeals process.[9] Such a process would permit HUD consideration of appeals based on circumstances driven by Fair Housing and Section 504 compliance actions.

95 The Task Force recommends increasing a PHA's Annual Expense Level (AEL) by a factor that reflects the "normal" annual expense for reasonable accommodations where the annual expense for reasonable accommodations would be established on the basis of the prior year's data. It should be noted that, even if PHAs

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9 HUD funds the difference between the PHA's operating costs and their rental income using a complex formula called the Performance Funding System (PFS). Each year, HUD issues an inflation factor that PHAs use to determine the total amount of funding or Allowable Expense Level (AEL) available.

do not receive this increase in the AEL, they must still consider other funding sources such as CIAP and CGP.

In considering the use of modernization funding, it must be kept in mind that a PHA's ability to spend it in a year other than that for which it was programmed is, at present, very limited. When faced with a very costly physical alteration to dwelling or non-dwelling facilities, most PHAs write the work into the next year's annual statement for modernization or CIAP application. When it comes to modernization, it is important to remember that PHAs have no reserve for replacement — so modernization funds are used for a wide variety of physical improvements from lead paint abatement to replacement of unsafe utility distribution systems to rehabilitation of entire buildings' systems and structures.

Given the statutory requirements for resident participation in the process of planning and prioritizing modernization work and a public hearing on the plan, plus the variety of work needed, PHAs have to parcel out their continuing responsibilities to make physical alterations under Section 504. For PHAs, the issue is usually waiting until the needed activity can be programmed into modernization.

Factors to Consider when Assessing Undue Burdens for Assisted Housing Properties

96 The Task Force recommends that HUD provide guidance to the owners of assisted housing for assessing whether a reasonable accommodation creates undue financial and administrative burdens. Such guidance should include the following factors:

(a) The size of the program or property budget.

(b) The number and availability of employees at the property.

(c) Income v. expenses; availability of surplus cash; access to residual receipts[10] and/or replacement reserves; availability of other sources of capital apart from income generated by the property; feasibility of a rent increase.

10 For properties where no residual receipts exist, the Task Force recommends alternative funding sources. See Recommendations 89, 90 and 91 in this Chapter.

(d) In the current budget year, a serious negative impact on the property's financial stability as expressed in its annual operating budget and required payments to replacement reserves. (E.g. inability to repay advances from owners and agents or pay owner distributions at some level;[11] inability to pay operating expenses at prices and wages that are normal and reasonable for the market in which the property is located.)

(e) The property's ability to meet FmHA, HUD, other governmental, or private lender requirements to operate in sound financial condition as expressed in regulatory, management, subsidy or financing agreements. (E.g. inability to fund mortgage payments or tax and insurance escrows at levels adequate to pay the next due tax and insurance statements.)

(f) Ability of the property to complete planned improvements or repairs, including adequate tenant-response maintenance and preventive maintenance essential to maintaining decent, safe and sanitary living conditions. (E.g. inability to fund preservation of the physical asset by completing major repairs and capital improvements, as provided for through regular deposits to replacement reserves and cash generated from operations.)

(g) Ability of the property to maintain full occupancy. (However, the Task Force emphasizes that, under no circumstances, may a provider argue that by making an accommodation, including making the property and dwelling units accessible, the property will be less attractive and therefore more difficult to market.)

(h) Substantial increases in the administrative workload so that staff at the property are unable to:

(i) perform essential management duties as expressed

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11 The HUD Multifamily Asset Management Handbook, 4350.1 REV, contains guidance for evaluating the appropriateness of project expenses, including owner return on investment. The rate of return is limited. Typically, annual returns for limited profit sponsors of assisted properties range from 6 to 10% of initial equity investment.

in the lease (e.g. re-examinations or required unit inspections);

(ii) perform administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance);

(iii) meet program operating requirements as expressed in subsidy or regulatory agreements; or

(iv) respond to a court order.

(i) Negative impact on services mandated by the lease or other agreements. (Excluding services provided by third parties where such services are not under the direct control or funded by the property's operating budget.).

(j) Access to and availability of other funds.

Testing for Undue Financial Burdens

97 **The Task Force recommends that HUD issue guidance that assists each housing provider to develop a methodical approach to determine whether or not an undue burden exists.**

The Task Force emphasizes that the process should be standardized, not the outcome. The outcome will vary based on individual need and property or program financial circumstances. The important point here is that housing providers, advocates and HUD might well be able to agree on a written process that will ensure the availability of funds for accommodations, and that will add reason and a note of certainty to a currently murky and controversial area. The result is still subject to challenge.

98 **The Task Force further recommends that a model worksheet and accompanying procedures be developed to lead public and assisted providers through the undue burdens assessment process.**

The purpose of recommendations 96 and 97 is to: (1) make the procedural review steps necessary to assess undue burdens consistent from provider to provider while allowing for variations in outcome based on individual circumstances; (2) permit the provider to document the assessment process for subsequent audit by the provider or HUD staff; and (3) to provide an appropriate mecha-

nism for a provider to make financial disclosures during negotiations leading to a reasonable accommodation.

With respect to the last point, the Task Force suggests that when accommodations are expensive, full disclosure of financial issues will provide a way for the provider, the person with disabilities, and the advocate to reach an amicable and cost effective resolution.

Depending on the provider's budget for accommodations, and the time in the budget year, the tests discussed in this section must be run for each accommodation, unless a decision is made to make the accommodation immediately.

The tests for undue financial and administrative burdens will be different for assisted providers and public housing authorities. The assisted properties have some program characteristics that are significant when trying to assess the degree to which expenditures might be an undue financial burden. These include:

Return on investment:

- limited distributions to owners;
- unlimited distributions to owners.

Extent of federal financial assistance:

- assisted with project-based Section 8 (100%);
- assisted without project-based Section 8, (Less than 100%).

Mechanism for establishing rent:

- rent increases are budget based;
- rent increases are based on an automatic annual rent increase factor.

PHAs operate with different accounting and budgeting systems. PHAs also have access to a modernization program. For these reasons, the undue burdens test will be different.

A Surplus Cash Test for Assessing Undue Financial Burdens in Assisted Housing[12]

The financial resources to pay for implementation of transition plans and to pay for reasonable accommodations will come either from funds budgeted for accessibility purposes or from general funds. Budgeted funds are available to the extent that the budget has not yet been spent; general funds are available to the extent that

12 The procedure and test described are for financial burdens. Providers must also demonstrate some level of administrative burden to satisfy Section 504 regulatory

the financial condition of the housing provider is sound rather than distressed or that other funds (Flex-subsidy) are available. The discussion which follows sets forth specific tests for determining the amount of funds available for accessibility purposes. Assisted housing budgets are for a twelve month fiscal year.

99 **The Task Force recommends that HUD provide guidance regarding the following procedures developed by the Task Force for assessing undue financial burdens in assisted housing.**

In line with the Task Force's prior recommendation on budgeting for accommodations, all assisted provider budgets will include funds targeted for accessibility purposes. These funds can be spent for Transition Plan activities (making the property, in its entirety, accessible) and for reasonable accommodations (meeting the accessibility needs of a specific resident or applicant).

The Task Force suggests the following procedure for determining whether budgeted funds are available to meet a reasonable accommodation request, bearing in mind that the availability of budgeted funds is but one among several factors which housing providers must consider in responding to a reasonable accommodation request:

1. Budgeted accessibility funds are considered available until they are committed. For Transition Plan activities, funds are committed once a contract for work is signed. For reasonable accommodations, funds are committed once a promise has been made to the resident or applicant (i.e. a written accommodation agreement is signed).

2. The full year's accessibility budget is considered available at the start of the year.[13] As funds are committed, they are charged against the accessibility budget.

3. Where there are conflicting demands on the accessibility budget, the following priorities will be followed:

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requirements. See, e.g., 24 C.F.R. Sections 8.21, 8.23 and 8.24.

13 It should be noted, however, that property cash flow may prohibit the expenditure of the money at that time.

(a) reasonable accommodations for residents.

(b) anticipated reasonable accommodations for applicants who are expected to move in within the budget year.

(c) transition plan activities.

4. When the accessibility budget has been fully committed, further accessibility costs may be considered in assessing an undue financial burden unless the housing provider has general funds available or third party funding sources are available (see below).

For example, if a housing provider has budgeted $10,000 for accessibility costs, up to $10,000 of Transition Plan activities and reasonable accommodations can be funded during the budget year without raising the question of undue financial burden.

The availability of general funds is measured by whether the provider has funds in excess of the amount required to meet normal financial obligations. The general funds test is applied only after the accessibility budget has been exhausted. Thus, the general funds test will normally be applied at some point during the fiscal year.

Assisted housing programs use Surplus Cash to measure financial strength. For most properties, Surplus Cash is measured at the end of each fiscal year by the property's independent public accountants (for purposes of determining the amount of cash which can be distributed to the owner).

The presence of Surplus Cash indicates cash in excess of financial obligations; in general, positive Surplus Cash is distributed to the property owner at the end of the fiscal year. Absence of Surplus Cash indicates financial obligations in excess of available cash. Although Surplus Cash is normally measured only once per year, the information which is needed in order to make the calculation is available at the end of each accounting month.

Properties without Surplus Cash do not have general revenues available to meet accessibility needs. Properties with Surplus Cash have general revenues available. To measure the availability of general revenues, the housing provider has two methods: (a) make a formal Surplus Cash computation as of the most recent accounting month end; or (b) use the following worksheet:

Surplus Cash (deficit) - end of previous year	$_____
Minus Surplus Cash distributed to ownership	$_____
Plus/Minus Cash Flow - year to date	$_____
Estimated current Surplus Cash	$_____
Balance Remaining	$_____
Minus potential return due owner (owner/ agent advances, payment of previously earned but unpaid distributions)	$_____
Balance remaining	$_____

100 The Task Force recommends that HUD issue guidance that clarifies the relationship of the availability of funds for reasonable accommodations, potential return on initial equity for owners and undue financial burdens.

Cash Flow for the year to date is available from the housing provider's monthly accounting reports. Where surplus cash is marginal, the worksheet should note the availability of third party funds or funds from the applicant or resident.

If surplus cash is available, some level of compliance is achievable. How far the property can go toward meeting the accommodation request depends on the cost of the accommodation and the amount of cash available. If surplus cash is insufficient, providers should indicate on the worksheet the availability of third party funds to meet the accommodation request.

Because housing providers have the obligation to make reasonable accommodations up to the point that undue burdens are incurred, it is important to be able to measure precisely the funds available. The test outlined above will yield precise results, uses existing accounting information, and is simple to apply. In addition, the procedure provides information essential to considering interim compliance steps and guiding future budget actions at the property.

An Undue Financial Burdens Test for PHAs

The process of testing for undue financial burdens in a PHA is less precise than that outlined for assisted providers. Assisted providers work with one budget per property, while PHA's have consolidated budgets for many properties and funding sources in addition to the operating budget that must be considered.

101 The Task Force recommends that the process of assessing undue financial burdens for a PHA be expressed in a checklist format that focuses on the resources available to the PHA. Checklist questions are sequential, once one potential resource area is eliminated from consideration, the next resource area is examined. HUD should issue as guidance the checklist and accompanying procedures that the Task Force developed.

An Undue Financial Burdens Test for PHAs with 250 or More Units

- Step 1 — Has the PHA budgeted CGP funds for accommodations or transition plan improvements? The Task Force recommends that priorities established in the assisted program for the use of budget funds be applied to PHAs.

Where there are conflicting demands on the accessibility budget, the following priorities will be followed:

(a) reasonable accommodations for residents;

(b) reasonable accommodations for applicants who are expected to move in during the budget year; and

(c) Transition Plan activities.

- Step 2 — Given the PHAs' accessibility priorities, what is the status of any CGP budgeted for accommodations or transition plan work?
- Step 3 — If CGP funds are budgeted for accommodations or transition plan work, are such funds obligated(contract signed)? The PHA should check for:

(a) CGP funds unobligated in other categories of work;

(b) Proposed use of any unobligated funds;

(c) Urgency of this work;

(d) Program impact, that is, can this work be delayed or phased in over time without creating a serious negative impact on the CGP or causing a significant departure from the 5-year plan?

If the CGP cannot support the accommodations or improve-

ments, the next step is to consider resources available through the operating budget.

- Step 4 — Has the PHA budgeted operating funds for accommodations? What is the status of any budgeted funds?
- Step 5 — If there are no budgeted funds or all such funds are obligated, then additional factors must be considered: In the current fiscal year, will the PHA make a deposit to reserves, make a withdrawal from reserves, or break-even?
- Step 6 (A) — PHA deposits to reserves: if a surplus is projected and there are no known demands against these funds, then the accommodation can be considered within the funds available.

In this situation, some level of funds may be available for Section 504 compliance. (Making a deposit to reserves is analogous to identifying surplus cash for an assisted housing property.) The deposit to reserves is made at the end of the PHAs budget year. During the budget year a PHA does not know for certain if a deposit will be made. Emergencies can arise that wipe out the projected surplus.

- Step 6 (B) — Withdrawal from reserves: the PHA is operating in the red, it is spending more than it is taking in.

In this situation, the Task Force believes that a financial burden exists and the PHA should not be required to go forward with the accommodation at the funding level proposed. Where a PHA has reserves below 25% of the required level , the PHA must be allowed to deposit to reserves in order to sustain the viability of the program. Step 6 (C) Break-even — the PHA does not deposit or withdraw from reserves.

In this situation the Task Force believes that limited funds may be withdrawn from reserves for purposes of providing a reasonable accommodation, **provided that**: the funds withdrawn do not reduce reserves below 25% of the required level and such withdrawals do not seriously impact a PHA that is attempting to increase reserve levels in line with the levels required by HUD through PHMAP.

Where the PHA is unable to make a withdrawal, the cost of work associated with the requested accommodation should be programmed into CIAP or CGP. Where the availability of CGP or operating budget funds is questionable, the PHA should explore sources of third party funds provided directly to the PHA or through the applicant or resident.

An Undue Financial Burdens Test for PHAs with 250 or Fewer Units

Use the process as described above, except that the questions asked about CGP will apply only if the PHA has an active or approved CIAP. Where there is no CIAP, the PHA should go right to the operating budget questions.

102 The Task Force recommends that the CIAP program be amended so that the current year's CIAP budget could be revised at any time to allow use of CIAP funds for reasonable accommodations.

Unfunded Accessibility Needs

At the heart of Section 504 is the concept that recipients of federal financial assistance use some portion of that assistance to achieve program accessibility and meet individual needs, with both requirements being subject to limitations of undue financial and administrative burdens.

However, undue burdens are distributed very unevenly among the range of public and assisted housing recipients: some recipient are able to achieve program accessibility rapidly, and others are so constrained financially that a backlog of unfunded accessibility needs has accumulated.

The Task Force received public comment on methods and approaches to address unfunded accessibility needs that, because of undue financial and administrative burdens declared during the provider's budget cycle, remain at the end of the budget cycle. One commentor advised that the 1992 Housing Act established a five year comprehensive needs assessment which requires all federally assisted projects to complete such an assessment before the end of FY '95 (Title IV, 401-404). Projects are to measure and identify all resident, staff and physical plant needs. The process could be helpful in documenting and justifying potential funds for accessibility needs.

The Task Force received additional advice which resulted in the following recommendation:

103 The Task Force recommends that, at the end of each fiscal year, PHAs and assisted housing owners have the option to submit to HUD a report disclosing:

(a) whether a transition plan is in place;

(b) whether policies and procedures are accessible to and usable by, persons with disabilities;

(c) amounts spent during the Fiscal Year for accessibility purposes (including implemention of the transition plan and provision of reasonable accommodations);

(d) amounts spent during the Fiscal Year for total operating expenses (excluding for PHAs: CIAP/CGP; excluding for assisted housing amounts funded from replacement reserve); and,

(e) accessibility needs unmet as of the end of the Fiscal Year;

and that HUD fund all such needs where:

(a) a transition plan is in place;

(b) policies and procedures are accessible to, and usable by, persons with disabilities; and

(c) amounts spent for accessibility exceed 4% of a base amount which for assisted housing equals the last audited actual expenditures for operating and maintenance expenses. For public housing corresponding percentage and base amounts should be developed.

See also the Task Force's recommendations for additional funding for reasonable accommodations. (In this Chapter, see Recommendations 89, 90, 91. Also see the Preface to the report for other funding recommendations.)

6

Certificate and Voucher Issues

Introduction

During the course of its deliberations, the Task Force generally discussed issues that could be addressed in a unified manner for all federally subsidized housing programs, such as the need for plain language forms and communications. Thus, the Task Force wishes to make clear that all such global recommendations, such as the need for plain language and timely and adequate notice, apply in the Section 8 Certificate and Voucher programs.

However, the Task Force also dealt with issues in the public housing and project-based assistance programs, such as admissions procedures, that could not be carried over so readily into the context of the Certificate and Voucher programs; this posed a particular challenge. In those programs the housing authority does not admit an applicant to housing, is not the resident's landlord and does not evict. Instead, in a delicate balance among the three parties involved, the housing agency (HA) provides a rental subsidy to the participant and, as a *quid pro quo* to the private landlord's receipt of a portion of the market rent, enforces specific regulatory provisions incorporated into the Housing Assistance Payments Contract. Between the private landlord and the resident-recipient flow another set of rights and obligations, arising from the lease, the HAP contract, federal law and regulation and state law.

In this Chapter, the Task Force has addressed only those issues that were of particular concern to Task Force members or were congruent with issues raised in the project-based context. The Task Force has not attempted a wholesale critique of the Certificate and Voucher programs nor wholly rewritten any area of program administration. Nor has the Task Force, in particular, dealt with the proposed regulations to consolidate the Certificate and Voucher pro-

grams, which have not yet been implemented and so do not represent current practice. This Chapter includes recommendations concerning:

- Expirations/extensions of time;
- Exemptions to fair market rents;
- Assistance for individuals with disabilities;
- Waiting lists;
- Evictions/terminations of assistance;
- Lease terminations in the first year of the lease;
- Damage and vacancy claims;
- Housing quality standards;
- Reasonable accommodations; and
- Portability/mobility.

Expirations/ Extensions of Time

Currently, Certificates and Vouchers are issued for a 60 day period. Whether or not a Certificate or Voucher holder is entitled to an extension, for a period of up to 60 additional days, is completely within the discretion of the HA,[1] as is any method for computing the duration of an extension.

For many participants, this time-frame is not adequate. Many HAs therefore exercise their discretion by granting extensions up to the full 60 days authorized. However, some members of the Task Force had experience with HAs exercising their discretion by not providing any extensions or using excessively restrictive methods of computing the extension which limits participants' ability to use their Certificates or Vouchers. Of particular concern were the specific housing needs of individuals with disabilities, large families, members of minority groups, residents of areas with a substandard or low-vacancy rate housing stock and participants seeking housing outside traditional low-income housing markets.

Some members of the Task Force expressed the concern that extending the time period of Certificates or Vouchers would result in keeping other deserving applicants on the waiting list from obtaining a subsidy and prolonging an already unduly long wait for assistance. In addition, some members of the Task Force were

1 The [P]HA's only constraint concerning the granting of extensions is that such policy must be contained within the HA's administrative plan.

concerned with HAs continued interest in flexible administration of the Certificate and Voucher programs depending on local conditions. The Task Force understands that HUD is currently reviewing these issues (see 58 Federal Register 11292, Feb. 24, 1993).

104 The Task Force recommends that HUD issue guidance clarifying that an extension of a certificate or voucher be granted where to do so is a reasonable accommodation. (See Chapter 4, Reasonable Accommodations.)

NOTE: HAs are required to consider the need for barrier free housing or supportive services in making a determination regarding extensions. HUD Handbook 7420.7 Ch 4, 4-48.

Finally, the Task Force notes that assistance in locating housing can often be provided by other agencies in the community. In other chapters we have discussed our recommendations for the establishment of clearinghouses and for the use of collaborative agreements.

105 The Task Force recommends that the provision of assistance in locating housing for Section 8 Certificate and Voucher holders be incorporated into the Clearinghouse and Collaborative Agreement models. (See Chapter 8, Broad Based Clearinghouse, and Chapter 7, Support Services.)

Exemptions to Fair Market Rents

24 C.F.R. §8.28(a)(5) permits an exception to Fair Market Rents in order to rent an accessible unit.

106 The Task Force recommends that HUD issue guidance clarifying this requirement to ensure that the ability to grant an exception to FMRs is used in order to assist participants in locating and renting accessible units. However, such rents must meet rent reasonableness standards for comparable units.

Assistance for Individuals with Disabilities

Current §504 regulations also require HAs to assist people with disabilities in finding accessible housing. 24 C.F.R. §8.28 (3).

107 The Task Force recommends that HUD provide guidance to ensure that adequate and appropriate assistance be provided to families needing accessible housing.

Note: HUD Handbook 7420.7 Ch. 4, 4-45 already requires that the briefing packet contain a list of accessible units and provides guidance as to other information PHAs may give to assist persons with disabilities.

Waiting Lists

The Task Force has addressed waiting list issues in the context of public housing. Many of the Task Force's recommendations concerning waiting lists for HAs carry over into the Certificate and Voucher program. (See Chapter 1, Admissions.)

It is critical that applicants on the waiting list not lose their right to receive Section 8 Certificate and Voucher assistance because of the very circumstances that entitle them to that assistance: their disability and their poverty. Applicants are sometimes removed from waiting lists for failure to respond to a letter they never got, could not read or understand or to which they were unable, because of sickness or personal responsibilities, to respond. On the other hand, HAs need to be able to administer the program and their waiting lists.

108 The Task Force recommends that HUD prohibit HAs from removing an applicant from a waiting list for failure to respond to a contact from the HA without specific written notice that the applicant's name is being removed and of the HA's policy and procedure for reinstatement on the waiting list. The Task Force further recommends that HUD develop a model plain language notice.

The purpose of such a notice is to ensure that the failure to respond to the first notice was not the result of a letter simply lost in the mail or a temporary inability of the applicant to respond and to inform the applicant of how to be reinstated on the waiting list.

109 The Task Force recommends that HUD provide guidance suggesting that it is good policy for HAs automatically to reinstate applicants if the HA reasonably believes that extenuating cir-

cumstances interfered with the ability of the applicant to keep his or her waiting list information current.

110 The Task Force further recommends that HUD issue guidance clarifying that HAs are required to make reasonable accommodations in their rules and policies concerning communication with the HA and justifications for removal from the waiting list for failure to respond when such failure is related to the applicant's disability.

Evictions/ Terminations of Assistance

In the chapter on Evictions and Terminations, the Task Force discussed and made recommendations concerning the need for adequate notice of lease termination, including a lease provision clarifying the obligation of the housing provider to provide reasonable accommodation when to do so would prevent the necessity of eviction.

In its Voucher regulations, HUD has declared that Voucher landlords are subject to §504. See 24 CFR §887.5(a)(4). Whether private landlords participating in the Certificate and Voucher programs are covered by §504 has yet to be judicially decided, and there is uncertainty in this area. However, it is clear that a Certificate or Voucher landlord is covered by the Fair Housing Act under the same terms as any private landlord and is thus required to make reasonable accommodations in rules and policies.

111 The Task Force recommends that HUD require that the Section 8 Certificate and Voucher lease addendum include a provision requiring the private landlord to provide reasonable accommodations upon the request of the resident, both during the tenancy and eviction proceedings.

Language similar to that proposed for assisted housing providers could be used.

112 The Task Force further recommends that HUD develop a model lease termination notice for Section 8 Certificate and Voucher landlords or, since requirements may vary by state, provide guidance to ensure that Certificate and Voucher lease termination notices are written in plain and understandable language, fully inform the resident of the reasons for the eviction (as well as

other regulatory requirements) and inform the resident that if he or she has a disability the landlord is required to make a reasonable accommodation if to do so would remove the grounds for termination. (See Chapter 3, Evictions).

The Task Force wishes to emphasize that the purpose of this recommendation is to ensure that participating residents and landlords are fully informed of their rights and obligations under the Certificate and Voucher program and the Fair Housing Act, not to expand the role of HAs or to require them to enforce these Fair Housing requirements.

Lease Terminations in the First Year of the Lease

Currently, the landlord can terminate the lease for several, limited reasons during the first year (generally, for resident related cause). However, Section 8 Certificate and Voucher residents have experienced several problems when they have sought to move during the first year.

For instance, a resident might enter into a one-year lease with a landlord. The resident may need to move for a valid reason, such as the harassment of a child by another resident. If the resident moves, the landlord might under state law have a potential claim against the resident (e.g. for the remaining rent due under the lease term). Should the landlord pursue the claim in state court, the resident may be able to raise the cause for moving as a defense, again depending on state law.

The resident's move will also have Section 8 Certificate/Voucher consequences. In some jurisdictions, if a resident does not obtain a "mutual recision" signed by the landlord, the HA will refuse to issue papers so that the resident can use the Section 8 Certificate/Voucher assistance elsewhere. In effect, this may trap the resident in a dangerous or untenable situation. Or, the HA makes a routine vacancy payment to the landlord without consideration of the resident's cause for moving.

113 **Thus, the Task Force recommends that HUD ensure, through regulation or guidance, that in cases where a tenant moves during the first year of his/her lease, and where no mutual termination/recission agreement between tenant and landlord exists, full opportunity for hearing for both parties be afforded. It should be**

noted that current HUD policy requires the PHA to review the cause for the vacancy claim and determine if any vacancy payment to the landlord is valid (HUD Handbook 7420.7, Ch. 10-16).

Damage and Vacancy Claims

Currently, HUD regulations permit a landlord to submit a claim for damages and unpaid rent to the HA when the Section 8 Certificate/Voucher resident moves out. 24 C.F.R. §882.112 (b). If the HA chooses to reimburse the landlord, the resident must reimburse the HA for any amounts above the security deposit the owner could have collected under the program and failure to reimburse the HA will result in termination of the subsidy. 24 C.F.R. §882.210(b)(2). Many HAs have some procedure that ensures that the landlord is not paid damage and vacancy claims unless the resident has had an opportunity to contest these claims. For instance, some HAs require the landlord to first file a case in Small Claims court, where the resident may appear and present his or her side of the case, and receive a judgment before paying the claim. However, the regulations as written do not make clear that such due process protections should be required before the claim is paid or the resident is required to reimburse the HA.

Some HAs have not developed or do not use such procedures. In those instances, the HA may pay the damage and vacancy upon some verification of the landlord without the tenant being able to fully challenge the procedure. Then, if the resident does not reimburse the HA and the HA seeks to terminate the subsidy, it may be too late to prove adequately that the damages were not the resident's fault or, even worse, the HA may not allow the issue to be raised at all on the theory that the only relevant issue is whether the claim was paid.

114 The Task Force recommends that HUD require that both residents and landlords be given an opportunity to be heard with respect to damage/vacancy claims, either in the HA's informal hearing process or some other forum that provides due process.

115 The Task Force further recommends that HUD provide guidance requiring that any repayment agreements be reasonable.

Housing Quality Standards

The Task Force recognized the importance of using HQS to enforce the national policy of providing safe, decent and sanitary housing and that the purpose of HQS is not to harm tenants arbitrarily. The Task Force firmly believes that landlords should be held accountable for providing safe, decent and sanitary housing. However, the Task Force also believes that the HQS system, both in structure and in practice, often operates to deprive families of needed housing. The Task Force believes that the HQS system can be improved.

It was the experience of some Task Force members that in some cases residents lose their homes because of minor, technical HQS violations or because the landlord is refusing to comply with HQS in order to circumvent the good cause termination requirement. In some cases there are legitimate HQS concerns, but due to no fault of their own, the residents lose a home and may risk losing the Certificate or Voucher altogether if replacement housing cannot be found. These problems may be caused by HUD's or some HA's inflexible approach to HQS enforcement.

116 The Task Force recommends that HUD revise the system for enforcing Housing Quality Standards to ensure that the goals of HQS are met while also minimizing the loss of housing for residents. In particular, the Task Force recommends that a revised HQS system attempt to match the severity of the problem to the severity of the enforcement. A fair and effective system of enforcing HQS would permit a range of enforcement actions, including the use of warnings, suspensions, abatements and terminations and would require termination if serious health and safety violations were not corrected immediately. In most instances, HAs should make use of these other enforcement measures prior to termination of the HAP contract, which is usually appropriate only when other compliance measures have failed. If the HQS failure does not affect the safety of the resident and if the landlord needs time to comply, that time should be given.[2] (As an ex-

2 A few years ago HUD considered a two-tier system, similar to this recommendation, that required HAP contract termination for serious health and safety violations not immediately corrected and permitted allowing a certain number of minor violations before requiring the unit to be failed. To the extent that the two-tier system carries out the intent of this recommendation, the Task Force supports modifications of the HQS system similar to the two-tier system previously considered by HUD.

ample, if a unit failed HQS because of a lack of screens that must be custom ordered, the HAP contract should not be terminated where the landlord has ordered the storm windows and they have not yet arrived.) Finally, suspension, even for a lengthy or indeterminate period of time, is especially appropriate if the landlord has indicated an unwillingness to comply with a minor HQS requirement to circumvent the good cause requirements.

HQS standards already provide a thirty day grace period to remedy any violations. Furthermore PHAs are instructed as per HUD Handbook 7420.7 Ch, 5, 5-9, to "determine if extensions of time are warranted depending upon the nature of the work to be completed and the PHA's determination of a reasonable deadline."

Reasonable Accommodations

Task Force recommendations concerning the need for housing providers, as recipients of federal funds, to make reasonable accommodations, also apply to the HA administering a Certificate or Voucher program. HAs must have reasonable accommodation policies and should utilize the guidance the Task Force has provided to other housing providers.

117 **The Task Force recommends that in the Certificate and Voucher programs HUD provide additional guidance along the lines of what has already been written (see Chapter 4, Reasonable Accommodations), with examples that are more pertinent to the Section 8 Certificate and Voucher programs. Guidance prepared on plain language forms and assisting people with cognitive impairments should also be made applicable.**

Portability/ Mobility

The Task Force agreed that HUD's rules used to determine the jurisdiction of an applicant or to determine in what jurisdiction a Certificate or Voucher should be used, should not have an adverse effect on applicants who are homeless or who have disabilities. For instance, in some jurisdictions, all shelters are located in a central, urban area so that no matter where one is originally from one winds up in the core city if shelter is needed. A person with disabilities

might be unable to access medical services if required to move to the issuing jurisdiction.

The Task Force agrees that individuals with disabilities must be exempted from residency requirements on a case-by-case basis as a matter of reasonable accommodation.

118 The Task Force recommends that HUD ensure that its guidance and policy on reasonable accommodations permit an exception on a case-by-case basis to Section 8 certificate or voucher residency requirements, relating to portability, as a reasonable accommodation for an individual with disabilities.

Landlord Participation

Many commenters on the preliminary report of the Occupancy Task Force expressed concern that a number of recommended changes to the Certificate and Voucher programs could result in decreased landlord participation in the program, noting that current landlord participation is woefully insufficient.

119 The Task Force urges HUD to develop a plan of action to encourage increased voluntary landlord participation in the Section 8 Certificate and Voucher programs thereby increasing housing opportunities for low-income families.

7

Support Service Issues in Public and Federally Assisted Housing

Introduction

This Chapter examines the intersection of housing and services and makes recommendations to Congress, HUD and the Department of Health and Human Services about how to coordinate and improve access to and delivery of services in an independent housing context. Many people who live in federally subsidized housing need, want and are eligible for services that have some form of federal subsidy or some form of federal mandate or encouragement. Services could help maintain tenancies and independence, promote economic and educational opportunity, and generally enhance the lives and opportunities of those who live in federally subsidized housing. The Task Force believes that one major problem is that the housing and service systems do not necessarily understand each other or work in a coordinated way to help the same individual. Because issues of coordination can be addressed *only by HUD and HHS working together*, this Chapter makes recommendations to HHS even though the Task Force was created to advise Congress about HUD matters.

Part A of this Chapter will cover general services and housing issues and recommendations to ensure the provision of services to residents. Part B will review the planning and funding complexities of federal, state and local programs, including recommendations to HUD and HHS. Part C will discuss collaborative agreements among housing and services providers.

Part A: Services and Housing Issues in General

There are several overarching issues relating to services in housing. First, all federal programs are required to operate under the principle of non-discrimination. The main tenet of non-discrimination is equal access. In the area of access to support services provided by or under the auspices of federal housing programs, residents should be able to access such services on an equal basis. Housing providers can ensure equal access by establishing a uniform process for providing residents with access to and information about housing program services and programs.

When funding criteria mandate services for a particular population, housing providers can make an effort to determine whether similar services could be obtained for residents who are ineligible for the existing service program but who could benefit from similar services. Similarly, service providers have an obligation to identify individuals who may benefit from support services and thus should seek broad-based collaborative agreements with housing providers.

Second, the term "supportive services" means different things to different individuals. In one housing context, "supportive services" may also be referred to as "resident services" and include such events as youth recreation activities, one-time educational events and community organizing functions. In another housing context, "supportive services" may describe those services specifically designed to establish and/or maintain lease compliance. Such services might include: housekeeping assistance; assistance with making rental payments; and related services. Within the social service context, "supportive services" are generally defined as any service designed to help support the efforts of an individual or family to address particular needs. Such supportive services might include: special devices and aids; health and mental health services; parenting skills training and family preservation services; rehabilitative services; vocational training; medication management; personal assistance; and related services.

Third, distinctions must be made between supportive services and reasonable accommodations.

Supportive services:

- are used by a broad range of groups and individuals, based on their particular needs and circumstances, not only by individuals with disabilities or individuals who are elderly;
- are selected by an individual based on need and desire and with an individual's agreement to accept services;

- may be provided by a housing provider, coordinated through a service provider, contracted for directly by individuals or provided informally by a caregiver, or provided by a service provider with no connection to housing; and,
- in most cases, cannot be required in order to establish or maintain tenancy in federal housing programs. The Section 811 Program which limits eligibility to persons with disabilities who need regular or intensive supportive services and mandatory meals programs are examples of some exceptions to this point.

On the other hand, reasonable accommodations:

- represent changes in rules, policies or procedures which allow individuals with disabilities to enjoy the full benefits of a particular program;
- are required of landlords as long as the accommodation does not constitute an undue financial and administrative burden or a fundamental alteration to the nature of the program and when "such accommodation may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling....(24 C.F.R. 100-204(a));"
- must be discussed and agreed to by a housing provider and a resident with disabilities; and,
- may include, but are not limited to, access to supportive services.

The issue of reasonable accommodations is discussed more fully in other areas of the Task Force report. See, especially, Chapter 4.

Fourth, residents have the right to refuse services. Residents who violate their leases and who refuse supportive services which could help them comply with their leases pose significant dilemmas for some housing providers. Housing providers do not want to evict residents but have an obligation to enforce the terms of the lease. However, a resident who is failing to comply with lease requirements and other house rules has a right to refuse supportive services, even if those services might help him or her to achieve compliance. Similarly, housing providers should enforce lease requirements and other house rules and should seek appropriate measures, including reasonable accommodations and lease termination, for any resident who fails to comply with such requirements.

Fifth, expectations that access to supportive services will somehow ameliorate all tenancy problems, must be tempered. The fact that residents have access to and participate in supportive services does not mean that all of those residents will comply with lease requirements and other house rules. While supportive services can

make a difference in the lives of many residents, some may violate their leases, will not be willing to develop mutually acceptable reasonable accommodations and ultimately face eviction.

Further, access to services will vary by state and locality. In some cases, states and localities, using federal funds and their own contributions, will be able to make a significant financial contribution to enhance access to services. Housing and supportive service providers may also make significant efforts to supply services to residents in federal housing programs; however, these providers are limited by budget and funding constraints which, without new funding sources, will not be likely to meet the ever-increasing demand for services.

Landlords may evict residents who fail to comply with essential lease requirements, even though those residents may have access to or be participating in supportive service programs. However, there are alternatives to eviction which may resolve the problems caused by and for residents who are being evicted. These alternatives, which include referrals to housing programs offering other types of living arrangements or to programs which provide assistance to individuals and families at-risk for homelessness, are addressed in Chapter 2, The Housing Management Process, Chapter 3, The Eviction Process, and Chapter 4, Reasonable Accommodations.

Sixth, service providers also have a responsibility to help their clients maintain their housing. For example, service providers could inform their clients about the various housing options available in the community and how to make informed housing decisions. Second, service providers should maintain contact with clients and former clients, particularly those individuals who are making an effort to live independently in integrated community settings. Third, service providers can help individuals resolve crises through emergency services, crisis mediation, temporary shelters and similar interventions. Finally, service providers are required to conduct outreach to individuals who may benefit from their service programs and should include individuals who reside in federal housing programs in their outreach efforts.

120 The Task Force recommends that HUD and HHS include the following as guidance to housing and service providers in order to obtain services for residents of public and assisted housing, and that HUD and HHS assist federal, state, and local housing and

services entities to implement the following, at whatever level is possible, with or without action by the others. The four recommendations below are not intended to be requirements upon which continued HUD funding is contingent, but rather to be encouraged as practices that can both improve resident satisfaction and reduce other management problems. Frequently residents in need of services who do not know how or where to access those services consume much of the staff time of the housing provider. The Task Force believes that by providing guidance to recipients, encouraging those practices, HUD can make clear that it is permissible to use current operating funds, to the extent that they are available, in implementation:

(a) Allow housing providers to fund service coordinators from operating budgets, replacement reserves or any other sources they deem feasible so long as other housing provider funding obligations are not compromised.

(b) Service Agency Listings for Self-Referral. In addition to service coordinators, housing and service providers should establish and maintain a listing of state and/or local service providers which residents could use to locate providers. Information could be gathered from state and local government agencies which provide services to families, children, individuals who are elderly, persons with disabilities, individuals who need emergency assistance, etc. In many cases, state and local governments can also provide a listing of the non-profit agencies with which they contract for services. (See Task Force recommendations regarding a broad-based housing information clearinghouse, Chapter 8.)

(c) Collaborative Agreements with Service Providers. Housing and service providers should enter into collaborative agreements which offer residents who need supportive services a direct link to service providers. (See Part B of this Chapter for a fuller discussion of collaborative agreements.)

(d) Resident Orientation and Education Programs. Housing providers, with or without assistance from service agencies, can help residents learn more about how to fulfill the essential lease requirements, the programs and

services offered through the housing provider, community-based programs and other issues which may help to ensure successful tenancies. Housing providers can also facilitate other educational events, such as health workshops, job training and job search seminars and sensitivity workshops, which help the entire resident community.

(e) Resident Self-Help Groups. By providing meeting space for resident self-help groups, housing providers can help foster a sense of community and encourage residents' efforts to support and assist each other. Housing providers also may spur the development of resident self-help groups through community education programs sponsored by non-profit, community and religious groups.

Part B: Federal, State and Local Support for Housing Programs and Supportive Services

This Section outlines the complex maze of federal, state and local planning, funding and service requirements through which housing and service providers must navigate to provide housing and supportive services. It also discusses the lack of integration among service programs which serve the same populations and the need for additional funding which all program lines share. The recommendations in this Section address the complexity of the system that is designed to help individuals with various needs and the scarcity of resources within that system.

Social Support System Lacks Integration and Funding

Inadequate and fragmented funding, insufficient staff, inconsistent, overly bureaucratic regulations and other issues often cause significant gaps in the social services "safety net." The way in which services are organized at the federal level, planned at the state level and implemented at the local level also creates problems for providers who must sort through layers of differing governmental interpretations of the laws, rules, regulations and procedures related to specific social service programs.

For example, mental health services may be funded under any combination of the following programs and sources:

Federal - Community Mental Health Services Block Grant, Substance Abuse Block Grant (for those dually-diagnosed

with mental illness and substance abuse disorders), Social Services Block Grant, Community Support Program, Child and Adolescent Support Service Program, Medicaid (federal share) and Medicare. Each of these programs has requirements regarding use of funds, mandated versus optional services and related issues. With the exception of Medicare, states and localities play a significant role in determining how these funds are used. States and localities then funnel the funds to service providers who offer specific services as defined in their contracts with the state or locality.

State - Medicaid (state share), state mental health authority funding, funding for state psychiatric facilities and state contributions for Block Grant-related services which require state maintenance of financial effort. While federal funds often come with service mandates, use of fund guidelines and service planning requirements, states have considerable leeway in determining which services to provide and which populations to serve. Over the past few years, states have closed their psychiatric facilities to save money but have not funnelled funds effectively into the communities to support former patients who were released from closed facilities.

Localities - Local mental health services funding and some special grant monies. It is generally through the localities that provider service contracts are utilized although many of the terms of those contracts may be defined by the state mental health authority.

The issues are very much the same for housing providers - each governmental layer attaches requirements related to use of funds, target populations to receive assistance, services (housing, social, etc.) planning and other areas. However, within the various requirements of social support programs, there is no requirement or directive that states and localities receiving federal funds coordinate services (housing, social, etc.) to provide an appropriate support system for individuals who need governmental aid. Generally, states and localities must only "plan to" provide or coordinate services among their service agencies.

At the local level, housing providers who must house applicants with varying needs and different independent living skill levels find

it extremely difficult to meet applicant and resident needs when social support services are offered through a myriad of programmatic bureaucracies. Similarly, social service providers are limited in their abilities to enter into service agreements with housing providers because of funding and contract constraints. Thus, if state and local governments do not target case management, emergency response, personal assistance and other supportive services to individuals in housing programs who need that aid, the service providers, like housing providers, will not have sufficient private funds to meet the need for assistance.

Federal laws governing many service-related programs and grants require that the needs of individuals participating in or utilizing other federal programs be addressed in funding applications, service planning requirements and grants to service providers. For example, states applying for federal community mental health service block grant funds must document how those funds will be used to address the needs of adults and children with serious mental illnesses who are homeless, live in rural areas, receive "substantial amounts of public funds or services" and function "outside of inpatient and residential institutions." Part B of Title XIX of the Public Health Service Act (42 U.S.C. § 300 et seq.) as amended by the ADAMHA Reorganization Act (P.L. 102-321). In fact, jurisdictions submitting a Comprehensive Housing Affordability Strategy are required to "make reasonable efforts to confer with appropriate social service agencies regarding the housing needs of children, elderly persons, persons with disabilities, homeless persons and other persons served by such agencies." 42 U.S.C. § 1274 et. seq. However, the use of these funds to assist individuals residing in federal housing programs may be affected by the participation of housing providers in the services planning process, the funding priorities of state and local government officials and the ability of affected individuals to advocate for their own interests.

Also under federal law, housing program funds may be used for the following efforts:

- Public Housing Authorities (PHAs) are permitted to use annual contributions to hire service coordinators or other personnel who can counsel residents on "household management, housekeeping,...and similar measures"; PHAs can also use annual contributions to cover up to 15 percent of the cost of supportive services. 42 U.S.C. § 1437 et. seq.

- Funds for service coordinators are also authorized for PHAs, Section 202, Section 8 Project-Based, Section 8 Tenant-Based, Section 221(d)(3) and Section 236 programs. 42 U.S.C. § 1437 et. seq. and 12 U.S.C. § 1701q, as amended by the Housing and Community Development Act of 1992, P.L. 102-550.
- Community Development Block Grant funds may be used to provide supportive services in communities which do not provide those specific services. 42 U.S.C. § 5301 et. seq.
- The Department of Housing and Urban Development Secretary (HUD Secretary) is authorized to conduct demonstration programs designed to "meet the needs of groups with special housing needs including the elderly, [and] the handicapped..." 12 U.S.C. § 1701z-1 et. seq.
- Under the HOME program guidelines, the HUD Secretary is empowered to negotiate and enter into service agreements with "agencies of the Federal Government, participating jurisdictions,...[and] nonprofit organizations..." in developing innovative housing programs. 42 U.S.C. § 1274 et. seq.

As the above examples of funding sources illustrate, even funds available within housing programs are fragmented into separate programs and funding streams. If the needs of low- and very low-income individuals and families are to be addressed adequately, the Congress and the White House must create a new national social support system.

The Task Force offers the following vision for an integrated housing and social support system. Such a system would:

- view public and federally-assisted housing programs as a valuable resource for individuals and families needing housing assistance;
- receive adequate federal, state and local funding support to maintain existing housing units, rehabilitate units which are currently uninhabitable and construct new units to meet the increasing demand for affordable housing;
- offer a variety of housing options (scattered site, individual and family apartments, group homes, Section 811/Section 202 supportive housing, etc.) so that individuals and families choose the housing program which they believe would best meet their needs;
- provide safe and decent housing to all individuals and families who need access to affordable housing;
- operate on principles of non-discrimination and equal access to housing programs and supportive services;

- offer access to a wide array of comprehensive services (health, mental health, substance abuse, personal assistance, chore assistance and related services) designed to help individuals and families live as independently as possible in communities of their choice;
- make available community development programs (job training, education events, group support and self-help programs, etc.) aimed at enhancing the overall quality of life within the community;
- include collaboration between housing and service providers and provide sufficient funding so that individuals and families who need support services could receive them;
- promote and encourage individual and family efforts to locate permanent and affordable private housing through supportive rather than punitive measures; and,
- be responsive to the changing needs and circumstances of the individuals and families participating in the housing and/or services programs.

121 To achieve the goal of an integrated housing and social support system, the Task Force recommends that Congress:

(a) appropriate sufficient funds to ensure that housing providers can employ a number of service coordinator positions to serve the resident population adequately;

(b) increase financial support for social service programs and enhance requirements that federal social service programs target adequate funds to meet the service needs of individuals and families who receive housing and other forms of federal assistance;

(c) coordinate housing and social service programs for individuals and families with low- and very low-incomes among the various congressional committees with jurisdiction for those programs;

(d) encourage the integration of social service programs by state and local governments (including services programs assisting individuals with disabilities and families; programs providing income assistance; housing programs; etc.).

122 To achieve the goal of an integrated housing and social support

system, the Task Force recommends that the Department of Housing and Urban Development and the Department of Health and Human Services:

(a) review the requirements for its special needs programs funded under the Stewart B. McKinney Homeless Assistance Act and all other federal housing programs to ensure consistency with the Task Force recommendations being made with regard to applicant and resident screening, admissions, occupancy and evictions in public and federally-assisted housing programs;

(b) establish the objectives of the 1990 Letter of Agreement between the two agencies as a priority of both agencies; and

(c) encourage states and localities to link the use of housing and service block grant funds to stimulate collaborative agreements and other cooperative ventures between local housing and service providers.

Part C: Collaborative Agreements

One way to bring services to public and assisted housing is through a collaborative agreement or agreements with service agencies. There is no single model for housing/services collaborations. Each housing community features a unique combination of residents, housing providers, service providers and community space. The most appropriate solution will address community-specific needs and available resources.

General purpose collaborations have as their goal the enhancement of the housing community overall, and the improvement of the social, economic and educational opportunities of the residents. Programs developed through collaborative agreements can include youth activities, job training and education services, as well as improved housing conditions for all of the residents.

Special purpose collaborations can target applicants who would otherwise be denied admission or who may be at risk of eviction or who need assistance in order to remain in their apartments as long as possible. Such programs might offer:

- case management, counseling, peer support groups
- preventive education/support and intervention

- education about or assistance with lease compliance and assistance with activities of daily living

Special purpose collaborations can make mainstream housing available to persons with a wide range of needs for assistance to maintain lease compliance and to many persons who have an unfavorable tenancy history. Residents can stay in their own apartment much longer, often indefinitely, if they have the support they need and want. Such support can include personal assistance services, chore and shopping services, medication and financial reminders, and so on.

Law and Policy

Some existing provisions encourage coordination between housing providers and supportive service providers:

- HUD Handbook 7465.1 REV-2 Chapter 6 encourages PHA's to develop collaborative agreements with service providers.
- January 1990 Memorandum of Understanding between HUD and HHS.
- McKinney Act "Supportive Housing" program.
- Congregate Housing Services Program (7 CFR Part 1944 and 24 CFR Part 700)
- Comprehensive Housing Investment Strategy program [Title IV, Subtitle E of the 1992 Housing and Community Development Act].
- Executive Order of May 19, 1993 [Homelessness]
- The Home Program requires each funding jurisdiction to prepare an annual Comprehensive Housing Affordability Strategy ("CHAS"), which includes [references to collaborative planning]
- The Urban Revitalization Demonstration (URD) Program [Severely Distressed Public Housing Developments grants receive funding which requires and pays for some supportive services for residents of those units, particularly aimed at self sufficiency activities].
- The §202 / §811 programs.
- The HOPE For Elderly Independence Program.

Because many federal laws governing service programs require that states and localities plan for coordinating services and housing, housing providers can play a significant role in ensuring that federal service dollars help applicants and residents who need access to publicly-funded supportive services. Such participation also is di-

rectly linked to cooperative agreements with service providers who can use a portion of the combined federal, state and local government service dollars to assist public and assisted housing applicants and residents once those dollars are targeted to those individuals.

Discussion of General-Purpose Collaborations

Housing communities that contain a mix of appropriate services and security are better and safer places to live than housing developments without such services and security. The Task Force uses the term "appropriate" to mean not only services needed by the residents but also services planned, chosen and often delivered by the residents.

Several types of collaborations might be chosen by residents:

- Services that will help residents function successfully and preserve their tenancies;
- Security and service programs that reduce the threats posed by alcohol and drug-related behavior;
- Services that will help residents achieve their personal goals for upward mobility.

Developing state-level collaborative agreements could ensure:

- The availability of services necessary to support tenancy for those who want them, to the extent that resources permit;
- Access to housing for those who would otherwise not be accepted or would lose their housing due to inability to meet tenancy obligations without assistance (to the extent that services are available, the applicant/resident chooses them, and there is a reasonable expectation of successful residency);
- A mechanism for interagency assessment and support in situations where a multi-disciplinary approach is needed;
- Close collaboration between housing provider and service provider (but only when a resident or applicant needs and consents to such collaboration);
- Professional advice and education to housing managers and residents re: working/living with persons with a particular disability or a need for social services;
- Professional advice, education and notice of housing availability to service providers regarding housing issues;
- A collaborative effort to offer a resident other housing alternatives if the current housing situation is not successful;
- Permitting the creation of housing/service resource centers (see

the Chapter 8, "Broad Based Clearinghouse" for a discussion of roles which might be played by these centers); and

- Establishment of coordinators and or ombudspersons at central service and housing agencies to facilitate collaborative program approaches and solutions to individual problems.

123 The Task Force recommends that HUD and HHS issue guidance based upon the following general principles for creating successful housing/service collaborations:

(a) That HUD fund (or allow housing agencies, owners and agents to fund as an allowable project expense) a central staff person to develop and oversee collaborative agreements and other housing / service partnerships.

(b) That HHS fund (or allow State and local grantees to fund) a housing coordinator to develop and oversee collaborative agreements and other housing / service partnerships.

(c) Clear communication of housing eligibility requirements, lease provisions, service eligibility requirements, service provider funding streams, and service provider priorities and constraints.

(d) Clear lines of accountability (including clarification of liability issues).

(e) Effective channels for resolution of problems.

(f) Clear contact procedures, both for day-to-day and for emergencies. Ideally, this will include named coordinators in the housing provider and service provider organizations.

(g) Mutual housing provider - service provider agreement for reciprocal education.

(h) Clear agreement regarding confidentiality.

(i) The service provider will agree to provide outreach, tenancy support and crisis intervention to any resident or applicant who (a) meets the service provider's eligibility criteria and (b) desires services, resources permitting.

(j) The housing provider agrees to make community space available from time to time, to facilitate service delivery.

(k) The service provider agrees to maintain services as long as the resident/client wants them and resources permit.

(l) Admission and tenancy are not dependent upon acceptance of services.

(m) When the resident/client decides that she needs a different type of housing (or decides that he or she needs a different type of housing environment), the service providers will assist with locating alternative housing.

(n) Housing providers should not expect service providers to provide voluntary testimony to the housing court, because for most service providers this would violate professional ethics standards.

8

Broad-Based Clearinghouse

Introduction

A number of vexing problems in delivering affordable and accessible housing are exacerbated by a lack of effective coordination among housing providers, supportive service providers, tenant representatives and advocates. These problems include the fact that low income persons generally cannot efficiently locate, apply for, and secure affordable housing. Providers of affordable housing generally cannot efficiently reach groups least likely to apply for housing. Low-income persons with disabilities have great difficulty locating the few accessible, affordable housing units that exist in any community.

In addition, the absence of reliable technical assistance in the reasonable accommodations process often results in housing providers' confusion about when, whether and how to provide accommodations that are legally required but that are not unduly burdensome. Mediation services are quite effective in preventing evictions and in resolving disputes, but are not generally available in the housing context. Finally, housing providers lack information on services which may be available to residents and, as a result, do not obtain resources that would help resolve management and tenancy problems.

The Task Force believes that broad-based Clearinghouses have the potential to resolve many of these and similar problems in cost-effective and positive ways, and therefore, recommends the following:

124 **Congress should require each state receiving federal housing funds to establish a model clearinghouse program to be funded under the CDBG or HOME Programs. The purpose of the clearinghouse would be to assist housing providers, service providers,**

housing consumers and advocates with a centralized resource for locating information essential to the housing process. Such a model program should recommend program services and staff qualifications. Recommendations should recognize local variations in housing and services availability — especially differences between urban and rural areas.

125 **Membership in the Clearinghouse should include housing providers, service providers, residents, membership and advocacy organizations, fair housing enforcement agencies, all state and local agencies responsible for developing the CHAS (Comprehensive Housing Affordability Strategy) and building code enforcement agencies.**

126 **Membership in the Clearinghouse would obligate housing providers to offer information about the availability of low income and accessible housing. Advocates and consumers would work with housing and service providers to inform them of impediments to finding and maintaining housing and support services, and all groups would work towards developing local solutions and strategies to expand the supply of affordable, accessible housing. Housing provider membership dues should be eligible project or budget expenses.**

127 **The Clearinghouse should include at least the following services:**

(a) A directory, and referral service, for structurally accessible housing.

(b) A directory, and referral service, for public housing, assisted housing and Certificate/Voucher programs.

(c) An electronic bulletin board service listing housing programs which have available units and/or open waiting lists and the numbers and types of units, including affordable and accessible units available under those programs.

(d) A directory of language translation resources, including Sign Language interpreters, and resources for converting written materials into alternative formats, including Braille and tape.

(e) Information on and referrals to supportive service providers. In particular, residents with lease compliance

problems could seek supportive service information through the Clearinghouse.

128 Beyond the basic services, the Clearinghouse could include services such as the following, based on local need and demand:

(a) Referral to mediation, technical, or legal aid assistance for resolution of admission and rejection disputes, and lease compliance/eviction disputes.

(b) Pre-occupancy training, to give potential residents an opportunity to be coached on lease compliance. The Clearinghouse would assist graduates of its training program with developing reasonable accommodations the resident needed to maintain ability to comply with the lease.

(c) A "rainy day fund" to which providers and others could voluntarily contribute to be used to prevent evictions for nonpayment of rent.

(d) For applicants who are on several waiting lists, a change of address service (to notify the appropriate housing providers when the applicant moves). The same service could be used for persons who are the clients of more than one service agency. In addition, the address service could extend to persons who are homeless or reside in shelters or institutional environments.

(e) Review documents at provider request to assist with meeting "plain language" and intelligibility requirements.

The Task Force believes that local clearinghouses, once established, would find that a number of additional services would be needed and viable. Finally, the Task Force believes that in most locations, an existing organization should receive available funds to create and administer the functions of the Clearinghouse.

9

Privacy and Confidentiality

The Task Force believes that housing providers should take reasonable precautions against the unauthorized disclosure of information regarding applicants and residents. Unlike other Chapters, here the Task Force makes a single recommendation:

129 The Occupancy Task Force recommends that HUD answer several questions that require careful research and, once that research is completed, in the very near future address privacy and confidentiality issues after consulting with interested parties.

Legal Background

§504 of the Rehabilitation Act of 1973; the Fair Housing Act, as amended in 1988; and the Americans with Disabilities Act discuss confidentiality relating to a disability only in the employment context. §504 provides that if a disability is disclosed to an employer, information "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 [persons with disabilities] 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 §504 shall be provided relevant information upon request"[24 CFR §8.13(d)].

The ADA's Title I regulations contain similar provisions at 29 CFR §1630.14(b)(1). We found no corresponding provisions regarding the disabilities of residents or applicants.

(1) **Legal Analysis** - the Task Force requests HUD to identify: (a) any federal laws and regulations which impose requirements regarding confidentiality, privacy and/or disclosure (hereafter "Requirements") upon participants in HUD's programs; (b) where the applicability of Requirements is unclear; and (c) where two or more Requirements are in conflict.

Good Practices

In the absence of Requirements, housing providers may voluntarily, for reasons of sound business judgment, adopt confidentiality-related practices (hereafter, "Good Practices"). The Task Force intends that HUD identify not only Requirements, but also potential Good Practices.

Applicant and Resident Records

Housing provider files contain personal information regarding applicants and residents ("File Data"), such as financial and family composition data; evidence of lease violations; and evidence of criminal activity. Where the applicant or resident has disclosed a disability, the housing provider may also have disability-related information related to program eligibility and/or requests for reasonable accommodations.

(2) **File Data** - The Task Force requests HUD to determine:

(a) Which, if any, File Data is subject to Requirements?

(b) Where Requirements apply, under what circumstances may the housing provider release File Data (i) with the consent of the applicant or resident and (ii) without such consent?

(c) When may law enforcement or emergencies (i.e. requests for information made by police or rescue squad officials) require disclosure which is otherwise prohibited by Requirements?

(d) Where disclosure is permitted or required, when (if ever) do Requirements specify that the housing provider remove identifying data such as the name of the head of household?

(e) Where disclosure is permitted or required, are there Requirements as to the scope and extent of the disclosure?

(f) Are there potential Good Practices in this area which housing providers should consider in the absence of Requirements?

(3) Disclosure with Permission - Regarding consent by applicants and residents to the disclosure of File Data, the Task Force requests that HUD clarify:

(a) Are there Requirements which apply?

(b) Are there potential Good Practices which housing providers should consider? These might include model consent forms.

(4) Access By The Resident to His or Her File - The Task Force requests that HUD clarify the following, regarding when, how and to what extent an applicant or resident may review information in his or her file:[1]

(a) Are there Requirements which give the applicant or resident a right to review (i) all File Data; or (ii) some File Data, but not all?

(b) Do Requirements create exceptions where the resident's legal rights to review file data are increased or decreased?

(c) Are there potential Good Practices?

See also questions 8 and 9 on page 9-5 regarding potentially damaging information.

1 For Public Housing, see 24 CFR Part 966.56(b)(1) and 966.4m.

Resident Screening / Eviction Committees

Housing Authorities may establish screening/eviction committees whose members, typically residents and at-large community members, review applicant and resident data. At a minimum, Committee members should respect and protect this sensitive data.

(5) Resident Screening/Evictions Committees - The Task Force requests that HUD clarify the following:

(a) To what extent are such Committees subject to Requirements?

(b) What Good Practices can be recommended? Such practices might include training for Committee members.

(c) Committee members who violate ethical standards should be removed. What Requirements and/or Good Practices apply?

Considerations of State and Local Laws

(6) State and Local Laws - The Task Force requests that HUD clarify:

(a) The Task Force has been told that some Housing Authorities, as government agencies, are required by state law to make all of their records available to the public. Which states have laws of this type, and what are their provisions regarding Housing Authorities?

(b) To what extent do Requirements provide mechanisms for resolving conflict among federal and state or local laws?

(c) When do State or local law considerations (i.e. state vulnerable adult reporting acts)[2] require disclosure which is otherwise prohibited by Requirements?

2 Adult protection laws authorize the government and, sometimes, private persons, to intervene on behalf of adults who are neglected, abused, or financially exploited.

Service Coordinators

Residents are likely to share personal information with service coordinators. Housing providers may expect service coordinators to share this information when it affects the housing program; this may conflict with professional and state regulatory codes of ethics which generally prohibit licensed/certified social service professionals from disclosing personal information provided to them in their professional capacities.

(7) **Service Coordinators** - The Task Force requests that HUD clarify:

(a) Are there Requirements which apply in the service coordinator context (i) always; or (ii) only where service coordinators are not otherwise bound by professional codes of ethics?

(b) What Good Practices can be recommended to housing providers who employ or plan to employ service coordinators? These might include a model Code of Ethics.

Potentially Damaging Information

Particularly in the process of documenting lease violations, housing providers sometimes acquire information which, if inadvertently disclosed, might cause harm to either the resident in question or the information provider.

(8) The Task Force requests that HUD determine if Requirements and/or Good Practices apply to information given in confidence which, if disclosed, might cause harm to a resident or to the person who provided the information.

(9) The Task Force requests that HUD clarify whether the housing provider may refuse to disclose the source and/or the general nature and/or the specifics of information given in confidence which supports the housing provider's allegation of resident noncompliance with the lease.

10

Not In My Back Yard (NIMBY) Barriers to Housing

Introduction

NIMBY, the Not In My Back Yard syndrome, both contributes to and is a form of housing discrimination. Like all forms of discrimination, NIMBY has ripple effects on subsidized housing providers. When a neighborhood association successfully prevents people with disabilities, people with low incomes, and people with no homes from moving in, it not only exacerbates the pressure on subsidized housing providers to house these groups, but it reinforces the stereotype that subsidized housing exists for the purpose of keeping "the undesireables" out of "decent" neighborhoods.

NIMBY, like the dearth of affordable housing, has permeated the Task Force's deliberations. Thus, the purpose of this chapter is two-fold: First, to describe how community perceptions and stereotypes can limit housing opportunities for individuals and families with low- and very low-incomes; and to emphasize that every individual and family should have an opportunity to choose from a variety of housing options, including private, public, federally-assisted, scattered site and supportive housing. Second, this chapter offers a number of specific recommendations to Congress and the Executive Agencies with regard to housing discrimination. This chapter is not an endorsement of one type of housing option over others but rather an endorsement of individual choice and empowerment. The Task Force was unanimous in its identification of discrimination as a major problem for everyone involved in the housing industry.

Discussion

Housing discrimination continues to be a pervasive problem across the country despite the existence of laws prohibiting state and local governments and public and private housing developers and landlords from discriminating against classes of individuals. Such problems are particularly acute for individuals and families with low- and very low-incomes. One significant barrier to the development of affordable housing is community opposition. Waving the NIMBY banner, many communities have enacted regulatory and safety laws designed to limit or restrict the development of community housing for low-income individuals and families, particularly individuals with disabilities. Some communities require public hearings to allow neighbors of a proposed low income housing development an opportunity to raise concerns and, in the process, often create a forum for fears, prejudices and unfounded opposition to the development of such projects. In many instances, community opposition effectively ends a project's development because of the cost and time involved in combating such opposition.

In the past few years, courts have identified these practices as violations of the Fair Housing Act. As a result, state and local legislatures have begun to modify their land use and zoning laws and state agencies have begun to revise their licensing requirements to make them consistent with the federal civil rights laws.

Some housing developers, landlords, real estate agents and banks also perpetuate discrimination through such practices as applicant steering to particular projects or neighborhoods, or intentional application processing delays and practices which have a disparate impact on a particular class of individuals. Such practices often deny individuals and families access to housing and discourage many from seeking alternative housing options in other communities. Until Congress, state legislatures and city and town councils commit themselves to vigorous opposition to all forms of discrimination against individuals and families, NIMBY practices will continue to limit affordable housing options for individuals and families with low- and very low-incomes.

Recommendations

The Task Force strongly recommends that federal and state governments improve their enforcement of the Fair Housing Act (states which have enacted "substantially equivalent laws" have

joint responsibility for enforcing the federal law). Specifically with regard to the federal government, the Task Force recommends:

130 **Congress, HUD and the Department of Justice must devote sufficient resources to conduct a decisive campaign to enforce all aspects of the Fair Housing Act. In addition to litigation, the federal agencies should collaborate to mount a national media campaign about the personal and public consequences of such housing discrimination. An important aspect of the campaign would highlight positive examples of integrated communities.**

131 **As Congress has noted in its review of mortgage loan practices, anti-discrimination testing programs and NIMBY barriers to housing, discrimination persists despite the existence of fair housing laws. Thus, the U.S. Attorney General should review the role of the Justice Department regarding the enforcement of the Fair Housing Act. This review should include and address the use of legal arguments against discrimination, an assessment of federal circuit handling of discrimination cases, and the filing of lawsuits against those individuals whose actions result in discrimination.**

132 **The Attorney General should speed the review of all state and local zoning and land use laws which inhibit the ability of protected classes to move into residential neighborhoods. One way to do so would be for the Attorney General to convene a meeting with all the state Attorneys General to review the Fair Housing Act's preemption of all such laws and to offer the Justice Department's assistance in their efforts. She would have close to 50 federal court cases to use in her review. She would also have examples of states whose Attorneys General successfully conducted such reviews and whose legislatures invalidated the illegal local and state laws.**

133 **The Task Force recommends that the Secretary of HUD convene an inter-agency work group of HUD, the Department of Health and Human Services, and the Department of Justice to develop a strategy to encourage city attorneys to review local zoning laws which conflict with the Fair Housing Act. Such a strategy could involve the U.S. Conference of Mayors and the League of Cities.**

134 The White House and Congress must highlight the economic impact of discrimination on individuals and communities and provide significant financial support to advance civil rights enforcement. The White House and Congress should publicly discuss the ways in which discrimination, through NIMBY or through selective admission standards, burdens a community's economy by preventing the development of low- and moderate-income housing, by trapping minority individuals and families in communities of poverty and despair, and by limiting education and employment opportunities. Such discussion coupled with increased funding for enforcement of anti-discrimination laws would increase the country's understanding of the economic costs of discrimination and the benefits of integration.

135 Every federal agency responsible for housing or housing finance programs should ensure that all components of the agency understand how the fair housing laws affect their operations, and adjust their policies, practices, regulations, guidance and manuals accordingly. The reviews and revisions should be secretarial responsibilities.

136 Congress must expand housing opportunities for individuals and families with low- and very low-incomes by:

(a) increasing the supply of affordable, low-income housing by, for example, appropriations for portable rental assistance, housing rehabilitation efforts and construction projects;

(b) intensifying support for education and enforcement initiatives designed to eliminate public and private housing discrimination against individuals based on race, national origin, religion, gender, age, disability, or familial status; and

(c) establishing national data collection mechanisms capable of monitoring, tracking and compiling reports related to various aspects of federally-supported housing programs, including those which receive any form of federal assistance (public, federally-assisted, farmers home, veterans affairs, private, etc.); the populations served through the housing program; the number of units occupied, va-

cant or needing repair; the number of individuals and families on waiting lists and the length of time it takes for them to obtain housing; housing provider agreements with service agencies and a listing of the agencies; the number of discrimination complaints filed and the current status of those complaints; and other useful information which Congress could use to evaluate federal housing programs regularly and to target funds where they are most needed.

(d) supporting programs and strategies that encourage metropolitan-wide solutions to this problem, including funding incentives for joint inner city and suburban Public Housing Agency applications for HUD's scattered-site development program.

137 The Occupancy Task Force recommends that HUD and the Department of Justice enforce the Fair Housing Act to prohibit state and local governments from requiring public hearings (or other special conditions for approval) for the development of public and assisted housing, unless such hearings are required for the development of *all* housing.

138 The Occupancy Task Force recommends that HUD identify and revise all policies and regulations which promote NIMBY responses, to ensure that public and assisted housing are located throughout a metropolitan area.

139 The Occupancy Task Force recommends that HUD issue regulations to implement the 1990 Housing and Community Development Act provisions permitting assisted housing funds (i.e. §811) to be used to purchase apartments in mixed-income, multi-family housing, condominiums, cooperatives and other forms of housing.

Appendices

1. Statutory Basis of the Task Force
2. Legislative History of the Task Force
3. Task Force Charter
4. List of Task Force Members
5. List of Recommendations
6. Sample Notice of Lease Termination — attachments for Chapter 2, Housing Management
7. Existing Laws on Evictions, Chapter 3.
8. Sample Procedure for Reasonable Accommodation, Sample Forms, Three Levels of Problematic Conduct, and Case Studies — attachments to Chapter 4.
9. Debbie Piltch, "Admission Issues Related to Individuals with a History of Illegal Drug Use, Convictions(s) for a Drug Related Crime, or Alcohol Related Lease Violation," prepared for the Task Force, 1994.

APPENDIX 1

STATUTORY BASIS OF THE TASK FORCE

(Housing and Community Development Act of 1992, Pub. L 102-550, Sections 641-643)

SEC. 643. ESTABLISHMENT OF CRITERIA FOR OCCUPANCY.

(a) TASK FORCE.--

(1) Establishment.--To assist the Secretary in establishing reasonable criteria for occupancy in federally assisted housing, the Secretary shall establish a task force to review all rules, policy statements, handbooks, technical assistance memoranda, and other relevant documents issued by the Department of Housing and Urban Development on the standards and obligations governing residency in federally assisted housing and make recommendations to the Secretary for the establishment of such criteria for occupancy.

(2) MEMBERS.--The Secretary shall appoint members to the task force, which shall include individuals representing the interests of owners, managers, and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health, and other nonprofit service providers who serve federally assisted housing.

(3) COMPENSATION.--Members of the task force shall not receive compensation for serving on the task force.

(4) DUTIES.--The task force shall

(A) review all existing standards, regulations, and guidelines governing occupancy and tenant selection policies in federally assisted housing;

(B) review all existing standards, regulations, and guidelines governing lease provisions and other rules of occupancy for federally assisted housing;

(C) determine whether the standards, regulations, and guidelines reviewed under subparagraphs (A) and (B) provide sufficient guidance to owners and managers of federally assisted housing to--

(i) develop procedures for preselection inquiries sufficient to determine the capacity of applicants to comply with reasonable lease terms and conditions of occupancy;

(ii) utilize leases that prohibit behavior which endangers the health or safety of other tenants or violates the rights of other tenants to peaceful enjoyment of the premises;

(iii) assess the need to provide, and appropriate measures for providing, reasonable accommodations required under the Fair Housing Act and section 504 of the Rehabilitation Act of 1973 for persons with various types of disabilities; and

(iv) comply with civil rights laws and regulations; and

(D) propose criteria for occupancy in federally assisted housing, standards for the reasonable performance and behavior of tenants of federally assisted housing, compliance standards consistent with the reasonable accommodation of the requirements of the Fair Housing Act and section 504 of the Rehabilitation Act of 1973, standards for compliance with other civil rights laws, and procedures for the eviction of tenants not complying with such standards consistent with sections 6 and 8 of the United States Housing Act of 1937; and

(E) report to the Congress and the Secretary of Housing and Urban Development pursuant to paragraph (7).

(5) PROCEDURE.--In carrying out its duties, the task force shall hold public hearings and receive written comments for a period of not less than 60 days.

(6) SUPPORT.--The Secretary of Housing and Urban Development shall cooperate fully with the task force and shall provide support staff and office space to assist the task force in carrying out its duties.

(7) REPORTS.--Not later than 3 months after the date of enactment of this Act, the task force shall submit to the Secretary and the Congress a preliminary report describing its initial actions. Not later than 6 months after the

date of enactment of this Act, the task force shall submit a report to the Secretary and the Congress, which shall include--

(A) a description of its findings; and

(B) recommendations to revise such standards, regulations, and guidelines to provide accurate and complete guidance to owners and managers of federally assisted housing as determined necessary under paragraph (4).

(b) RULEMAKING.--

(1) AUTHORITY.--The Secretary shall, by regulation, establish criteria for selection of tenants for occupancy in federally assisted housing and lease provisions for such housing.

(2) STANDARDS.--The criteria shall provide sufficient guidance to owners and managers of federally assisted housing to enable them to (A) select tenants capable of complying with reasonable lease terms, (B) utilize leases prohibiting behavior which endangers the health or safety of others or violates the right of other tenants to peaceful enjoyment of the premises, (C) comply with legal requirements to make reasonable accommodations for persons with disabilities, and (D) comply with civil rights laws. The criteria shall be consistent with the requirements under subsections (k) and (l) of section 6 and section 8(d)(1) of the United States Housing Act of 1937 and any similar contract and lease requirements for federally assisted housing. In establishing the criteria, the Secretary shall take into consideration the report of the task force under subsection (a)(7).

(3) PROCEDURE.--Not later than 90 days after the submission of the final report under subsection (a)(7), the Secretary shall issue a notice of proposed rulemaking of the regulations under this subsection providing for notice and opportunity for public comment regarding the regulations, pursuant to the provisions of section 553 of title 5, United States Code (notwithstanding subsections (a)(2), (b)(B), and (d)(3) of such section). The duration of the period for public comment under such section 553 shall not be less than 60 days. The Secretary shall issue final regulations under this subsection not later than the expiration of the 60-day period beginning upon the conclusion of the comment period, which shall take effect upon issuance.

APPENDIX 2

LEGISLATIVE HISTORY OF THE TASK FORCE

(Housing and Community Development Act of 1992, H. Rep. 102-760, pp. 139-140)

Subtitle C--Standards and Obligations of Residency in Federally Assisted Housing

The Committee is aware that good management of federally assisted housing plays an important role in making any living situation, especially mixed or population specific housing, work for the residents. Part of good management is applying consistent, fair, and reasonable occupancy standards, selection criteria, and eviction procedures to all current and future residents. The Committee recognizes that many housing managers of public and assisted housing have been given mixed signals and inconsistent information regarding what can and cannot be asked of applicants for housing assistance and what is and is not just cause for eviction. Therefore, public housing authorities and assisted housing managers may sometimes accept for residency residents who should not have been admitted or fail to evict residents when good cause for an eviction exists. The Committee is aware that part of the conflicting information comes from application of a number of laws including the Fair Housing Act, section 504 of the 1973 Rehabilitation Act, the Age Discrimination Act, and the Americans with Disabilities Act as well as the various housing acts.

The Committee believes that this lack of good screening and eviction procedures or at least the confusion certainly has contributed to the dilemma caused by mixed populations which these provisions address. Therefore, the Committee bill requires that the Secretary establish a task force, comprised of individuals who represent public housing authorities, owners and managers of federally assisted housing, tenant advocacy groups, advocates for the elderly, disabled, and homeless, and social and mental health service providers, to systematically review all laws, regulations, handbooks, policies, and court cases to develop recommended criteria for occupancy and regulations based on the criteria.

In developing their recommendations, the Task Force is required to hold public hearings and receive written comments. Ultimately, these criteria will form the basis for regulations that are to be applied by PHAs and owners to all tenants of pubic and assisted housing as a condition of federal assistance. The Committee expects the Department to cooperate and support fully the work of the Task Force.

The Committee intends that the Task Force's recommendations and the

Department's regulations ensure that all residents of public and assisted housing will enjoy peaceful, and safe living arrangements. Further, the Committee intends that the Task Force's recommendations and the Sectary's regulations, provide guidance that is additional to and consistent with the Department's existing Fair Housing Amendments Act regulations, issued in January 1989, and the existing federal lease and grievance procedures. The Committee encourages the Task Force to review the model screening and occupancy package promulgated in 1991 by the Council of Large Public Housing Authorities, as well as the procedures developed in connection with *Cason v. Rochester Housing Authority, 748 F.S. 1002 (W.D. N.Y. 1990).*

The Committee bill places tight time frames on the issuance of the Task Force's report with the final report due 6 months after the Task Force convenes. Similarly there are tight time frames on subsequent rulemaking, with the proposed rule required within 90 days of the final report of the Task Force and the final regulations within 120 days. The Committee strongly believes that the difficulty and the urgency of the issue dictate speedy responses.

The Committee also is concerned that many management "problems" could have been avoided if PHAs and assisted housing managers had accepted co-applications from handicapped or disabled families and service providers or relatives who could be called in any emergency situation. The Committee is aware that in Milwaukee one service provider had offered to sign on the dotted line, providing a contact, with a client seeking public housing an insurance against any future problems, but the offer was denied. The Committee bill provides for an assisted application where a care giver, family member, friend or advocate would provide pertinent information so that they could be contacted to provide special care or to assist in resolving problems.

Task Force Charter

CHARTER OF THE HUD TASK FORCE ON OCCUPANCY STANDARDS IN PUBLIC AND ASSISTED HOUSING

Section 1. Purpose. The purpose of this document is to establish a Charter for a Task Force on Occupancy Standards in Public and Assisted Housing, as required under the provisions of the Federal Advisory Committee Act (FACA).

Section 2. Authority. The Task Force is established by the Secretary pursuant to section 643 of the Housing and Community Development Act of 1992 (P.L. 102-550), and implements the determination of the Secretary of Housing and Urban Development to establish an Advisory Committee in accordance with section 9(a)(1) of the FACA.

Section 3. Objectives, Scope of Activities and Duties. The Task Force will (1) review all existing standards, regulations and guidelines governing occupancy and tenant selection policies, and lease provisions and other rules of occupancy in public and assisted housing; (2) propose criteria for occupancy, standards for reasonable behavior of tenants, compliance standards consistent with reasonable accommodation and other requirements of civil rights laws and procedures for eviction of tenants who fail to comply with the standards; and (3) report to the Secretary and the Congress on its findings and recommendations.

Section 4. Membership. The Task Force will be composed of no more than 35 members, and will include representatives of owners, managers and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health and other nonprofit service providers who serve federally

may be modified as appropriate by the Chair. Any subcommittees appointed by the Chair will be subordinate and advisory to the full Task Force. Subcommittees may meet at such times and places as the subcommittee Chair has approved for the performance of Task Force business. The results of all subcommittee meetings will be reported to the Task Force for its review.

Section 8. Meetings. The Task Force will meet at least twice during its term. The Task Force Chair may call special meetings as needed. The Task Force and any of its subcommittees will convene under the following conditions:

a. A notice of each Task Force or subcommittee meeting will be published in the Federal Register at least 15 days in advance of the meeting. Shorter notice is permissible in cases of emergency, but the basis for the declaration of an emergency must be reported in the notice.

b. Detailed minutes of each meeting of the Task Force will be kept, and the accuracy of the minutes will be certified to by the Task Force Chair, submitted to the Secretary of HUD, and filed with the Departmental Committee Management Officer. The minutes will include:

(1) The time and place of the meeting;

Task Force with administrative services, funds, facilities, staff and other support necessary for the effective performance of its functions.

Section 10. Estimated Support and Cost. The Department estimates that the operating cost of the Task Force will not exceed $45,000, including staff support costs.

Section 11. Travel and Compensation. Members of the Task Force will serve without compensation, but are entitled to be paid for travel and subsistence in the performance of duties as authorized by 5 U.S.C. 5703(b).

Section 12. Reports. The Task Force will submit a written report to the Secretary, describing its membership, functions and actions before its termination. The Task Force will submit other written reports from time to time to the Secretary and the Congress as required by section 643.

Section 13. Expiration. The Task Force established under this Charter will terminate 12 months after the charter is filed, unless sooner extended.

Dated: DEC 31, 1992

Approved:

Jack Kemp
Secretary
Department of Housing and
Urban Development

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List of Recommendations

The following recommendations are divided into six categories: Recommendations to Congress, to Congress and to HUD, to HUD, to HUD and HHS, to the Department of Justice, and to Providers. The recommendations have been listed sequentially through the report, and those numbers are used here. At the end of each recommendation, the first number in the parenthesis indicates the Chapter in which the recommendation appears, and the second number indicates the page.

Important: See text in chapters for footnotes and additional discussion of Recommendations. Explanatory and background text can only be found in the chapters. The Recommendations have been edited for inclusion in this Appendix.

Recommendations to Congress

11. When Congress authorizes new programs, such as Family Self Sufficiency, HOPE for Elderly Independence, and the myriad of resident empowerment programs, they should analyze the cost to housing providers and resident associations to administer the programs. Participation in such programs should not be mandated unless additional administrative funding is provided. (Preface-3)

90. The Task Force recommends that Congress increase the level of modernization funds available to address the alterations and accommodations required by Section 504. (5-10)

92. The Task Force recommends that Congress direct HUD to add reasonable accommodations and accessibility costs to the list of special rent adjustments. (5-10)

121. To achieve the goal of an integrated housing and social support system, the Task Force recommends that Congress:

(a) appropriate sufficient funds to ensure that housing providers can employ a sufficient number of service coordinator positions to adequately serve the resident population;

(b) increase financial support for social service programs and enhance requirements that federal social service programs target adequate funds to meet the service needs of individuals and families who receive housing and other forms of federal assistance;

(c) coordinate housing and social service programs for individuals and families

with low- and very low-incomes among the various congressional committees with jurisdiction for those programs;

(d) encourage the integration of social service programs by state and local governments (including services programs assisting individuals with disabilities and families; programs providing income assistance; housing programs; etc.). (7-10)

124. Congress should require each state receiving federal housing funds to establish a model clearinghouse program to be funded under the CDBG or HOME Programs. The purpose of the clearinghouse would be to assist housing providers, service providers, housing consumers and advocates with a centralized resource for locating information essential to the housing process. Such a model program should recommend program services and staff qualifications. Recommendations should recognize local variations in housing and services availability — especially differences between urban and rural areas. (8-1)

134. The White House and Congress must highlight the economic impact of discrimination on individuals and communities and provide significant financial support to advance civil rights enforcement. The White House and Congress should publicly discuss the ways in which discrimination, through NIMBY or through selective admission standards, burdens a community's economy by preventing the development of low- and moderate-income housing, by trapping minority individuals and families in communities of poverty and despair, and by limiting education and employment opportunities. Such discussion coupled with increased funding for enforcement of anti-discrimination laws would increase the country's understanding of the economic costs of discrimination and the benefits of integration. (10-4)

136. Congress must expand housing opportunities for individuals and families with low- and very low-incomes by:

(a) increasing the supply of affordable, low-income housing by, for example, appropriations for portable rental assistance, housing rehabilitation efforts and construction projects;

(b) intensifying support for education and enforcement initiatives designed to eliminate public and private housing discrimination against individuals based on race, national origin, religion, gender, age, disability, or familial status; and

(c) establishing national data collection mechanisms capable of monitoring, tracking and compiling reports related to various aspects of federally-supported housing programs, including those which receive any form of federal assistance (public, federally-assisted, farmers home, veterans affairs, private, etc.); the populations served through the housing program; the number of units occupied, vacant or needing repair; the number of individuals and

families on waiting lists and the length of time it takes for them to obtain housing; housing provider agreements with service agencies and a listing of the agencies; the number of discrimination complaints filed and the current status of those complaints; and other useful information which Congress could use to evaluate federal housing programs regularly and to target funds where they are most needed.

(d) supporting programs and strategies that encourage metropolitan-wide solutions to this problem, including funding incentives for joint inner city and suburban Public Housing Agency applications for HUD's scattered-site development program. (10-4)

Recommendations to Congress and HUD

1. In each of the past fourteen years, HUD's budget has proposed less money for public housing operating subsidies than PHAs were eligible for under law. Public housing operating subsidies should be funded at 100% of eligibility without OMB's assumptions about illusory savings.

   The Performance Funding System's allowable expense level should be raised to reflect increased costs for fair housing and section 504 requirements, as well as costs for service coordination for residents. (Preface-1)

2. Section 8 Existing Fair Market Rents and housing voucher payment standards should be fine-tuned with respect to sub-market areas and set at levels high enough to reflect increased costs for fair housing and section 504 requirements and so that they do not have the effect of limiting recipients' choices of the neighborhoods in which they can live. (Preface-2)

3. Section 8 New Construction and Substantial Rehabilitation Rents should be adjustable to reflect increased costs for fair housing and section 504 requirements, as well as costs for service coordination for residents and necessary expenses for security beyond that provided by local law enforcement. (Preface-2)

4. The Community Partnerships against Crime (COMPAC) should be authorized and funded at a level sufficient for housing authority programs of prevention, treatment and law enforcement in public housing neighborhoods beyond that required to be provided by the locality. (Preface-2)

5. Many public housing developments are in poor condition today because of years of deferred funding for maintenance. The modernization needed for viable public housing developments should be completed over the next ten years. This will require funding at a level of at least $4.2 to 4.5 billion per year for the combination of the comprehensive grant, CIAP (Comprehensive Improvements Assistance Program), MROP (Major Reconstruction of Obsolete Projects) and Severely Distressed programs. HUD should manage the assisted housing programs so that their maintenance needs are funded as they accrue. (Preface-2)

6. Non-viable public housing developments should be replaced unit-for-unit with a combination of region-wide project-based units and permanent tenant based assistance as determined by the PHA and its democratically elected resident association.

   Project-based units should be in scattered site developments. Total Development Cost ceilings must be high enough to permit building appropriately sized units designed to foster family living, compatible with all neighborhoods. (Preface-3)

7. Current levels of tenant-based assistance (certificates and vouchers) should be preserved by renewing expiring instruments. (Preface-3)

8. The HUD-assisted housing stock should be preserved through the variety of mechanisms found in Title II of the 1987 Act, Title VI and Title VIII of the 1990 Act and Title IV of the 1992 Act. Owners should be provided with the appropriate mixture of loan management set-aside Section 8 and Flexible Subsidy Capital Improvement loans. When preservation is not viable, residents of subsidized units should be provided with tenant-based subsidies.

   All reasonable steps should be taken to renew expiring project-based assistance and when renewal is not feasible, residents of subsidized units should be provided with tenant-based subsidies. (Preface-3)

9. When viable developments are located in distressed neighborhoods, Community Development funding should be provided to revitalize the neighborhood. (Preface-3)

10. Receipt of CDBG (Community Development Block Grant)and HOME funds should be predicated upon the locality's submission of a credible Fair Housing Plan and compliance with the Plan once approved. (Preface-3)

13. The Occupancy Task Force recommends that HUD budget for and Congress appropriate funding sufficient to offset the costs of housing provider compliance with Fair Housing and §504 requirements. (1-6)

28. The Occupancy Task Force recommends that Congress take action to implement and fully fund the four allowances authorized by the 1990 National Affordable Housing Act:
   - A deduction from income of ten percent of all earned income of adult family members;
   - For all families (not just elderly families) a deduction of unreimbursed medical expenses in excess of three percent of annual income;
   - An increase in the dependent deduction to $550 per dependent;
   - A deduction of child care or alimony paid up to $550 per person thus supported. (1-23)

29. The Task Force recommends that Congress authorize and HUD issue regulations implementing reasonable ceiling rents based on neighborhood market rents for standard housing and defer rent increases for up to 18 months for families who leave public assistance and go to work. (1-24)

51. The Task Force recommends that the statutes, regulations, handbooks and lease provisions regarding eviction not be changed, except as noted in Chapter 3 of the report. (3-1)

55. The Task Force recommends that Congress appropriate sufficient funding for the following programs:

(a) The Public Housing Drug Elimination Program, or a successor program, for public and assisted housing;

(b) Special additional adjustments for security costs in the Section 8 New Construction and Substantial Rehabilitation program. (3-5)

56. The Task Force recommends that Congress authorize and appropriate funding for drug treatment on demand. (3-6)

102. The Task Force recommends that the CIAP program be amended so that the current year's CIAP budget could be revised at any time to allow usage of CIAP funds for reasonable accommodations. (5-24)

130. Congress, HUD and the Department of Justice must devote sufficient resources to conduct a decisive campaign to enforce all aspects of the Fair Housing Act. In addition to litigation, the federal agencies should collaborate to mount a national media campaign about the personal and public consequences of such housing discrimination. An important aspect of the campaign would highlight positive examples of integrated communities. (10-3)

Recommendations to HUD

12. The Task Force recommends that HUD issue guidance incorporating the 11 principles governing admission to Federally-Assisted housing to help housing providers, applicants, advocates and service providers to understand the balance required between the individual rights of applicants and residents and the need to maintain a quality living environment. (1-2)

14. The Task Force recommends that HUD make clear the requirement that the application facility and intake process be accessible and intelligible to applicants with disabilities. (1-9)

15. The Task Force recommends that HUD develop sample application materials in 'plain language' versions. HUD should clarify the affirmative requirement for housing providers to communicate with applicants with disabilities in a manner intelligible to the applicant. (1-9)

16. The Task Force recommends that HUD require all housing providers to ask all applicants at the point of initial contact whether they need another form of communication other than plain language paperwork. Some alternatives include but are not limited to sign: language interpretation, having materials explained orally by staff, either in person or by phone; providing large type materials, offering information on tape; or having some third party representative (a friend, relative or advocate, named by the applicant) acompany the applicant to receive, interpret and explain housing materials and be present at all meetings and discussions. (1-16)

17. The Task Force recommends that HUD offer guidance and sample materials to housing providers on marketing materials and techniques that incorporate the following:
    - Marketing should describe the housing units, application process, waiting list and preference structure accurately.
    - Marketing should be "plain language" and may use more than strictly English-language print media.
    - An effort should be made to target all agencies that serve and advocate for potentially eligible applicants (e.g. persons with disabilities, to ensure that accessible/adaptable units are used by people who can best take advantage of their features).
    - Marketing materials should make clear who is eligible: individuals and families, people with both physical and mental disabilities.
    - Housing providers' responsibility to provide reasonable accommodations to people with disabilities should be made clear. (1-12)

18. The Task Force recommends that HUD make it clear that housing providers are not permitted to require that all applicants complete a written application form without assistance, since such a requirement will have a disparate impact on applicants with disabilities who cannot read, write or understand written materials.

Housing providers must, if requested, provide or obtain help for such applicants to complete their applications. (1-12)

19. The Task Force recommends that HUD issue guidance for housing staff to explain to all applicants what screening standards will be used by the provider and how screening information will be verified. (1-13)

20. The Task Force recommends that HUD establish (by regulation) either maximum occupancy standards based on the square footage of the habitable area in the entire unit or in each of the dwelling unit's bedrooms, or, at a minimum, some sort of occupancy guidance that will hold housing providers harmless. (1-14)

21. The Task Force recommends that HUD issue guidance to assist housing providers in determining the minimum occupancy standards taking into account unit size, age, gender and relathipship of applicant family members. (1-14)

22. The Task Force recommends that HUD require families to be given full information on the sizes of units on the waiting sub-lists and the length of the probable wait on all lists, and permit families to change their designation if their circumstances change (e.g., they have another baby or formerly had housing and they become homeless). (1-17)

23. The Task Force recommends that HUD permit housing providers to require families to sign a statement agreeing to remain in the unit they initially accept until a change in their family circumstances justifies a transfer. (1-17)

24. The Task Force recommends that HUD require all providers to have lease clauses that require persons who are initially admitted to units with special features for persons with disabilities (because no one on the waiting list needs such a unit) to move to another unit when someone already in residence or on the waiting list needs the special features of the unit. (1-18)

25. The Task Force recommends that HUD revise the definitions of homelessness throughout its programs to correct the problems described regarding Federal preferences. (1-19)

26. The Task Force recommends that HUD issue the final rule on preferences to clarify that local preferences are subject to the Fair Housing Law, and, therefore, may not have a disproportionate effect on a protected class. (1-19)

27. The Task Force recommends that HUD clarify the requirement that housing providers grant reasonable accommodations by reinstating applicants with disabilities who fail to respond within the reasonable time frame to inquiries to update the waiting list, *but only for reasons that are related to their disabilities*. (1-20)

30. The Task Force recommends that HUD's guidance on screening include and reflect all aspects of the discussion in this Report. (1-25)

31. The Task Force recommends that HUD issue guidance permitting applicants with disabilities who have spent some or all of the past three to five years in medical or other facilities receiving treatment to provide only third-party verification of the dates (beginning to end) when they were receiving treatment and were not living in housing. (1-28)

32. The Task Force recommends that HUD issue guidance permitting housing providers to require an applicant to provide other verification of ability to comply with the essential provisions of the lease, if the applicant verifies only the dates during which the applicant was in a medical facility and the period covered by the medical treatment is recent or of significant duration. (1-28)

33. The Task Force recommends that HUD issue guidance permitting housing providers to require an applicant to document in a manner that would convince a reasonable person that the applicant is not a current user of illegal drugs if objective evidence raises a question about the issue. Documentation that an applicant is not a current user of illegal drugs could include:
    - Verification from a reliable drug treatment counselor or program administrator indicating that the applicant is/has been in treatment that there is a reasonable probability of success in refraining from use of illegal drugs, is complying with the requirements of the treatment program and that the applicant is not currently a user of illegal drugs;
    - Verification from a self help program (e.g. Narcotics Anonymous - trusted servant) indicating that the applicant is/has been participating in their program, that there is a reasonable probability that the applicant will be successful in refraining from use of illegal drugs, and, that the applicant is not currently a user of illegal drugs;
    - Verification from a probation or parole officer that the applicant has met or is meeting the terms of probation or parole and with respect to illegal use of a controlled substance;
    - A voluntary interview with a substance-abuse screening team made up of local professionals who will indicate that the applicant has a reasonable probability of success in refraining from use of illegal drugs; and
    - Voluntary drug testing. Testing should be an option, not a requirement and several parameters must guide a housing provider's use of the option:
        - Drug tests must be conducted at facilities that use the National Institute of Drug Abuse Guidelines; and
        - The test must screen for illegal drugs only and applicant's use of prescription drugs that contain controlled substances must be taken into account; and
        - The housing provider must pay for all costs associated with drug testing un-

less the costs are otherwise reimbursed as HUD guidance already requires. Such cost is an allowable project expense. (1-31)

34. The Task Force recommends that HUD clarify the current statutory requirement that housing providers consider mitigating circumstances for applicants with disabilities. (1-33)

36. The Task Force recommends HUD clarify that housing providers are permitted to make limited inquiries to determine that an applicant meets the HUD definition of "disabled" or "handicapped" for eligibility, or in order to qualify for allowances available only to persons who are elderly, disabled or handicapped, or to qualify for a unit with special features, or to verify assertions made by an applicant with a disability claiming mitigating circumstances or seeking reasonable accommodations. (1-35)

37. The Task Force recommends that HUD guidance include the principle that the housing provider must be the final judge of what constitutes adequate and credible documentation. (1-41)

38. The Task Force recommends that HUD offer broader and more helpful guidance on ways applicants can demonstrate and housing providers can verify that applicants with non-traditional housing histories can comply with essential lease provisions. (1-42)

39. The Task Force recommends that HUD require housing providers to include in all letters rejecting applicants a notice asking applicants with disabilities who are being rejected to request an interview to determine whether a reasonable accommodation would enable them to comply with essential lease provision. (1-44)

40. The Task Force recommends that HUD encourage all housing providers to offer at least an orientation for new residents that should cover the rights and responsibilities of the owner and resident, how rent is calculated, the program's benefits and obligations, security issues, recertification requirements, the lease, the move-in inspection, care of the unit and how to request maintenance, and reasonable accommodations. (1-45)

41. The Task Force recommends that HUD issue guidance which adopts the following guiding principles regarding the housing management process:

(a) Federal housing programs are based on the mutual obligations of all parties (applicants, residents, housing providers, and regulatory agencies) involved in the process. These obligations are spelled out in laws, regulations, leases, regulatory contracts, and in the generally accepted principle of mutual respect between and among individuals. Ensuring that all parties understand and fulfill their obligations establishes the groundwork for a successful housing program.

(b) The essential commandment of anti-discrimination laws is that each individual be treated on his or her own merits, without presumption of his or her abilities based on race, sex, religion, gender, age, national origin, disability, or familial status, (State and local anti-discrimination laws may also protect individuals based on sexual orientation), recognizing that specific housing program requirements may limit eligibility under the law.

(c) Lease terms, house rule and other policies governing behavioral based tenancy standards must be reasonable and applied uniformly to all residents.

(d) Housing providers have three essential obligations:

- to provide decent, safe and sanitary housing; and
- to comply with applicable legal and regulatory requirements; and
- to comply with the requirements of its lease with each resident. If housing providers fail to adhere to these requirements, residents may avail themselves of appropriate remedies for redress, such as grievance procedures, contained in the lease or provided under the law.

(e) Housing providers have the right to enforce essential, performance-based lease requirements and may seek appropriate remedies up to and including evictions.

(f) Housing providers must make reasonable accommodations in lease and other policy requirements when requested by a qualified resident with disabilities (see Chapter 4). The concept of reasonable accommodation involves helping a resident meet essential lease requirements; it does not require the lowering or waiving of essential requirements. Accommodations are not reasonable if they require a fundamental alteration in the nature of the program or impose undue financial and administrative burdens on the housing provider (fundamental alterations and undue burdens are discussed in Chapter 5).

(g) Housing providers must provide timely, effective and adequate notices and an appropriate opportunity for review of their decisions affecting residents, including responses to resident requests for reasonable accommodations.

(h) Housing providers are permitted to seek information necessary to meet program requirements in the lease intrusive manner possible. Housing providers are encouraged, and in some instances obligated, to protect confidentiality of information provided by residents and to respect the individual privacy of residents consistent with program requirements.

(i) Residents have five essential lease requirements:

- to pay rent and other charges under the lease in a timely manner;
- to care for and avoid damaging the unit and common areas; to use facilities and equipment in a reasonable way; to create no health or safety hazards; to report maintenance needs;

- not to interfere with the rights and enjoyment of others, and not to damage the property of others;
- not to engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents or staff; and not to engage in drug-related criminal activity on or near the premises; and
- to comply with necessary and reasonable rules and program requirements of HUD and the housing provider; to comply with health and safety codes.

If residents fail to comply with these obligations or repeatedly fail to comply with other lease requirements, the housing provider may avail itself of appropriate remedies for redress contained in the lease or provided under the law, up to and including eviction. (2-1) Also, see Recommendation 12 in this appendix, which offers a parallel set of principles for admission to public and assisted housing.

42. The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the Public Housing lease requirements at 24 CFR §966.4 as follows:

(a) To require that, to the maximum extent feasible, leases be in plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting of sample lease provisions for all programs.

(b) To change subparagraph (l) which now reads: "The lease shall set forth the procedures to be followed by the PHA and by the resident in terminating the lease" to read:

The lease shall set forth the procedures to be followed by the PHA and by the resident in terminating the lease. In terminating the lease of any qualified resident with a disability, the PHA has two obligations in addition to the others that are listed:

(i) To provide the required notices to the resident, and any third party designated by the resident, in a form and manner that is accessible and intelligible to the resident; and

(ii) to the extent that the resident's assertions of his or her failure to comply with the essential obligations of the lease is the result of the resident's disability, to determine whether the resident can propose a reasonable accommodation which, if implemented, would result in compliance with essential lease requirements. The PHA may require verification of the proposed accommodation. (2-4)

43. The Task Force recommends that the Assistant Secretary for Housing revise the assisted housing Model Lease as follows:

(a) To convert the Model Lease, to the maximum extent feasible, to plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting process.

(b) In terminating the lease of any resident with a disability, the housing owner has two obligations in addition to any others listed:

(i) To provide the required notices to the resident, and any third party designated by the resident, in a form and manner that is accessible and intelligible to the resident; and

(ii) to the extent that the resident's assertion of his or her failure to comply with the essential obligations of the lease is the result of the resident's disability, to determine whether the resident can propose a reasonable accommodation which, if implemented, would result in compliance with essential lease requirements and prevent termination. The housing owner may require verification of the proposed accommodation. (2-5)

44. The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the lease requirements in the certificate and voucher programs as follows:

(a) To require that, to the maximum extent feasible, the lease and HAP Contracts be in plain language; and that HUD consult with housing providers, housing consumers and advocates to assist in the drafting process. (2-6)

45. The Task Force recommends that the Assistant Secretary for Public and Indian Housing revise the public housing notice requirements [24 CFR §966.14 (k)] which now read: "(2) If the resident is visually impaired, all notices must be in an accessible format" to read as follows:

(2) It is the PHA's responsibility to notify residents with disabilities in an accessible and intelligible manner. (2-6)

46. The Task Force recommends that HUD require State Housing Finance Agencies and others who administer applicable HUD programs to adopt lease requirements eqivalent to Recommendations 42 through 45 above. (2-7)

47. The Task Force recommends that HUD and industry groups incorporate the discussion in the report on preventing and addressing least violations into Fair Housing training and into HUD handbook or other guidance. (2-9)

48. The Task Force recommends that HUD issue guidance in all programs that, as a result of a disability, granting a unit transfer within a development, or agreeing not to require a transfer, is a reasonable accommodation; further, such guidance shall provide that HUD may not withhold subsidy or otherwise penalize the resident or housing provider as a result of such a reasonable accommodation. (2-12)

49. The Task Force recommends that HUD issue guidance in all programs that expressly permits housing providers to approve residents' unit transfer requests whenever the housing provider determines that to do so is consistent with the goals of the housing program; and to prioritize such unit transfers in any reasonable manner vis-a-vis admissions from the waiting list. (2-12)

50. The Task Force recommends that HUD issue guidance providing that, where the tenant of record is temporarily hospitalized or in a residential treatment facility, such temporary absence of the tenant of record shall not, in and of itself, constitute a lease violation. (2-13)

53. The Task Force recommends that HUD issue guidance to clarify the existing requirement that housing providers are not permitted to require residents to enter treatment programs or to obtain or continue supportive services. Housing providers may verify assertions by residents that they are receiving assistance which would allow them to comply with essential lease provisions. The housing provider would not be barred from seeking an eviction if the resident does not comply with essential lease provisions. (3-2)

54. The Task Force recommends that, in addition to the various notice requirements already included in HUD program guidance, all such notices must:

    (a) Be given in writing and in an accessible format;

    (b) Include a clear description of the offense, including how it violates the lease;

    (c) Describe what, if anything, the resident can do to cure the problem and prevent the eviction; and

    (d) Describe the reasonable accommodation procedure.

    It is also good business practice to use plain language and to issue the notices promptly after the housing provider determines that a lease violation has occurred. (3-4)

57. The Task Force recommends that HUD clarify that housing providers may make space available for treatment programs, without having to secure HUD approval. (3-6)

58. The Task Force recommends that HUD amend the regulations and Model Lease for assisted housing programs to conform with 24 CFR 966.4(f)(12) as cited in the report. The provision, as modified, should also be added to the regulations for the certificate and voucher programs, specifying this as a required provision in each dwelling lease. (3-7)

59. The Task Force recommends that HUD issue guidance that housing program fraud has taken place only if: (a) there is intentional misrepresentation, and

(b) the misrepresentation conferred some gain on the resident or applicant who made the misrepresentation. (3-11)

60. The Task Force recommends that HUD issue guidance to clarify that:

(a) criminal activity which threatens the health, safety or right to peaceful enjoyment of the housing premises by other residents or staff constitutes grounds for eviction.

(b) drug-related criminal activity which takes place on or near the premises constitutes grounds for eviction.

(c) The "on or near" language applies only to drug related crime. Crimes which pose threats to residents or management staff are grounds for eviction regardless of where they occur. For example, one resident may assault another or vandalize another resident's car, away from the housing development. Eviction could be appropriate in those instances.

(d) Other activities, whether or not they are criminal, are grounds for eviction if they constitute material noncompliance with the lease (or if they constitute repeated minor violations of the lease). For example, damages to the property of the housing provider (which may be criminal) will often be grounds for eviction as a violation of a lease provision requiring residents to refrain from destroying, defacing, damaging or removing any part of the dwelling unit or project.

(e) One-time occurrences of some minor criminal activities do not pose a threat but, if engaged in with frequency or duration, can have a very serious impact on individual residents or the housing community as a whole. (3-12)

61. The Task Force recommends that HUD limit the grounds for eviction to activities that have occurred since the resident was admitted to the housing. An exception should be made for situations where an applicant deliberately concealed information and the information withheld would have been grounds for rejecting the applicant. (3-15)

62. The Task Force recommends that in the certificate and voucher programs, a regulatory provision should be added limiting the grounds for termination of subsidy to activities that have occurred since the resident was admitted to the subsidy program. An exception should be made for situations where an applicant deliberately concealed information and the information withheld would have been grounds for rejecting the applicant. (3-15)

63. The Task Force recommends that HUD issue regulations to provide for a 30 day stay of the subsidy termination, for certificate/voucher holders to affirmatively seek review in State court of the PHA's decision to terminate subsidy. (3-16)

64. The Task Force recommends that, to ensure that this defense will be available in state courts, the Model Lease should be modified to permit the resident to raise the

impropriety of a termination of assistance as a defense, if the owner should seek to evict for nonpayment of rent after previously terminating the assistance. (3-17)

65. The Task Force recommends that, where assistance is terminated, if the housing provider brings an eviction action for nonpayment of rent, and the court finds that the subsidy termination was improper, HUD's Handbook 4350.3 and the Model Lease should:

    (a) require restoration of the subsidy retroactively; and

    (b) bar the housing provider from evicting the resident on the ground of failure to pay the subsidy portion of the rent; but

    (c) permit eviction, however, for any additional grounds for eviction, such as engaging in drug-related or criminal activity, or nonpayment of the resident's portion of the rent. (3-17)

66. Where assistance is terminated, if the housing provider brings an eviction action for nonpayment of rent, and the court orders the eviction, HUD's Handbook 4350.3 should require the retroactive payment of the subsidy for the period through the date the resident vacates the unit. (3-17)

67. With respect to the existing requirements for the Transition Plan and Self-evaluation, the Task Force recommends that HUD provide additional guidance on these issues to PHAs and assisted providers, specifically that HUD fund training on how best to develop and implement these program-based requirements. (4-7)

68. The Task Force recommends that HUD issue regulations providing that as common areas, dwelling units, policies and procedures are modified to promote accessibility, it may be appropriate to modify the Transition Plan; this should be done with the participation of persons with disabilities, or persons or groups representing persons with disabilities. (4-7)

69. The Task Force recommends that the reasonable accommodation principles adopted by the Task Force be incorporated into HUD guidance. Where these principles illustrate legal requirements, the designation '(required)' is included.

    a. (required) Reasonable accommodations are made in response to individual requests from a qualified person with disabilities; the request may be made in any manner which is convenient for the person with disabilities. Reasonable accommodations are in addition to any program- or property-based accessibility requirements specified in the Section 504 regulations.

    b. (required) The housing provider's obligation is to make an accommodation which is effective (i.e. one which overcomes barriers to equal access and facilitates the use of the housing program), provided that the accommoda-

tion also is reasonable (i.e. does not cause undue burdens or cause a fundamental alteration in the nature of the housing program).

c. (required) Reasonable accommodations are unique to the needs of the person as a result of his or her disability, and to the characteristics of the housing environment.

d. (suggested) In general, the person with disabilities will suggest an accommodation which he or she believes to be effective, and the housing provider will determine whether the requested accommodation is reasonable from the provider's viewpoint. The housing provider may also suggest alternative accommodations which are less burdensome to the provider.

e. (suggested) In general, the person with disabilities is in the best position to determine whether a suggested accommodation is effective (i.e. removes the barriers). This is analogous to the situation discussed in 24 CFR 8.6(a)(1)(i) which states that in determining what auxiliary aids are necessary, the housing provider "shall give primary consideration to the requests of" the person with disabilities. Housing providers, on the other hand, are in the best position to determine whether a suggested accommodation is reasonable (i.e. the burden on the provider is within the limits established in the law).

f. (suggested) Effective, two-way communication is essential to the process of identifying the most appropriate accommodation; (required) this may require that the housing provider use alternate forms of communication.

g. (required) Often, reasonable accommodation will mean that persons with disabilities be treated differently, in order to ensure equal access to programs and services.

h. (suggested) Applicants and residents with disabilities may designate a third party to receive information on their behalf.

i. (required) Section 504, the Fair Housing Act, and the Americans with Disabilities Act should be interpreted to require that information regarding reasonable accommodations be made available to applicants and residents during the admission and occupancy cycle, specifically: at time of application; with any notice of rejection; and with any notice of lease violation or lease termination. (suggested) Such information should also be provided at other times as the housing provider deems appropriate.

j. (suggested) Forms and other documents used for applicants and residents should be in plain, intelligible language. (required) Providers must be prepared to present documents in alternative formats, make use of auxiliary aids, or communicate with a third party designated by the applicant or resident (see Appendix 8 for model plain language forms).

k. (required) The reasonable accommodation requirement is intended to pro-

vide persons with disabilities *equal* opportunity to participate in housing programs through the modification of rules, procedures, policies and structures. Such accommodations are not intended to provide greater program benefits to persons with disabilities than to nondisabled residents or applicants.

l. (required) If the provider receives Federal financial assistance, structural reasonable accommodations must be made at the housing provider's expense (provided such accommodations do not create undue burdens or fundamental alterations; see Chapter 5 for a fuller discussion of undue burdens and fundamental alterations).

m. (required) All housing providers must allow residents to make, at the resident's expense, reasonable accessibility modifications to their dwelling units and to the common areas (24 CFR §100.203).

n. (required) Reasonable accommodations must be provided throughout the occupancy cycle in admissions, residency, lease enforcement and eviction. (See discussion later in this chapter on accommodations related to lease terminations. Also see Chapter 2 on interventions prior to lease violations.)

o. For information on whether, and if so to what extent, housing providers may request information related to the nature or severity of a disability during the reasonable accommodation process, see Chapter 1.

p. (suggested) In general, housing providers are not required to provide supportive services that they do not offer to the current resident population (see also Chapters 5 and 7).

q. (required) A housing provider may not unilaterally discontinue a particular method of providing a reasonable accommodation. *Instead*, notice must be given to the resident with disabilities allowing the parties to agree to another effective method of providing an accommodation, including an opportunity to meet to discuss the decision to discontinue the accommodation. (4-10)

70. The Task Force recommends that HUD require assisted housing providers and PHAs to have written procedures for reasonable accommodation, which address the issues discussed below:

a. Information on the availability of the provider's reasonable accommodation procedure will be posted in the rental office and will be provided at application intake, notice of rejection, notice of lease violation, and notice of lease termination.

b. The reasonable accommodation procedure is uniform but flexible. The applicant or resident may make a request for reasonable accommodation in

any manner which is convenient to him or her. Thereafter, standard forms and instructions are used to drive a system for making decisions. The process is standardized but the results will be unique to the individual and the property involved.

c. Reasonable accommodation decisions will be made in a timely manner and both denials and agreements to make accommodations will be documented in writing (plus, if applicable, notification in a format accessible to the requester). Agreements to make accommodations will include terms, conditions, performance expectations (for all parties), and, if appropriate, a schedule.

d. The written procedure will describe (i) the points in the occupancy cycle where information will be provided; (ii) procedures for investigating reasonable accommodation for applicants who do not pass screening; (iii) how requests for accommodations are made; (iv) the decision making process (including determination of undue burdens or fundamental alterations); (v) timely processing of accommodation requests; (vi) the manner in which the housing provider will respond to the request for accommodation; (vii) the right to an informal meeting if the decision is unfavorable; (viii) the process used to settle differences; and (ix) timely implementation of accommodations.

e. The procedures must allow persons with disabilities to communicate with the housing provider in an accessible manner. Communication with the applicant or resident must be provided in an accessible and intelligible format (the intent is to make the process of accommodation accessible). (4-16)

71. The Task Force recommends that HUD incorporate into guidance the following principles developed by the Task Force to reach agreement regarding reasonable accommodations:

a. Where two or more potential accommodations are effective from the viewpoint of the person with disabilities (i.e. each potential accommodation removes the barriers) and reasonable from the viewpoint of the housing provider (i.e. neither potential accommodation causes undue hardship on the provider), the housing provider may select from among the effective accommodations.

b. Questions may arise regarding whether a suggested accommodation poses undue burdens or constitutes a fundamental alteration. In general, housing providers are in the best position to make these determinations, although their decisions can be challenged (either informally, through the Fair Housing Act enforcement process or through the courts).

c. Questions may arise regarding whether a suggested accommodation is effective. In general, the person with disabilities is in the best position to determine whether a suggested accommodation is effective, although his or her decision can be challenged (either informally, through the Fair Housing Act enforcement process or through the courts).

d. Sometimes the housing provider is willing to make an accommodation which the applicant or resident maintains is not effective, and the housing provider is not willing to make the accommodation which the applicant or resident prefers. If this remains unresolved, the housing provider should make clear that its offer remains open. If the resident decides to accept the offered accommodation while continuing to maintain that more is needed, the housing provider should not refuse to provide the offered accommodation. Similarly, the resident's acceptance of the offered accommodation should not be considered a waiver of any right the resident may have to secure the preferred accommodation.

e. The Task Force suggests that if the provider and the applicant are not able to reach agreement, the provider might ask the applicant if there is a third party expert whom the person with disabilities recommends as an advisor to help the two parties reach agreement. (4-12)

73. The Task Force recommends that HUD incorporate the following items into guidance regarding disputes as to whether the housing provider must provide a sign language interpreter:

a. An alternative to providing a sign language interpreter is effective if it removes the barrier(s) to equal participation.

b. The person with disabilities may not be prevented from bringing his or her own interpreter.

c. If lease violations or possible eviction are to be discussed, the housing provider will agree to provide a sign language interpreter because of the seriousness of the topic.

d. If, however, the context of discussion is relatively routine, such as rent which is being paid on time, or a request for maintenance service which can be readily communicated despite the disability, the housing provider might reasonably provide communication in writing.

e. The Task Force concluded that most recertifications would require a sign language interpreter. In particular, an interpreter should be provided if the recertification involves complicated issues, if the housing provider suspects under-reporting of income, if the housing provider feels that a lease violation may have taken place, if the resident indicates that he or she has something major to discuss, or if there is some equivalent reason to feel that very clear, very complete communication is needed. On the other hand, if the recertification process is limited to the simple exchange of documents, the housing provider might reasonably provide communication in writing.

f. The Task Force points out that some persons with disabilities communicate *only* in American Sign Language, and are not able to read or write in English. Also, while American Sign Language is the most commonly used,

there are other languages. Before engaging an interpreter, the housing provider must be sure that the interpreter is qualified in the communication system used by the person with the disability. (4-24)

74. The Task Force recommends that HUD incorporate into guidance the systematic approach discussed below for connecting reasonable accommodations to lease compliance issues, for residents with disabilities.

(a) First, the provider must ask "what is the effect of the lease violation?" This is intended to determine the actual, practical impact. Once this is determined, the provider is well placed to judge whether an accommodation can ameliorate or eliminate the practical impact.

(b) Having determined the practical impact, the provider then needs to assess whether the requested accommodation eliminates, or sufficiently reduces, the practical impact, so that there is now a reasonable likelihood that the resident will succeed with lease compliance in the future.

(c) For the housing provider, *the key is to step outside the narrow viewpoint of administrative convenience and technical lease compliance*, and judge whether the practical purpose of the lease requirement can be met in a creative way which will work for the person with disabilities *and* for the housing provider. (4-27)

75. The Task Force recommends that HUD incorporate into guidance the following approach to reasonable accommodations and objectionable behavior:

(a) Housing providers must distinguish between behavior which is merely irritating (and which is not in violation of the lease), and behavior which is sufficiently destructive of the rights of other residents that it violates the lease. (See Appendix 7, Three Levels of Problematic Conduct.)

(b) Residents do not have a right to be shielded from seeing or interacting with persons with disabilities.

(c) Housing providers should take into account the degree to which behavior is involuntary; many disability conditions result in behavior which cannot be readily controlled and which some persons may consider annoying or disturbing. In these cases, housing providers should generally accept the behavior and discuss, with the disabled resident, his/her willingness to permit or participate with the provider in providing information to his/her neighbors that will allay their concerns and eliminate further conflict between the resident and his/her neighbors.

(d) Where the housing provider judges that the behavior does not constitute a lease violation, experience suggests that education of the objecting resident (ideally by a neutral, expert third party, with the goal of increasing the objecting resident's sensitivity, compassion and tolerance) may be necessary so that the situation does not escalate. (Refer to Appendix 8 on Three Levels of Problematic Conduct.) (4-28)

76. The Task Force recommends HUD incorporate into guidance the following approach to reasonable accommodations and lease compliance:

a. If an applicant has a history of behavior which, if displayed by a resident, would result in a material violation (or repeated minor violations) of the lease, the housing provider may deny the application; the notice of denial must include information regarding the reasonable accommodation procedure.

b. If a resident commits a material violation (or repeated minor violations) of the lease, the housing provider may issue a notice of lease violation or lease termination; this notice must include information regarding the reasonable accommodation procedure.

c. All notices of denial, lease violation and lease termination must include the opportunity for an informal meeeting (or other equivalent procedure, depending on the specific housing program), and must include the opportunity to discuss reasonable accommodations.

d. If the applicant or resident asserts that she is a person with disabilities, asserts that the behavior was a result of her disability, asserts that the behavior is now under control, and requests a reasonable accommodation, the housing provider must consider the request and may require that the applicant or resident provide verification for her assertions.

e. In making these decisions, the housing provider may take into account: (i) the seriousness of the conduct; and, (ii) the likelihood that the suggested accommodation will prevent recurrence of the unacceptable conduct.

f. If, in the future, a resident fails to comply with his or her "support" program, this does not constitute grounds for enforcement action by the housing provider. The housing provider's concern is that lease compliance be maintained; how lease compliance is maintained is solely the concern of the resident.

g. If, after receiving a reasonable accommodation, a resident violates the lease, the housing provider may pursue enforcement of the lease, up to and including eviction (where the action constitutes material noncompliance with the lease or repeated minor violations). The Task Force points out, however, that where (i) the new lease violation is related to a disability and (ii) the previous reasonable accommodation was not intended to overcome this aspect of the disability, another reasonable accommodation may be appropriate. (4-29)

77. The Task Force recommends that HUD issue guidance to make it clear to housing providers and others that reasonable accommodations are applicable to HUD's own rules and regulations, and that HUD develop a regulatory ac-

commodations procedure to standardize the process and allow for a decision in timely manner. (4-31)

78. Upon the joint request of *both* the resident and housing providers, the Task Force Recommends that HUD Field Offices permit a resident of a HUD-assisted property to transfer directly to a similar housing assistance program at another HUD-assisted property without first being placed on a waiting list. (4-32)

79. The Task Force recommends that the Public Housing lease regulations and the assisted housing model lease be revised to include the following language (or equivalent) regarding reasonable accommodations:

    Upon request by a resident with a disability, the landlord will grant a reasonable accommodation to provide the resident equal access to and use of the housing program, unless to do so would cause undue burdens or constitute a fundamental alteration in the nature of the housing program. (4-32)

80. The Task Force recommends that HUD establish a Section 504/FHAA hotline, in order to facilitate (but not ratify or certify) reasonable accommodation decisions by housing providers. The hotline should include access to a computer bulletin board and provisions for linkage to the broad-based clearinghouses proposed in Chapter 8 of this report. (4-32)

81. The Task Force Recommends that HUD provide training to staff in the field offices, or identify specific headquarters staff (perhaps part of the hot-line service) whose responsibility it will be to answer resident and provider questions about conflicts between civil rights requirements and housing program requirements. (4-33)

82. The Task Force recommends that the Assistant Secretary for Policy Development and Research contract with a qualified third party consultant to research, develop and publish a guidebook on reasonable accommodations. As providers and advocates gain experience with housing related accommodations the guidebook should be updated.

83. The following are examples of actions that might result in a fundamental alteration in the nature of the program. The Task Force recommends that these examples be included in HUD guidance on this issue:

    (a) actions that require substantial modifications to, or elimination of, essential lease provisions or program eligibility or screening requirements based on the obligations of tenancy (e.g. admission of an unqualified family);

    (b) actions that require a provider to add supportive services, e.g. counseling, medical, or social services, that fall outside the scope of existing services offered by housing providers to residents at the project;

    (c) actions that require a provider to offer housing or benefits of a fundamentally different nature than the type of housing or benefits that the provider does offer;

(d) actions that substantially impair the provider's ability to meet its essential obligations as a landlord, as defined in the lease (the question here is what is the program benefit delivered and how is it impaired? Essential provider obligations under the lease might include management, administrative, maintenance, or other services required for the operation of the program or upkeep of the property.) (5-3)

84. The Task Force recommends that HUD provide guidance on the issue of fundamental alteration, suggesting that, as part of the self-evaluation process, housing providers prepare a Statement of Program Purpose and Services. Housing providers who prepare a statement of program purpose have take a useful first step towards understanding what may constitute a fundamental alteration. (5-5)

85. The Task Force recommends that only those services provided by the property and under the direct control of the housing provider be considered when evaluating fundamental alterations. (5-6)

87. The Task Force recommends that the issue of profit distribution is not an issue of fundamental alteration, rather, foregoing profit to make a reasonable accommodation should be considered in the context of undue financial and administrative burdens. (5-7)

88. The Task Force recommends that HUD incorporate into its guidance on undue burdens all of the following principles:

(a) The undue financial and administrative burden limitations apply to individual requests for reasonable accommodations and certain property-based compliance actions as defined in the Section 504 regulations. See 24 CFR §§ 8.21(b), 8.23(b), 8.24(a)(2).

(b) With respect to individual requests for reasonable accommodations, the determination of undue burdens is unique to each case. There are two primary reasons for this:

(i) An accommodation will be unique to the individual with disabilities; individuals with the same disability may not need, or desire, the same level of accommodation. There is no standard approach. What works for one person may not work for another in the same situation.

(ii) The cost of the accommodation will be measured against the resources available at the time of the request. Not only is the nature of the accommodation unique, but so is the assessment of the resources available.

(c) 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, property income and

expenses, capital improvements planned or underway, prior commitments to reasonable accommodations or program accessibility, the point in the budget year at which the accommodation is requested and availability of other funds. (See more detailed discussions later in this Chapter.)

(d) For housing providers, the annual budget (income and expenses) is the best resource indicator. The budget should also be considered in light of any other resources available to the provider. Examples of other resources include: for PHAs, modernization funds through the Comprehensive Grant Program (CGP) or the Comprehensive Improvement Assistance Program (CIAP); for assisted owners, permitted use of reserves, special adjustments to the Annual Adjustment Factor (AAF); for both PHAs and assisted owners, availability of local or state funds (either directly or through the resident or applicant), help from non-profits, volunteer agencies, churches and state/local agencies. (5-7)

89. The Task Force recommends that HUD provide guidance specifying that public housing providers budget CIAP or CGP funds for both structural alterations and reasonable accommodations. The Task Force further recommends that HUD track Section 504 improvements by establishing a new account or subaccount in the Chart of Accounts applicable to these programs. (5-10)

91. The Task Force recommends that HUD provide guidance specifying and permitting assisted providers to budget for structural alterations and reasonable accommodations including the establishment of a budget line item for such improvements. The Task Force further recommends that HUD make such costs eligible for budget-based rent increases and clarify to its field offices that providers are:

(a) permitted to seek revisions and amendments to the property budget; and,

(b) to use other funds, including replacement reserves and residual receipts, available to the property in making alterations or accommodations for persons with disabilities, and that requests for such funds be processed in an expedited manner.

In making the above recommendation for assisted housing, the Task Force recognizes that, unlike the CGP for Public Housing, assisted properties have no comparable resource for capital improvement funds. The Task Force notes that many assisted providers operate with an Annual Adjustment Factor (AAF) that limits rent increases. (5-10)

93. The Task Force recommends that HUD provide guidance to PHAs that includes factors for assessing whether a requested reasonable accommodation creates undue financial and administrative burdens. Such guidance should include the following factors:

(a) The size of the program budget including any modernization funds available (see below).

(b) The number and availability of PHA employees.

(c) In the current budget year, any serious negative impact on the PHA's financial stability.

(d) Expenditures that are beyond the PHA's financial ability (even with an operating budget revision) because of limitations in the total amount of operating funds available to the PHA and the other expenses the PHA must incur during the operating period.

(e) In the current budget year, the ability of the PHA to make a deposit to reserves where the level of reserves is at or below 25% of the required level.

(f) The requirement for additional withdrawals from reserves when, in the current budget year, the PHA is running a budget deficit and modernization funds are not available to make the accommodation;

(g) Expenditures that are beyond the amount programmed for accommodations (including physical alterations) in the PHA's annual statement of the five-year action plan for the CGP or CIAP application, taking into account the need for the other work included in that annual statement or application;

(h) A *significant* change to a critical element in a PHA's five-year plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health, or safety systems be postponed).

(i) The ability of the PHA to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe and sanitary living conditions.

(j) Substantial increases in administrative workload. For example, in the current budget year the accommodation affects program operations such that the PHA is unable to:

(i) perform essential management duties as expressed in the lease (e.g. reexaminations or required unit inspections);

(ii) perform administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance);

(iii) meet program operating requirements as expressed in the Annual Contributions Contract, other agreements, or the PHMAP performance indicators; or

(iv) respond to a court order.

(k) Negative impact on services provided by the PHA and mandated by the lease or other agreements. (Excluding services provided by third parties

where such services are not under the direct control or funded by the PHA's operating budget.).

(l) Access and availability of other funds. (5-12)

94. The Task Force recommends that HUD issue regulations to implement existing legislation that creates a Performance Funding System (PFS) appeals process. Such a process would permit HUD consideration of appeals based on circumstances driven by Fair Housing and Section 504 compliance actions. (5-14)

95. The Task Force recommends increasing a PHA's Annual Expense Level (AEL) by a factor that reflects the "normal" annual expense for reasonable accommodations where the annual expense for reasonable accommodations would be established based on prior year's data. It should be noted that, even if PHAs do not receive this increase in the AEL, they must still consider other funding sources such as CIAP and CGP. (5-14)

96. The Task Force recommends that HUD provide guidance to the owners of assisted housing for assessing whether a reasonable accommodation creates undue financial and administrative burdens. Such guidance should include the following factors:

(a) The size of the program or property budget.

(b) The number and availability of employees at the property.

(c) Income v. expenses; availability of surplus cash; access to residual receipts and/or replacement reserves; availability of other sources of capital apart from income generated by the property; feasibility of a rent increase.

(d) In the current budget year, a serious negative impact on the property's financial stability as expressed in its annual operating budget and required payments to replacement reserves. (E.g. inability to repay advances from owners and agents or pay owner distributions at some level; inability to pay operating expenses at prices and wages that are normal and reasonable for the market in which the property is located.)

(e) The property's ability to meet FmHA, HUD, other governmental, or private lender requirements to operate in sound financial condition as expressed in regulatory, management, subsidy or financing agreements. (E.g. inability to fund mortgage payments or tax and insurance escrows at levels adequate to pay the next due tax and insurance statements.)

(f) Ability of the property to complete planned improvements or repairs, including adequate tenant-response maintenance and preventive maintenance essential to maintaining decent, safe and sanitary living conditions. (E.g. inability to fund preservation of the physical asset by completing major repairs and capital improvements, as provided for through regular deposits to replacement reserves and cash generated from operations.)

(g) Ability of the property to maintain full occupancy. (However, the Task Force emphasizes that, under no circumstances, may a provider argue that by making an accommodation, including making the property and dwelling units accessible, the property will be less attractive and therefore more difficult to market.)

(h) Substantial increases in the administrative workload such that staff at the property are unable to:

(i) perform essential management duties as expressed in the lease (e.g. re-examinations or required unit inspections);

(ii) perform administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance);

(iii) meet program operating requirements as expressed in subsidy or regulatory agreements; or

(iv) respond to a court order.

(i) Negative impact on services mandated by the lease or other agreements. (Excluding services provided by third parties where such services are not under the direct control or funded by the property's operating budget.).

(j) Access and availability of other funds. (5-15)

97. The Task Force recommends that HUD issue guidance that assists each housing provider to develop a methodical approach to determine whether or not an undue burden exists. (5-17)

98. The Task Force further recommends that a model worksheet and accompanying procedures be developed to lead public and assisted providers through the undue burdens assessment process. (5-17)

99. The Task Force recommends that HUD provide guidance regarding the following procedures developed by the Task Force for assessing undue financial burdens in assisted housing.

In line with the Task Force's prior recommendation on budgeting for accommodations, all assisted provider budgets will include funds targeted for accessibility purposes. These funds can be spent for Transition Plan activities (making the property, in its entirety, accessible) and for reasonable accommodations (meeting the accessibility needs of a specific resident or applicant).

The Task Force suggests the following procedure for determining whether budgeted funds are available to meet a reasonable accommodation request, bearing in mind that the availability of budgeted funds is but one among several factors which housing providers must consider in responding to a reasonable accommodation request:

1. Budgeted accessibility funds are considered available until they are commit-

ted. For Transition Plan activities, funds are committed once a contract for work is signed. For reasonable accommodations, funds are committed once a promise has been made to the resident or applicant (i.e. a written accommodation agreement is signed).

2. The full year's accessibility budget is considered available at the start of the year. As funds are committed, they are charged against the accessibility budget.

3. Where there are conflicting demands on the accessibility budget, the following priorities will be followed:

(a) reasonable accommodations for residents.

(b) anticipated reasonable accommodations for applicants who are expected to move in within the budget year.

(c) transition plan activities.

4. When the accessibility budget has been fully committed, further accessibility costs may be considered in assessing an undue financial burden unless the housing provider has general funds available or third party funding sources are available. This recommendation includes a surplus cash test for undue burdens. (5-19)

100. The Task Force recommends that HUD issue guidance that clarifies the relationship of the availability of funds for reasonable accommodations, potential return on initial equity for owners and undue financial burdens. (5-21)

101. The Task Force recommends that the process of assessing undue financial burdens for a PHA be expressed in a checklist format that focuses on the resources available to the PHA. Checklist questions are sequential, once one potential resource area is eliminated from consideration, the next resource area is examined. HUD should issue as guidance the checklist and accompanying procedures that the Task Force developed. (5-22)

103. The Task Force recommends that, at the end of each fiscal year, PHAs and assisted housing owners have the option to submit to HUD a report disclosing:

(a) whether a transition plan is in place;

(b) whether policies and procedures are accessible to and usable by, persons with disabilities;

(c) amounts spent during the Fiscal Year for accessibility purposes (including implementing the transition plan and provision of reasonable accommodations);

(d) amounts spent during the Fiscal Year for total operating expenses (excluding for PHAs: CIAP/CGP; excluding for assisted housing amounts funded from replacement reserve); and,

(e) accessibility needs unmet as of the end of the Fiscal Year;

and that HUD fund all such needs where:

(a) a transition plan is in place;

(b) policies and procedures are accessible to, and usable by, persons with disabilities; and

(c) amounts spent for accessibility exceed 4% of a base amount which for assisted housing equals the last audited actual expenditures for operating and maintenance expenses. For public housing corresponding percentage and base amounts should be developed. (5-24)

104. The Task Force recommends that HUD issue guidance clarifying that an extension of a certificate or voucher be granted where to do so is a reasonable accommodation. (6-3)

105. The Task Force recommends that the provision of assistance in locating housing for Section 8 Certificate and Voucher holders be incorporated into the Clearinghouse and Collaborative Agreement models. (See Chapter 7, Broad Based Clearinghouse, and Chapter 6, Support Services.) (6-3)

106. The Task Force recommends that HUD issue guidance clarifying this requirement to ensure that the ability to grant an exception to FMRs is used in order to assist participants in locating and renting accessible units. However, such rents must meet rent reasonableness standards for comparable units. (6-3)

107. The Task Force recommends that HUD provide guidance to ensure that adequate and appropriate assistance be provided to families needing accessible housing. (6-4)

108. The Task Force recommends that HUD prohibit HAs from removing an applicant from a waiting list for failure to respond to a contact from the HA without specific written notice that the applicant's name is being removed and of the HA's policy and procedure for being reinstated on the waiting list. The Task Force further recommends that HUD develop a model plain language notice. (6-4)

109. The Task Force recommends that HUD provide guidance suggesting that it is good policy for HAs automatically to reinstate applicants if the HA reasonably believes that extenuating circumstances interfered with the ability of the applicant to keep his or her waiting list information current. (6-4)

110. The Task Force further recommends that HUD issue guidance clarifying that HAs are required to make reasonable accommodations in their rules and policies concerning communication with the HA and removal from the waiting list for failure to respond where such failure is a result of the applicant's disability. (6-5)

111. The Task Force recommends that HUD require that the Section 8 Certificate and Voucher lease addendum include a provision requiring the private land-

lord to provide reasonable accommodations upon the request of the resident, both during the tenancy and eviction proceedings. (6-5)

112. The Task Force further recommends that HUD develop a model lease termination notice for Section 8 Certificate and Voucher landlords or, since requirements may vary by state, provide guidance to ensure that Certificate and Voucher lease termination notices are written in plain and understandable language, fully inform the resident of the reasons for the eviction (as well as other regulatory requirements) and inform the resident that if he or she has a disability that the landlord is required to make a reasonable accommodation if to do so would remove the grounds for termination. (See Chapter 3, Evictions). (6-5)

113. Thus, the Task Force recommends that HUD ensure, through regulation or guidance, that in cases where a tenant moves during the first year of his/her lease, and where no mutual termination/recission agreement between tenant and landlord exists, that a full opportunity for hearing for both parties be afforded. It should be noted that current HUD policy requires the PHA to review the cause for the vacancy claim and determine if any vacancy payment to the landlord is valid (HUD Handbook 7420.7, Ch. 10-16). (6-6)

114. The Task Force recommends that HUD require that both residents and landlords be given an opportunity to be heard with respect to damage/vacancy claims, either in the HA's informal hearing process or some other forum that provides due process. (6-7)

115. The Task Force further recommends that HUD provide guidance requiring that any repayment agreements be reasonable. (6-7)

116. The Task Force recommends that HUD revise the system for enforcing Housing Quality Standards to ensure that the goals of HQS are met while also minimizing the loss of housing for residents. In particular, the Task Force recommends that a revised HQS system attempt to match the severity of the problem to the severity of the enforcement. A fair and effective system of enforcing HQS would permit a range of enforcement actions, including the use of warnings, suspensions, abatements and terminations and would require termination if serious health and safety violations were not corrected immediately. In most instances, HA's should make use of these other enforcement measures prior to termination of the HAP contract, which is usually appropriate only when other compliance measures have failed. If the HQS failure does not affect the safety of the resident and if the landlord needs time to comply, that time should be given. (As an example, if a unit failed HQS because of a lack of screens that must be custom ordered, the HAP contract should not be terminated where the landlord has ordered the storm windows and they have not yet arrived.) Finally, suspension, even for a lengthy or indeterminate period of time, is especially appropriate if the landlord has indicated an unwillingness to comply with a minor HQS requirement to circumvent the good cause requirements. (6-8)

117. The Task Force recommends that in the Certificate and Voucher programs HUD provide additional guidance along the lines of what has already been written (see Chapter 4, Reasonable Accommodations), with examples that are more pertinent to the Section 8 Certificate and Voucher programs. Guidance prepared on plain language forms and assisting people with cognitive impairments should also be made applicable. (6-9)

118. The Task Force recommends that HUD ensure that its guidance and policy on reasonable accommodations permit an exception on a case-by-case basis to Section 8 certificate or voucher residency requirements, relating to portability, as a reasonable accommodation for an individual with disabilities. (6-10)

119. The Task Force urges HUD to develop a plan of action to increase voluntary landlord participation in the Section 8 Certificate and Voucher programs thereby increasing housing opportunities for low-income families. (6-10)

Recommendations 125, 126, 127, and 128 refer to the Task Force's call for Congress to establish a model Clearinghouse program.

125. Membership in the Clearinghouse should include housing providers, service providers, residents, membership and advocacy organizations, fair housing enforcement agencies, all state and local agencies responsible for developing the CHAS (Comprehensive Housing Affordability Strategy) and building code enforcement agencies. (8-2)

126. Membership in the organization would obligate housing providers to offer information about the availability of low income and accessible housing. Advocates and consumers would work with housing and service providers to inform them of impediments to finding and maintaining housing and support services, and all groups would work towards developing local solutions and strategies to expand the supply of affordable, accessible housing. Housing provider membership dues should be eligible project or budget expenses. (8-2)

127. The Clearinghouse should include at least the following services:

    (a) A directory, and referral service, for structurally accessible housing.

    (b) A directory, and referral service, for public housing, assisted housing and Certificates/Vouchers.

    (c) An electronic bulletin board service listing housing programs which have available units and/or open waiting lists and the numbers and types of units, including affordable and accessible units available under those programs.

    (d) A directory of language translation resources, including Sign Language

interpreters, and resources for converting written materials into alternative formats, including Braille and tape.

(e) Information on and referrals to supportive service providers. In particular, residents with lease compliance problems could seek supportive service information through the Clearinghouse. (8-2)

128. Beyond the basic services, the Clearinghouse could include services such as the following, based on local need and demand:

(a) Referral to mediation, technical, or legal aid assistance for resolution of admission and rejection disputes, and lease compliance/eviction disputes.

(b) Pre-occupancy training, to give potential residents an opportunity to be coached on lease compliance. The Clearinghouse would assist graduates of its training program with developing reasonable accommodations the resident needed to maintain ability to comply with the lease.

(c) A "rainy day fund" to which providers and others could voluntarily contribute to be used to prevent evictions for nonpayment of rent.

(d) For applicants who are on several waiting lists, a change of address service (to notify the appropriate housing providers when the applicant moves). The same service could be used for persons who are the clients of more than one service agency. In addition, the address service could extend to persons who are homeless or reside in shelters or institutional environments.

(e) Review documents at provider request to assist with meeting "plain language' and intelligibility requirements.

The Task Force believes that local clearinghouses, once established, would find that a number of additional services would be needed and viable. Finally, the Task Force believes that in most locations, an existing organization should receive available funds to create and administer the functions of the Clearinghouse. (8-3)

129. Privacy and confidentiality—The Task Force recommends that HUD answer several questions that require careful research and, once that research is completed, in the very near future address privacy and confidentiality issues after consulting with interested parties. (9-1)

134. The White House and Congress must highlight the economic impact of discrimination on individuals and communities and provide significant financial support to advance civil rights enforcement. The White House and Congress should publicly discuss the ways in which discrimination, through NIMBY or through selective admission standards, burdens a community's economy by preventing the development of low- and moderate-income housing, by trapping minority individuals and families in communities of poverty and despair, and by limiting education and employment opportunities. Such discussion coupled with increased funding for en-

forcement of anti-discrimination laws would increase the country's understanding of the economic costs of discrimination and the benefits of integration. (10-4)

135. Every federal agency responsible for housing or housing finance programs should ensure that all components of the agency understand how the fair housing laws affect their operations, and adjust their policies, practices, regulations, guidance and manuals accordingly. The reviews and revisions should be Secretarial responsibilities. (10-4)

137. The Task Force recommends that HUD and the Department of Justice enforce the Fair Housing Act to prohibit State and local governments from requiring public hearings (or other special conditions for approval) for the development of public and assisted housing, unless such hearings are required for the development of *all* housing. (10-5)

138. The Task Force recommends that HUD identify and revised all policies and regulations which promote NIMBY responses, to ensure that public and assisted housing are located throughout a metropolitan area. (10-5)

139. The Task Force recommends that HUD issue regulations to implement that 1990 Housing and Community Development Act provisions permitting assisted housing funds (i.e. §811) to be used to purchase apartment in mixed-income, multi-family housing, condominiums, cooperatives and other forms of housing. (10-5)

Recommendations to HUD and HHS

120. The Task Force recommends that HUD and HHS include the following as guidance to housing and service providers in order to obtain services for residents of public and assisted housing, and that HUD and HHS assist federal, state, and local housing and services entities to implement the following, at whatever level is possible, with or without action by the others. The four recommendations below are not intended to be requirements upon which continued HUD funding is contingent, but rather to be encouraged as practices that can both improve resident satisfaction and reduce other management problems:

(a) Allow housing providers to fund service coordinators from operating budgets, replacement reserves or any other sources they deem feasible so long as other housing provider funding obligations are not compromised.

(b) Service Agency Listings for Self-Referral. In addition to service coordinators, housing and service providers should establish and maintain a listing of state and/or local service providers which residents could use to locate providers. Information could be gathered from state and local government agencies which provide services to families, children, individuals who are elderly, persons with disabilities, individuals who need emergency assistance, etc. In many cases, state and local governments can also provide a listing of the non-profit agencies with which they contract for services. (See Task Force recommendations regarding a broad-based housing information clearinghouse, Chapter 7.)

(c) Collaborative Agreements with Service Providers. Housing and service providers should enter into collaborative agreements which offer residents who need supportive services a direct link to service providers.

(d) Resident Orientation and Education Programs. Housing providers, with or without assistance from service agencies, can help residents learn more about how to fulfill the essential lease requirements, the programs and services offered through the housing provider, community-based programs and other issues which may help to ensure successful tenancies. Housing providers can also facilitate other educational events, such as health workshops, job training and job search seminars and sensitivity workshops, which help the entire resident community.

(e) Resident Self-Help Groups. By providing meeting space for resident self-help groups, housing providers can help foster a sense of community and encourage residents' efforts to support and assist each other. Housing providers also may spur the development of resident self-help groups through community education programs sponsored by non-profit, community and religious groups. (7-4)

122. To achieve the goal of an integrated housing and social support system, the Task Force recommends that the Department of Housing and Urban Development and the Department of Health and Human Services:

(a) review the requirements for its special needs programs funded under the Stewart B. McKinney Homeless Assistance Act and all other federal housing programs to ensure consistency with the Task Force recommendations being made with regard to applicant and resident screening, admissions, occupancy and evictions in public and federally-assisted housing programs;

(b) establish the objectives of the 1990 Letter of Agreement between the two agencies as a priority of both agencies; and

(c) encourage states and localities to link the use of housing and service block grant funds to stimulate collaborative agreements and other cooperative ventures between local housing and service providers. (7-10)

123. The Task Force recommends that HUD and HHS issue guidance based upon the following general principles for creating successful housing/service collaborations:

(a) That HUD fund (or allow housing agencies, owners and agents to fund as an allowable project expense) a central staff person to develop and oversee collaborative agreements and other housing / service partnerships.

(b) That HHS fund (or allow State and local grantees to fund) a housing coordinator to develop and oversee collaborative agreements and other housing / service partnerships.

(c) Clear communication of housing eligibility requirements, lease provisions, service eligibility requirements, service provider funding streams, and service provider priorities and constraints.

(d) Clear lines of accountability (including clarification of liability issues).

(e) Effective channels for resolution of problems.

(f) Clear contact procedures, both for day-to-day and for emergencies. Ideally, this will include named coordinators in the housing provider and service provider organizations.

(g) Mutual housing provider - service provider agreement for reciprocal education.

(h) Clear agreement regarding confidentiality.

(i) The service provider will agree to provide outreach, tenancy support and crisis intervention to any resident or applicant who (a) meets the service provider's eligibility criteria and (b) desires services, resources permitting.

(j) The housing provider agrees to make community space available from time to time, to facilitate service delivery.

(k) The service provider agrees to maintain services as long as the resident/client wants them and resources permit.

(l) Admission and tenancy are not dependent upon acceptance of services.

(m) When the resident/client decides that she needs a different type of housing (or decides that he or she needs a different type of housing environment), the service providers will assist with locating alternative housing.

(n) Housing providers should not expect service providers to provide voluntary testimony to the housing court, because for most service providers this would violate professional ethics standards. (7-14)

Recommendations to Department of Justice

130. Congress, HUD and the Department of Justice must devote sufficient resources to conduct a decisive campaign to enforce all aspects of the Fair Housing Act. In addition to litigation, the federal agencies should collaborate to mount a national media campaign about the personal and public consequences of such housing discrimination. An important aspect of the campaign would highlight positive examples of integrated communities. (10-3)

131. As Congress has noted in its review of mortgage loan practices, anti-discrimination testing programs and NIMBY barriers to housing, discrimination persists despite the existence of fair housing laws. Thus, the U.S. Attorney General should review the role of the Justice Department regarding the enforcement of the Fair Housing Act. This review should include and address the use of legal arguments against discrimination, an assessment of federal circuit handling of discrimination cases, and the filing of lawsuits against those individuals whose actions result in discrimination. (10-3)

132. The Attorney General should speed the review of all state and local zoning and land use laws which inhibit the ability of protected classes from moving into residential neighborhoods. One way to do so would be for the Attorney General to convene a meeting with all the state Attorneys General to review the Fair Housing Act's preemption of all such laws and to offer the Justice Department's assistance in their efforts. She would have close to 50 federal court cases to use in her review. She would also have examples of states whose Attorneys General successfully conducted such reviews and whose legislatures invalidated the illegal local and state laws. (10-3)

133. The Task Force recommends that the Secretary of HUD convene an interagency work group of HUD, the Department of Health and Human Services, and the Department of Justice to develop a strategy to encourage city attorneys to review local zoning laws which conflict with the Fair Housing Act. Such a strategy could involve the U.S. Conference of Mayors and the League of Cities. (10-3)

134. The White House and Congress must highlight the economic impact of discrimination on individuals and communities and provide significant financial support to advance civil rights enforcement. The White House and Congress should publicly discuss the ways in which discrimination, through NIMBY or through selective admission standards, burdens a community's economy by preventing the development of low- and moderate-income housing, by trapping minority individuals and families in communities of poverty and despair, and by limiting education and employment opportunities. Such discussion coupled with increased funding for enforcement of anti-discrimination laws

would increase the country's understanding of the economic costs of discrimination and the benefits of integration. (10-4)

135. Every federal agency responsible for housing or housing finance programs should ensure that all components of the agency understand how the fair housing laws affect their operations, and adjust their policies, practices, regulations, guidance and manuals accordingly. The reviews and revisions should be Secretarial responsibilities. (10-4)

137. The Task Force recommends that HUD and the Department of Justice enforce the Fair Housing Act to prohibit State and local governments from requiring public hearings (or other special conditions for approval) for the development of public and assisted housing, unless such hearings are required for the development of *all* housing. (10-5)

Recommendations to Providers

35. The Task Force recommends that housing providers notify all applicants at least at the time that final screening begins that applicants with disabilities may request an opportunity to discuss and verify any reasonable accommodation, including considering mitigating circumstances, that will enable the applicant to overcome the negative screening information and to comply with essential lease provisions. (1-33)

52. The Task Force recommends that housing providers, at their discretion, use alternatives to eviction if there is a reasonable expectation that the resident will comply with essential lease provisions. (3-2)

54. The Task Force recommends that, in addition to the various notice requirements already included in HUD program guidance, all such notices must:

(a) Be given in writing and in an accessible format;

(b) Include a clear description of the offense, including how it violates the lease;

(c) Describe what, if anything, the resident can do to cure the problem and prevent the eviction; and

(d) Describe the reasonable accommodation procedure.

It is also good business practice to use plain language and to issue the notices promptly after the housing provider determines that a lease violation has occurred. (3-4)

72. The Task Force recommends that housing providers adopt the following approach for considering requests for reasonable accommodation from residents with disabilities to keep animals which are not service animals, in communities with no-pet policies:

a. When an applicant or resident with a disability asserts and can verify that an animal is therapeutic for his/her disability, the applicant should make a request for a reasonable accommodation; specifically, to be allowed to keep the animal.

b. The housing provider may require verification that the applicant is a "qualified individual with handicaps" as defined in the Section 504 regulations, and the housing provider can also require verification that the animal is necessary in coping with the disability.

c. If both verifications are provided, and the animal has special training in helping the applicant cope with a physical impairment, then the animal is a "service animal" as defined under §504. Service animals are equivalent to other "auxiliary aids" such as wheelchairs and eyeglasses, and as such must be permitted.

d. If, on the other hand, the animal does not have specific disability-related training but is necessary in coping with the disability (for instance, if the animal provides emotional support to a person with a panic disorder), the animal is a "companion animal" not a "service animal" and must be considered under the housing provider's standard reasonable accommodation procedure. The Task Force suggests that it is likely that the animal should be allowed in these instances.

e. The resident will be responsible for the animal's care.

f. If, subsequently, the animal or its care poses a public health problem or results in a lease violation, the problem must be addressed. The provider may send the resident a notice of lease violation.

g. Reasonable accommodations to allow animals, other than service animals, in support of a disability may be subject to reasonable rules; however, a pet deposit may not be required. (4-23)

85. The Task Force recommends that only those services provided by the property and under the direct control of the housing provider be considered when evaluating fundamental alterations. (5-6)

86. In addition the Task Force recommends that, where on-site services are delivered by a third party, housing providers should spell out responsibility for compliance with Fair Housing and Civil Rights laws in a written agreement with the third party. (5-6)

87. The Task Force recommends that the issue of profit distribution is not an issue of fundamental alteration, rather, foregoing profit to make a reasonable accommodation whould be considered in the context of undue financial and administrative burdens. (5-8)

125. Membership in the Clearinghouse model proposed by the Task Force should include housing providers, service providers, residents, membership and advocacy organizations, fair housing enforcement agencies, all state and local agencies responsible for developing the CHAS (Comprehensive Housing Affordability Strategy) and building code enforcement agencies. (8-2)

126. Membership in the Clearinghouse would obligate housing providers to offer information about the availability of low income and accessible housing. Advocates and consumers would work with housing and service providers to inform them of impediments to finding and maintaining housing and support services, and all groups would work towards developing local solutions and strategies to expand the supply of affordable, accessible housing. Housing provider membership dues should be eligible project or budget expenses. (8-2)

127. The clearinghouse should include at least the following services:

(a) A directory, and referral service, for structurally accessible housing.

(b) A directory, and referral service, for public housing, assisted housing and certificates/vouchers.

(c) A bulletin board service listing housing programs which have available units and/or open waiting lists and the numbers and types of units, including affordable and accessible units available under those programs.

(d) A directory of language translation resources, including American Sign Language interpreters, and resources for converting written materials into alternative formats, including Braille and tape.

(e) Information on and referrals to supportive service providers. In particular, residents with lease compliance problems could seek supportive service information through the clearinghouse. (8-2)

128. Beyond the basic services, the Clearinghouse could include services such as the following, based on local need and demand:

(a) Referral to mediation, technical, or legal aid assistance for resolution of admission and rejection disputes, and lease compliance/eviction disputes.

(b) Pre-occupancy training, to give potential residents an opportunity to be coached on lease compliance. The clearinghouse would assist graduates of its training program with developing reasonable accommodations the resident needed to maintain her ability to comply with the lease.

(c) A "rainy day fund" to which providers and others could voluntarily contribute to be used to prevent evictions for nonpayment of rent.

(d) For applicants who are on several waiting lists, a change of address service (to notify the appropriate housing providers when the applicant moves). The same service could be used for persons who are the clients of more than one service agency. In addition, the address service could extend to persons who are homeless or reside in shelters or institutional environments.

(e) Review documents at provider request to assist with meeting 'plain language' and intelligibility requirements. (8-3)

Sample Notice of Lease Termination (Non-PHA)[1]

Date:

Green Acres Apartments is terminating (ending) your lease effective [date]. After [date] you can no longer be a resident at Green Acres Apartments because [describe lease violation; see next page for suggestions for clear and simple communication].

Meeting to Review Our Decision: If you contact us by [date], we will review our decision to end your lease. We will arrange a meeting with someone who was not part of the decision to end your lease. At the meeting you can present your side, bring someone to help you present your case (like a case manager, friend or lawyer) and ask Green Acre's staff and witnesses questions.

Seeing your Resident File: You can arrange to see your resident file by calling us at [our telephone number] or by coming to the office.

Eviction Case: If you do not move out by [date], Green Acres can start a court case in Green Acres City Court asking a judge to evict you. In court you can present your side of the case, have an attorney represent you, bring witnesses and ask us questions.

If you win the court case, you will be able to stay as a resident at Green Acres. If you lose the court case, the judge can order the Green Acres City Marshall to put you out of your apartment, and you will have to pay court costs and fees.

If you have a disability or a handicap: If the reason we have ended you lease is related to your disability or handicap you may be able to stay on as a resident at Green Acres *if you can show:*

> That the reason we are ending your lease was related to your disability but that because of treatment, medication, therapy or other help you now get you will be able to follow the lease and house rules; or
>
> The reason we are ending your lease is related to your disability and a change in our rules, the way we communicate with you, or a change to your apartment, will solve the problem that caused us to end your lease.

---

1 The Task Force cautions that, prior to adoption, model lease violation notices should be reviewed with counsel to ensure that applicable State and local requirements are met.

Legal Help: If you want legal advice or someone to represent you, you may call [local legal services office, bar referral service, state Protection and Advocacy system, etc.].

Signed:

Title/Position:

NOTES TO LEASE TERMINATION NOTICE

Description of the Lease Violation

The violation notice must list *all* incidents the housing provider will rely on, including for each the date and time, the nature of the incident, the manner in which the lease was violated, lease provision or rule violated and how other's rights were interfered with. For example:

> (1) On May 25, at about 2 p.m., you screamed at the repair person we sent to fix your toilet, blocked her from leaving your apartment and threw a shoe at her.
>
> (2) On April 9 we sent you a lease violation notice telling you your garbage must be put out in covered containers or we will get rats. This is required by Paragraph 87 of your lease. We gave you two weeks to follow this rule. Now, one month later, you are still using a garbage can without a lid and rats have been seen by Mr. Mickey going into your can on three nights).

Existing Laws on Evictions

Public Housing:

42 U.S.C.A. §§ 1437d(k) and (l) (West Supp. 1993).

24 C.F.R. § 966 (1993) (good cause and procedures)

Privately Owned HUD Assisted Developments:

12 U.S.C.A. § 1715z-1b (West 1989).

24 C.F.R. § 247 (1993) (§§ 221(d)(3), 236 & 202).

24 C.F.R. § 880.607 (1993) (New Construction).

24 C.F.R. § 881.607 (1993) (Substantial Rehabilitation).

24 C.F.R. § 882.511 (1993) (Moderate Rehabilitation).

24 C.F.R. § 882.759(c) (1993) (Project-based Certificates).

24 C.F.R. § 883.708 (1993) (State Housing Agency).

24 C.F.R. §§ 884.216 (1993) (FmHA).

24 C.F.R. §§ 886.128 (1993) (§ 8 Loan Management)

24 C.F.R. §§ 886.128 and .328 (1993) (§ 8 Property Disposition).

Proposed 24 C.F.R. § 885.630, 52 Fed. Reg. 46,614, 46,626 (Dec. 9, 1987) (Section 202).

Proposed 24 C.F.R. §§ 247.3, 880.607, 881.607 & 883.708, 59 Fed. Reg. 5155 (Feb. 3, 1994) (Criminal Activity).

HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs 4350.3, through CHG-20, ¶¶ 4-17 - 4-21 (Nov. 1981 - Jan. 1992).

Id. at App. 19a, ¶ 23 (Model Lease).

Certificates and Vouchers:

42 U.S.C.A. § 1437f(d)(1)(B)(ii & iii) (West Supp. 1993) (good cause & criminal activity).

42 U.S.C.A. § 1437f(d)(1)(B)(iv) (West Supp. 1993) (notices).

42 U.S.C.A. § 1437f(c)(9) (West Supp. 1993) (90 day notices for business reason evictions).

24 C.F.R. §§ 882.215 & 887.213 (1993) (evictions).

24 C.F.R. §§ 882.118, 882.210, 887.401 & 887.403 (1993) (subsidy termination).

Appendix 8

Contents

Sample Procedure for Responding to Requests for Reasonable Accommodation

General Principles

1. The person requesting the reasonable accommodation is usually an expert in regard to his or her own disability and the accommodations that may be appropriate. Generally, we presume that the information the person provides concerning his or her own needs is accurate and the method proposed for accommodating those needs is the most appropriate.

2. This procedure for evaluating and responding to requests for a reasonable accommodation relies on a cooperative relationship between us and the applicant/resident. The process is not adversarial.

3. The Request for a Reasonable Accommodation Form is designed to help us and applicants/residents. If an applicant/resident does not, or cannot, use the Form, we will still respond to the request for an accommodation.

4. If the accommodation is reasonable (see Procedure 3 below), we will grant it (also see Principle 5 below).

5. Where the reasonable accommodation is requested by an applicant in order to overcome negative information, or by a resident in order to overcome a lease violation, we will make the following additional determinations:
   - ◆ What is the essential impact of the negative information or lease violation? How serious is it, and exactly how does it impact us?
   - ◆ Does the requested accommodation eliminate, or satisfactorily reduce, the essential impact, so that the person can occupy the housing with a reasonable expectation of success?

   If the requested accommodation is reasonable and produces a reasonable expectation of success, we will grant the request.

6. Reasonable accommodations will be focused on the individual and designed to address each person's situation.

7. In some cases, reasonable accommodations may be perceived (incorrectly) by non-disabled residents as conferring a special advantage on a person with disabilities; however, we will not base our decisions on how the decisions will be perceived, but rather on whether the accommodation is effective in removing the barriers which inhibit a person with disabilities from accessing and using the housing program.

8. Communications under this policy will be in plain language, in a format appropri-

ate to meet the communication needs of the person with disabilities. Where the following procedures refer to written documents this plain language directive shall apply and alternative formats will be used in order to communicate information and decisions to the applicant or resident.

9. Any meetings required by this policy will be held in an accessible location.

Procedure 1 - Communication with Applicants and Residents

1. All applicants will be provided the Request For A Reasonable Accommodation Form ("Request Form") at the time of application.
2. All residents will be provided the Request Form again at the time of recertification, upon notice of lease violation, and upon request.
3. We will respond in writing to all Request Forms and, if appropriate, use an alternative format intelligible to the person making the request.
4. All decisions to grant or to deny reasonable accommodations will be communicated in writing (in the appropriate format as noted in 3 above).

Procedure 2 - Sequence for Making Decisions

1. Is the applicant/resident a qualified "individual with handicaps" ?

   (a) If NO, we are not obligated to make a reasonable accommodation, and we may deny the request.

   (b) If YES, go to step 2.

   (c) If more information is needed, either write for more information using the standard Request For Information letter, or request a meeting using the standard Request For Meeting letter.

2. Is the requested accommodation related to the disability?

   (a) If NO, we are not obligated to make the accommodation, and we may deny the request.

   (b) If YES, go to step 3.

   (c) If more information is needed, either write for more information using the standard Request For Information letter, or request a meeting using the standard Request For Meeting letter.

3. Is the requested accommodation reasonable? We will make this determination by following Policy 3 - Guidelines For Determining Reasonableness.

(a) If YES, we will approve the request for reasonable accommodation. A written description of the accommodation will be prepared and included in the approval letter.

(b) If NO, we may deny the request. Denial will be made in writing.

(c) If more information is needed, either write for more information using the standard Request For Information letter, or request a meeting using the standard Request For Meeting letter.

Policy 3 - Guidelines for Determining Reasonableness

1. In accordance with Principle #1, in most instances we will accept the judgment of the person with a disability that an accommodation is needed. However, we retain the option to require the person with disabilities to show the need for an accommodation to enable him/her to access and use the housing program.

2. In accordance with Principle #1, in most instances we will accept the judgment of the person with disabilities that the requested accommodation is the most appropriate for him or her. However, we retain the option to investigate alternatives to the requested accommodation, and/or alternative methods of providing the requested accommodation.

3. If a number of potential accommodations will satisfy the needs of the person with disabilities (are equally effective), we retain the option to select the accommodation which is most convenient and cost-effective for us. This includes the option to select a change in procedure or policy, rather than to make a structural change, when the procedure change would be equally effective.

The following steps refer to requested accommodations which are needed, and which represent the most appropriate means of accommodating the disability:

4. Does the requested accommodation constitute a fundamental alteration? If so, we will deny the request. (Note: See Chapter 5 of the report for a discussion of fundamental alterations.)

5. Does the requested accommodation create undue financial and administrative burdens for us? If so, we will comply with the request only up to the extent that we can do so without creating undue burdens. (Note: See Chapter 5 of the report for a discussion of undue burdens.)

Sample Forms to Illustrate "Plain Language"

The attached forms illustrate the "plain language" principle discussed in Chapter 4 and elsewhere in the report. In addition, these forms also illustrate one method of implementing the Sample Procedure for Reasonable Accommodation, pages 1-3 of this Appendix.

The attached forms include:

- Request for a Reasonable Accommodation
- Request for Information Or Verification
- Request for a Meeting
- Reasonable Accommodation: Favorable Decision
- Denial pf Request for a Reasonable Accommodation

Notes and comments on the forms are also included in this attachment.

Request for a Reasonable Accommodation

[our return address]

If you need:

- a change in our policies or procedures
- a repair or change in your apartment
- a repair or change to some other part of the property
- a change in the way we communicate with you

because of a disability, you can ask for this change, which is called a "reasonable accommodation".

If your request is reasonable, if it is not too expensive, and if it is not too difficult to arrange, we will try to make the changes you need.

We will make a decision as soon as possible, at least within thirty (30) days, unless you agree to an extension of time. We will let you know if we need more information or verification from you or if we would like to discuss other ways of meeting your needs.

If we turn down your request, we will explain our decision, and you may give us additional information.

If you need help in using the form, or if you want to give us your request in another way, we will help you.

Request for a Reasonable Accommodation

The following member of my household has a disability:

Please provide this reasonable accommodation:

I need this reasonable accommodation because:

(◆ Tell us how the accommodation will:

__ help you live in the housing or take part in our program;

__ meet the lease requirements of our program;

__ meet other requirements of our program.

◆ We do not need medical information about your disability.

◆ Do not tell us the name of your disability or the nature or extent of your disability.)

Date: _____

Name: _____

Address: _____

Telephone: _____

Request For Information Or Verification

[our return address]

Date: _____

To: _____

_____

_____

Dear Applicant or Resident:

We have received your Request for a Reasonable Accommodation. We need to know more about [issue, simply and clearly stated] before we can decide.

We need to know more because [reason, simply and clearly stated].

You can give us more information by [acceptable methods of verification]. If this is a problem for you, other ways of providing the information may also be acceptable.

We will not make a decision until we have this new information.

If you think that you have given us this information, or if you think that we should not ask for this information, please call us at [our telephone number]. Please call if you have any other questions.

[signature and closing]

Notes to Request for Information

Examples of how we might describe an issue, and our reason for needing to know:

Issue 1 — Please show us how you meet the definition of "individual with handicaps".

Reason 1 — If you do not meet this definition, we do not have to make the change you requested.

Issue 2 — Please explain why you need a washer-dryer in your apartment when the laundry in your building is wheelchair accessible.

Reason 2 — We need to provide you with a washer-dryer in your apartment only if you cannot do your laundry without it.

Issue 3 — Usually residents just drop off their rent checks — please tell us why you would like to have a sign language interpreter each month when you pay the rent.

Reason 3 — We will provide communication assistance if you can show us that it is necessary.

Issue 4 — You asked for an audio loop to be installed in the community room. Could you please tell us where these loops may be purchased and, if you know, the model number and cost of the system you need.

Reason 4 — We need to know the cost of a loop, and we would like to find the least expensive equipment to meet your needs.

Example of how we might describe the appropriate verification methods:

We have attached a form which can be completed by a qualified person who understands your disability.

Request for a Meeting

[our return address]

Date: _____

To: _____

_____

_____

Dear Applicant or Resident:

We have received your request for a reasonable accommodation. It would help us make our decision if we could meet with you. You may bring someone to help you to this meeting. If you need a sign language interpreter or other assistance, notify us so we can make arrangements to provide appropriate assistance.

We would like to meet on [date, time, place]. If you cannot come at that time, please call us at [our telephone number].

We will talk about [describe issue, simply and clearly] at this meeting.

Please come ready to talk to us about the changes you want. Please bring copies of any information that you would like to give us.

We look forward to meeting with you.

[signature and closing]

NOTES TO REQUEST FOR MEETING

Examples of issues and reasons for needing to meet:

> At the meeting, we would like to discuss the assistive listening device you would like us to install in the community room. We would like to learn more about the system you need and whether this is the only alternative that will work for you.
>
> At the meeting, we would like to discuss whether there are other modifications, less expensive to install, that would meet your needs. Since the modifications you proposed will cost over $_____ and may be too expensive to install, we would like to consider other possible ways to meet your needs.

Approval of Request for a Reasonable Accommodation

[our return address]

Date: _____

To: _____

_____

_____

Dear Applicant or Resident:

We have approved your request for the following change or reasonable accommodation [description]:

___ We can provide you with this accommodation by [date].

___ To make the change you requested, we must have three bids and then arrange installation. This is why we are not able to provide you with the accommodation immediately.

___ [other reason for delay].

Please call us at [our telephone number] if you have any questions.

If you think this change or reasonable accommodation is not what you requested, if it is not acceptable to you, or if you object to the amount of time it will take to provide it, you may request an informal hearing by [describe procedure].

[signature and closing]

Denial of Request for Reasonable Accommodation

[our return address]

Date: _____

To: _____

_____

_____

Dear Applicant or Resident:

You requested the following change or accommodation [describe request]. We have attached a copy of your request form. We have **denied** your request because:

___ You do not meet the definition of an individual with handicaps and we are not required to provide a reasonable accommodation.

___ We think the accommodation you requested is not reasonable because we have decided:

___ You do not need this accommodation in order to enjoy or participate equally in our housing.

___ It will cost too much money.

___ It will create undue financial and administrative burdens for us.

___ It will change the fundamental nature of our program:

We have decided this because [give reasons, in clear and simple language].

We relied on these facts to deny your request [give facts, in clear and simple language].

To make this decision we [tell what documents or records we reviewed, tell which people we spoke with, describe other aspects of our investigative process].

If you disagree with our decision, you may request an informal hearing by [describe procedure].

[signature and closing]

Notes for Denial of Request

Examples of why we might consider a request unreasonable.

"We cannot walk your dog for you. Although your disability requires you to

have a dog, you will have to be responsible for taking care of it because it is not reasonable to expect a landlord to perform this chore for you".

"You requested that we ban children from playing in the courtyard because the noise upsets you. We cannot ban children from the courtyard because the children need a place to play and the playground equipment is in the courtyard."

Example of a description of the facts:

"You told us you walk to work each day. That is a half mile each way. It is only one block to the office to bring in your check. Since this is shorter than your walk to work, we believe you can walk to the office and bring in your check."

Example of who we talked to:

"You asked us to call your physical therapist (Ms. Smith) to verify that you are under treatment for an injury that makes it impossible for you to bring the rent check in person. However, she told us that you can walk one block. She also said that she feels that you will soon have no limitations on your walking. When we met with you to discuss this, you told us that you can walk to the office, but that you preferred not to because it was a 'bother.'"

Three Levels of Problematic Conduct: No Violation, Minor Violation, Serious Violation

It is helpful to divide the behaviors that might trigger intervention by a housing provider into three categories, or levels. This framework can then be used to provide guidance to the on-site staff who are, after all, the people who confront this issue day after day.

Level 1: No lease violation, either substantial or minor.

If no actual lease violation has taken place, it is inappropriate to send a lease violation notice. However, the following actions may be taken:

- Keeping lists of available service and counseling resources and flyers always available and prominently displayed;
- Having on-site service providers who, when they observe behavior of concern could approach the resident with information about their services.
- Other actions specifically agreed by the resident, after full disclosure and provided all residents are treated equally. The Task Force has developed a sample form that a resident may complete that would give the housing provider permission, for a limited time (usually 1 year, between re-certifications), to contact a specific person or agency in situations where the resident is not able to provide consent at the time such consent is needed.

Depending on the circumstances, it may also be appropriate for the housing provider to approach the resident in a way which makes it clear that the housing provider is not acting in a lease enforcement capacity, with an inquiry such as "Would you like some help?".

The Task Force acknowledges that some resident-provider relationships are such that there is an implicit permission for the provider to take action; in these relationships, an intervention would be intended, and interpreted, as a natural part of the relationship, and thus would be appropriate. (See discussion in Chapter 4, pgs. 26 to 31.) However, the Task Force cautions that these situations are the exception and should be considered in light of the foregoing discussion.

Finally, the Task Force wishes to make clear that where the resident engages in behavior that is seriously threatening to his or her own safety or well-being, the housing provider may call whatever local emergency services are available, such as the rescue squad, crisis control center or police. Where the behavior is actually threatening to others there will be a lease violation, and it will be appropriate for the housing provider to send a lease violation notice (and, where the threat is serious and immediate, contacting the police is appropriate as well).

Level 2: Minor lease violation.

The housing provider would respond by sending a lease violation notice (see Appendix 6, Sample Notice of Lease Termination and the discussion of lease violations in Chapter 2, pgs. 7 to 11 of the report).

Regarding minor lease violations, the Task Force notes that there will almost always be either an opportunity to cure the violation or the opportunity to avoid eviction by not committing another minor violation of the lease. Thus, it is particularly important to communicate clearly with the resident, in the interest of changing the pattern of conduct which has led to the lease violation.

However, where minor violations are repeated, and thus constitute grounds for eviction, lease termination is in order.

Level 3: Serious lease violation.

Where there has been a serious lease violation, the housing provider has the right to terminate the tenancy, using the lease violation notice procedure outlined above, together with any additional procedures dictated by State or local law. See also Chapter 3 on Evictions.

Case Studies

The following examples are drawn from the experience of Task Force membersand other sources. They illustrate some of the practical issues which arise in deciding reasonable accommodation issues. The Task Force cautions readers that seemingly similar situations, involving other persons with disabilities, might require different reasonable accommodations. As a general principle, each reasonable accommodation must be fitted to the individual needs of the person with disabilities, in the context of a particular housing environment.

Case 1 - Mr. Smith

From: Cohen, Gene D., *The Older Person, The Older Patient, and the Mental Health System; The Elderly Mentally Ill*, May, 1985, collected articles from hospital and Community Psychiatry Service, Washington, D.C. 20005.

Joe Smith is an elderly man living in a housing project for elderly citizens. Mr. Smith was behaving in an unusual and bizarre manner, and the landlord wanted to evict him. A case worker learned that the man did not physically intimidate anyone. Instead, he went about sprinkling perfume on himself, taping pennies to his wrists, and touching a Bible and a bar of soap to his, lips.

The case worker explained to the manager that the bizarre behaviors were symptoms of an underlying problem, and that symptoms are sometimes indirect messages that the person is seeking help. The case worker suggested that the next time the landlord saw the man, that he ask how the man is doing and indicate concern for him, then suggest he might want to see the doctor in the building's medical clinic.

The landlord followed this suggestion and the elderly man responded and went to the clinic. The clinic doctor learned that the man was having hallucinations of horrible smells, which he tried to dilute by sprinkling perfume over the odors. Mr. Smith also expressed guilt over the sexual attraction he felt for women other than his wife, who was very ill and in bed resting most of the time. His psychotic approach to dealing with this guilt was to attempt to wash it away with the Bible and bar of soap. The pennies took longer to figure out, however, it was noticed that whenever the man talked of the odors, he rubbed the pennies. Since another name for penny is cent, in primary-process thinking a penny might be thought of as its **homonym** scent. Mr. Smith's approach to gaining control over the hallucinations of bad smells was to smother those scents (cents) under tape on his wrists.

While the landlord was not given details of the man's medical condition, the landlord was told that Mr. Smith was experiencing distressing hallucinations of smell that he tried

to control with the perfumes. The landlord's uneasiness about the man, which was largely due to fear of the unknown, was replaced by compassion. The case worker explained to the landlord that a chronic medical problems tend to flare up and then abate long term emotional problems periodically become more apparent and can be brought back under control with proper treatment. The case worker was able to assist the landlord in understanding that Smith had chronic ambulatory schizophrenia.

This case is even more interesting in view of what happened over the ensuing years. The management of the housing project changed several times over a ten year period. Each time the new management rediscovered Mr. Smith and saw him as an urgent problem, one in need of an alternate housing option. Each time the case worker was able to intervene; the man was able to remain in that building with the help of periodic follow up for psychiatric support and psychotropic medication. The management and the neighbors not only tolerated the man, but sometimes even provided him with assistance.

Case 2 - Mr. Jones

Mr. Jones is a very heavy, middle-aged man who cannot hear or speak, and who typically presents a very disheveled appearance. He moved into a public housing building where most of the other residents were elderly.

The other residents complained that Mr. Jones would approach them in the halls and elevators, move very close to them, and make loud unintelligible noises. The other residents interpreted this as threatening behavior.

Upon investigation, the housing authority learned that Mr. Jones was merely trying to communicate with the other residents as best he could. Management held several meetings with residents to explain Mr. Jones' need to communicate and his limitations.

The other residents now accept Mr. Jones and his behavior.

Case 3 - Ms. G.

Ms. G is mentally retarded and is a non-reader. She was on a list to receive housing assistance. A letter arrived at her home informing her that the assistance was available. The letter required a timely response. She did not respond in the time allotted and lost the rental assistance. This problem could have been avoided had the housing provider used the following method, which is generally useful for non-readers:

(a) Give her a piece of letterhead paper or a letterhead envelope, with instructions to tape it by her front door.

(b) Instruct her that every time she saw any mail with that letterhead, she should contact the housing provider (or get assistance in reading and responding to the letter).

Case 4 - Mr. P.

Situation: An advocate was contacted by Mr. P.'s brother after Mr. P. had been hospitalized as a result of an acute episode of schizophrenia. Mr. P.'s brother told the advocate that Mr. P.'s landlord, an assisted housing property, had brought an eviction proceeding against Mr. P. for incidents that had occurred immediately prior to his hospitalization.

The court papers alleged that Mr. P. had committed serious damage in his apartment, had completely broken his electric stove and had damaged the garbage chute in the hallway. There were also some allegations about disruptive behavior, but the focus was on the damage he had committed.

Management and Mr. P.'s family members revealed that at a recent housekeeping inspection the on-site manager had been concerned about Mr P.'s housekeeping. In particular, the manager had told Mr. P. that "his stove was a piece of garbage", by which she intended to tell him that it was so dirty that it had become useless. However, Mr. P. took her remarks literally. He believed that he was being told that his stove was a piece of garbage and that he was being instructed to throw away the stove. It also seemed to him that the proper way to throw away the stove was to put it down the garbage chute. Most of the other damage in the apartment was the result of his taking the stove from his apartment and dragging it out the door.

Mr. P.'s brother, as well as Mr. P.'s social worker at the hospital, had resigned themselves to the fact that there was no hope in keeping his subsidized apartment because they knew he had done this damage. However, Mr. P. had been a resident for 6 or 7 years; throughout that time he had an exemplary residency record. It had only been in the several months before his hospitalization that his housekeeping had deteriorated and that any disruptive behavior had been noticed.

Resolution: The advocate pointed out to the management that Mr. P.'s behavior had resulted from his disability and that Mr. P.'s past behavior had been exemplary. The first reasonable accommodation requested was to postpone any further eviction action until Mr. P. was released from the hospital; this was supported by the fact that he was continuing to pay the rent and that he obviously could not further damage his apartment while he was hospitalized.

The second issue addressed was the damage charges. Mr. P. was fortunate in that the family was very supportive. Mr. P.'s brother agreed to pay for the actual damage that was

done (essentially the cost of replacing the stove). The advocate agreed to hold in escrow an additional amount of money equal to the damage that had been done; this money would be available if Mr. P. committed any further damage within the next twelve months. After 12 months, if no damage had been done, the money would be released back to Mr. P.'s family.

Third, all parties agreed to a "probationary lease" for 6 months. During these 6 months if Mr. P. was to commit any damage to the apartment the housing provider was to be allowed to use an expedited termination procedure. On the other hand, only actual lease violations or violations of the obligations of tenancy could be evictable offenses during the probationary lease. The real purpose of the probationary lease was to spell out to Mr. P. exactly what his tenancy obligations were in more detail than the lease did. It was also to give the housing provider some relief from having to go back to ground zero if Mr. P. could not follow the terms of the lease. The settlement document also spelled out some of the actions Mr. P. would take in order to help himself comply with the lease, such as continuing to attend certain group meetings. However, attending these meetings was not made a condition of the probationary lease or grounds for eviction.

Mr. P. is still a resident several years later. There have not been any further incidents. After one year the advocate was able to return the deposit to Mr. P.

Comments on Case Study #4, Mr. P.:

1. In the notice of lease termination, management should have included an explanation of Mr. P.'s right to suggest a reasonable accommodation.
2. Because Mr. P. was hospitalized at the time management sent the notice of lease termination, management should have ensured that the notice was received by someone who could act on Mr. P.'s behalf.
3. The housing provider would not have been able to require the escrow to protect against future damages; however, it was a useful gesture by the resident, because it demonstrated the resident's understanding of the seriousness of his actions, and the resident's determination to abide by the lease in the future.
4. Similarly, the housing provider would not have been able to require the probationary lease; however, this also was instrumental in achieving a prompt, mutually acceptable settlement.

Case 5 - Mr. F.

Situation: Just prior to Mr. F.'s hospitalization, he had barricaded himself into his public housing apartment using his refrigerator. Since to do so he had to unplug his refrigerator, everything in it spoiled and a horrible smell quickly seeped out into the hallway. When, after the smell was reported to the manager, and the manager real-

ized that Mr. F. had locked himself in, the management called the police. When the police entered the apartment they found that the apartment was in very bad condition. For instance, there was rotten food all over the floors and counter tops and garbage thrown about.

At the time the advocate was notified of the case, no termination notice had been sent. Management had other serious concerns about Mr. F.'s behavior, including apparent threats to other tenants. For instance, two tenants had reported that they had seen Mr. F. carrying a large butcher knife in the elevator. Other tenants were concerned that Mr. F. had made a large black "X" out of electrical tape on his door. They were afraid that this was a threat against them.

While Mr. F. was in the hospital; management reviewed the file with the advocate. Mr. F.'s only on-going problem was housekeeping; all the threatening or violent incidents had occurred immediately before Mr. F.'s hospitalization. A complicating factor was that another tenant's son had written a letter to the housing authority demanding that Mr. F. be evicted immediately or a lawsuit would be filed against the housing authority.

Resolution: Regarding the apparent threats, management agreed that it would be reasonable to accommodate Mr. F.'s disability by giving him a second chance. The facts that Mr. F. had entered treatment and had been hospitalized was sufficient to assure management that Mr. F. would be in an improved state when he was released.

On the other hand, management was concerned about the ongoing housekeeping problems. With Mr. F.'s permission, the advocate contacted the Adult Protective Service, which was able to obtain ongoing housekeeping services, and to arrange for Mr. F's apartment to be put back into its proper state prior to his release.

Mr. F. continues to live as a public housing resident, and no further problems have occurred.

Regarding the apparent threatening behavior, Mr. F. realized that he feels very uncomfortable in the elevator. He now uses the stairs whenever possible because he does not like being in the elevator with other people. He realizes that this brings out behavior that other people feel is threatening.

Case 6 - Mr. C.

Situation: The advocate was contacted by the mother of a single man in his 30's who suffered from a psychiatric disability. As a result of his disability, Mr. C. had trouble speaking, he shook constantly and he had some cognitive difficulties. His only tenant history, apart from living with his mother, was in a boarding house where he rented a bedroom and shared common space.

The housing authority had denied Mr. C. housing because he had failed their housekeeping inspection. When they inspected his room it had been completely in shambles. The

housekeeping inspection also noted that there were empty containers of medication scattered around the room. There was a notation on file that the investigator was concerned about Mr. C.'s ability to remember to take his medication. The advocate took on the case in time for Mr. C.'s "second interview" to discuss possible reasonable accommodations.

The condition of Mr. C.'s room (for which he was responsible for keeping clean) did warrant concern. Mr. C. admitted to the advocate that he really could not keep an apartment clean. Primarily, it was because he did not have the skills, but it was also because he did not have the ability to focus long enough on a project to complete most tasks.

Resolution: His mother and niece agreed to help him keep the apartment clean. The advocate arranged a meeting with Mr. C, his mother, and the admission staff to go over the requirements of tenancy. In addition, the advocate screened a pre-occupancy video tape with Mr. C. and his mother. Mr. C.'s mother also completed a Verification of Individual Providing Assistance stating that she would assist Mr. C. in keeping his apartment clean.

At this point, the housing authority felt reassured that Mr. C. would not pose any health and safety risk if he moved in and they admitted him.

Comments on Case Study #6, Mr. C.:

1. The fact that the investigator found empty medicine containers is irrelevant to Mr. C.'s ability to meet the obligations of tenancy. In this instance, the inspector erred by making unjustified assumptions, and by speculating on areas of conduct which were not related to lease compliance. This created an atmosphere in which discrimination was likely to occur, and in which there was at least the appearance of actual illegal discrimination.
2. The inspector was, of course, justified in noting actual housekeeping problems.
3. If Mr. C.'s mother stops providing the services, but Mr. C.'s apartment stays at the appropriate level of cleanliness, Mr. C. cannot be evicted.

Case 7 - Mr. S.

Situation: A resident with a severe physical disability was moving into a housing authority apartment. The state vocational rehab department had agreed to do over $7,000 worth of work to make the apartment accessible for Mr. S. One of the changes they wanted to make to the apartment was to install a washer/dryer.

Management rejected the proposed plans on the grounds they had a rule that washer/dryers were not permitted, but informed Mr. S. that management would be willing to make the Laundromat accessible. However, because of the nature of Mr.

S.'s disability, he was not able to do laundry in the Laundromat, but needed the washer/dryer in his home.

Resolution: After much discussion, management agreed that it would be a reasonable accommodation to make an exception to their no washer/dryer policy and permit the washer/dryer to be installed.

Comments on Case Study #7, Mr. S.:

1. Because of the nature of Mr. S.' disability, making the Laundromat accessible was not an effective accommodation, but installing a washer/dryer was effective.
2. Because the installation was paid for by the vocational rehab department, there was no significant burden to the housing authority.
3. The housing authority was prepared initially to argue that allowing a washer/dryer in the apartment constituted a "fundamental alteration", but after discussion decided that this issue did not justify the time and expense of a trial.

Case 8 - Ms. B.

Situation: Ms. B. was a resident in an assisted housing property. She was also attending the University of Rochester as a full time student. Because of her use of a wheelchair and the limited paratransit available to her, it was difficult for her to arrange transportation, especially on a student's schedule. As a local resident, Ms. B. would normally have been prohibited from having a dorm room at the University of Rochester campus. However, as a reasonable accommodation the University of Rochester provided her with a dorm room so that she would have a place to rest on campus and to spend the night when she had to study late in the library and could not get home.

The housing provider then made a determination that she was not using her apartment as her primary residence and served a notice of termination of her tenancy on that basis.

Resolution: The housing provider agreed to make an exception to its policies because of Ms. B.'s disability.

Admission Issues Related To Individuals With a History of Illegal Drug Use, Conviction(s) for A Drug Related Crime, or Alcohol Related Lease Violations.

Prepared for the Task Force by

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1993

Introduction

Housing Providers and the public at large are deeply concerned with the influx of illegal drug use and associated criminal activity, as well as violent, damaging and dangerous behavior associated with alcohol abuse. The elimination of drug related crime in public and assisted housing requires a multifaceted approach. One approach touted by many housing providers is the use of strict admission standards to filter out applicants who are allegedly likely to engage in illegal use of a controlled substance and associated criminal activity, or violate the terms of the lease due to illegal drug use. Guidance is needed in the admissions area to help housing providers understand the issues involved in this approach.

(A) Relevant Legal Principles Contained Within The Fair Housing Amendments Act[1] of 1988 (FHAA), §504 of the Rehabilitation Act (§504),[2] the Americans With Disabilities Act (ADA),[3] Accompanying Regulations[4] and Legislative History.

Note: Title II of the ADA is applicable to this discussion because it covers public entities, which includes any State or local government, any department, agency, special purpose district, or other instrumentality of a State or local government, including public housing providers. There is no exclusion under Title II of the ADA for housing covered by the Fair Housing Amendments Act.

Title V of the ADA is also relevant because it contains miscellaneous provisions which are applicable to Title II and this discussion. Public housing providers must also comply with §504 of the Rehabilitation Act and the Fair Housing Amendments Act.

The Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) have not agreed whether private housing which is financed via bonds issued by State or local governments is covered by Title II. Regardless, private housing providers have to comply with the Fair Housing Amendments Act, and if they receive Federal financial assistance, §504 of the Rehabilitation Act.

1) The Fair Housing Amendments Act,[5] §504 of the Rehabilitation Act[6] and the

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1 The Fair Housing Amendments Act of 1988 (PL 100-430) is published in *Statutes at Large* (102 Stat. 1619) and codified in the *United States Code* (42 U.S.C. §§3601-3619[1988]). References to various portions of the act within this chapter cite the specific section of the Code.

2 Section 504 of the Rehabilitation Act of 1973 is codified in the United States Code (29 U.S.C. §794).

3 The Americans with Disabilities Act of 1990 (PL 101-336) is published in Statutes at Large (104 Stat. 327) and codified in the United States Code (42 U.S.C. §§12101-12213 [Supp. II. 1990]). References to various portions of the act within this document cite the specific section of the Code.

4 The Department of Housing and Urban Development's regulations to the FHAA are codified at 24 C.F.R. part 100. HUD's §504 regulations are codified at 24 C.F.R. part 8. The ADA's Title II regulations are codified at 28 C.F.R. part 35 and Title III regulations are codified at 28 C.F.R. part 36. References within this paper cite the specific section of the regulations.

5 42 U.S.C. §3602(h). The FHAA's legislative history states that the "[t]he definition of handicap is not intended to be used to condone or protect illegal activity." H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183. The House Report, together with the 1988 House and Senate floor statements, represent the fullest expressions of congressional intent with regard to the bill that became enacted into law. The Senate adopted the House bill (H.R. 1158) in substantial part, with only minor changes that are not relevant here, and did not publish an analogous committee report. 134 Cong. Rec. S10454-5 (August 1, 1988). In the Senate floor debate on the bill that became law, S. 558, various Senators referred to the House Report to explain the meaning of the bill. See, e.g. 134 Cong. Rec. S10462 (August 1, 1988) (Sen. Kennedy); 134 Cong. Rec. 510464 (August 1, 1988) (Sen. Harkin).
Also see HUD's regulations to the FHAA, Subpart D, §100.201.

6 The Americans with Disabilities Act (Subchapter (V) amended Section 706(8) of the Rehabilitation Act of

Americans With Disabilities Act[7] explicitly exclude from the definition of person with a disability any individual who is currently engaged in the illegal use of a controlled substance. Housing providers may discriminate against an individual currently engaging in the illegal use of a controlled substance when the housing provider acts on the basis of such use. If a housing provider acts on some other basis, such as the individual's HIV status, the housing provider's actions may constitute discrimination.

a) Persons who take controlled substances for a medical condition under the care of or by prescription from a physician are protected, because they are using a controlled substance legally.[8]

2) Individuals who have a history of illegal use of a controlled substance or addiction *and* do not engage in the current illegal use of a controlled substance are protected by anti-handicap discrimination laws if they can otherwise meet the definition of a person with a disability.[9]

a) At what point in the recovery process does a person stop being a current illegal user and become a recovering addict?

The statutes, their regulations and the legislative history of the Fair Housing Amendments Act provide some guidance in answering this question. In accordance with one or more laws, a person is a recovering addict if he or she falls into one of the following categories:

1973 [29 U.S.C. 706(8)] by inserting after subparagraph (B) the following subparagraph:
(C)(i) For purposes of title V, the term 'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.
(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who-
(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging is such use;
(II) is participating in a supervised rehabilitation program and is no longer engaging is such use; or
(III) is erroneously regarded as engaging in such use, bust is not engaging in such use;....

7 Subchapter V of the ADA (miscellaneous provisions), 42 U.S.C. §12210. Also see 28 C.F.R. §35.131.

8 The preamble to the relevant ADA regulation, 28 C.F.R. §35.131, makes this clear. 56 Fed. Reg. 35706 (2nd column) (7/26/1991). (The preamble explains the contents of the ADA's regulations and gives the history surrounding the creation of the regulations). The legislative history of the Fair Housing Amendments Act indicates that the statute was not intended to exclude from protection people who use medically prescribed drugs. See Report of the House Committee on the Judiciary regarding the Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess., at 22(1988); and discussion of other legislative history at 53 Fed. Reg. 45000 (2nd column)(11/7/88).

9 Section 504 of the Rehabilitation Act, the Fair Housing Amendments Act, and the ADA define a person with a disability or handicap essentially the same. A person satisfies these laws' definition if he or she:
1) has a physical or mental impairment that substantially limits one or more major life activities;
2) has a record of such an impairment; or
3) is regarded as having such an impairment.
29 U.S.C. §706(7)(B), 42 U.S.C. §3602(h), and 42 U.S.C. §12102(2). The term disability is used in the ADA, whereas the term used in the FHAA and §504 is "handicap." The use of the term disability in the ADA is not meant to denote a substantive change in the definition, but rather "represents an effort by Congress to make use of up-to-date, currently accepted terminology." 56 Fed. Reg. 35698 (column 1) (7/26/91).

i) Completed a supervised drug rehabilitation program and is not currently engaged in the illegal use of a controlled substance;[10]

ii) Otherwise successfully been rehabilitated and not currently illegally using drugs;[11]

iii) Involved in a supervised rehabilitation program and not currently illegally using drugs;[12] and

iv) Being involved in a self help group, such as Narcotics Anonymous, and not currently illegally using drugs.[13]

Note: Spontaneous recovery, which does occur, is not mentioned in any of the statutes, regulations or legislative history.

b) Is there a definition of current illegal use of a controlled substance?

i) The FHAA, The Rehabilitation Act of 1973, and the ADA do not define current illegal use of a controlled substance. The ADA's conference Report[14] and the preamble to the Title II regulations[15] indicate that Congress intended the ADA to be interpreted in a manner consistent with a reasonable person's idea of whether an individual's drug use is current or that continuing use is a real and ongoing problem.[16]

3) Individuals who are *perceived* to be current illegal users of a controlled substance

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10 See 42 U.S.C. §12210, 28 C.F.R. 35.131(ADA) Subchapter IV of the ADA which amended the rehabilitation Act; H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22(June 17, 1988)(FHAA).

11 See 42 U.S.C. §12210, 28 C.F.R. 35.131(ADA) Subchapter IV of the ADA which amended the rehabilitation Act.

12 See 42 U.S.C. §12210, 28 C.F.R. 35.131(ADA) Subchapter IV of the ADA which amended the rehabilitation Act; H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22(June 17, 1988)(FHAA).

13 H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22(June 17, 1988) (FHAA).

14 In discussing the meaning of "current use" the ADA's Conference Report states the following:

> The provision is not intended to be limited to persons who use drugs on the day of, or, within a matter of days or weeks before, the action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that the person's use is current. H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 87, *reprinted in* 1990 U.S.C.C.A.N. 565, 596.

The quoted excerpt directly refers to ADA's drug use provisions as they apply to the ADA itself. However, the Conference Report goes on to state that the phrase "current illegal use of drugs" has the same meaning under the ADA Amendment to the Rehabilitation Act as under the ADA itself. *Id.* at 88-89, 1990 U.S.C.C.A.N. at 597-598.

15 28 C.F.R. 35.131.

16 The Court in *United States v. Southern Management Corp.*, 955 F.2d 914(4th Cir. 1992), interpreted the Fair Housing Amendments Act' exclusion of "current, illegal use or addiction to a controlled substance." The court in this case concluded that under the particular circumstances of the case an individual who was drug free for one year and was involved in a continuing professional rehabilitation and monitoring program related to his drug use was not excluded from the protection of the federal law.

or addicts, but who in fact are not illegally using a controlled substance are protected by the laws.[17]

4) Title V of the ADA and the regulations to Title II of the ADA provide that public entities (which includes public housing providers and may in some circumstances cover assisted housing providers) are not prohibited from "adopting or administering reasonable policies or procedures," including drug testing, designed to ensure that an individual who has a history of illegal use of a controlled substance is not engaging in current illegal use of such substances.[18] The Fair Housing Amendments Act does not contain a similar provision.

Note: There is a provision in Title V of the ADA that nothing in the ADA is to be construed to invalidate or limit the protection provided by other Federal Laws (and state laws) that provide greater protection for the rights of individuals with disabilities than are afforded by the ADA.[19] An argument may be made that the FHAA provides greater protection for individuals who have a history of illegal drug, and is the applicable law. Public housing providers would thereby not be able to rely on the provisions in the ADA regarding drug testing. Therefore, housing providers who operate publicly assisted programs which do not fall under Title II may not have the same latitude.

a) Drug Testing

The preamble to the ADA's Title II regulations specify that any procedure that is used, *including drug testing*, must be designed to identify accurately *only the illegal use of controlled substances*.[20] The ADA does not authorize inquiries, tests or other procedures "that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal Law, because such uses are not included in the definition of 'illegal use of drugs.'" *A drug test must therefore be limited to substances that are controlled or may not be taken under supervision of a licensed health care professional, such as heroine.*

5) Housing providers may not discriminate against someone solely because he or she is a person with alcoholism.[21]

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17 42 U.S.C. §12210 and 28 C.F.R. §35.131(a)(2)(iii)(ADA); 29 U.S.C. §706(8)(C)(iii)(Rehabilitation Act); H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22(June 17, 1988)(FHAA).

18 42 U.S.C. §510(b); 28 C.F.R. §35.131(c)(1).

19 42 U.S.C. §12201.

20 See preamble to 28 C.F.R. §35.131(c), 56 Fed. Reg. 35706 (3rd column)-35707 (1st column) (7/26/1991).

21 In accordance with the ADA, the FHAA and §504 of the Rehabilitation Act, and their regulations, the phrase "physical or mental impairment" includes alcoholism. 28 C.F.R. §35.104 (ADA); 24 C.F.R. §100.201(FHAA); 24 C.F.R. §8.3(§504). Although §504's HUD regulations include alcoholism within the definition of "physical or mental impairment," a person with alcoholism is not considered a "individual with handicaps" for the purpose of the act if his or her current use of alcohol prevents him or her from participating in the housing program or his or her participation, by reason of his or alcohol abuse, would

Example: If an applicant reveals during the application process that he or she is someone with alcoholism but meets all the eligibility criteria a housing provider could not reject the applicant.

6) Housing providers may not assume that all or substantially all members of a *protected class* (individuals with alcoholism, individuals who have a history of illegal use of a controlled substance) cannot meet tenancy requirements. A housing provider must make a judgement based solely on an applicant's individual qualifications, not his or her protected status.[22]

Note: Individuals who currently illegally use controlled substances are not a protected class.

7) Applicant selection Inquiries

a) The laws do not prohibit housing providers from asking applicants the following questions:

i) Whether an applicant is a current illegal user of a controlled substance.[23]

• In accordance with the FHAA, housing providers may not ask this question of only individuals who have a history of illegal user of a controlled substance. Rather, if they want to ask this question, they must ask it of all applicants. However, it is debatable under the ADA if it is a "reasonable policy," and therefore permissible, for public housing providers to ask this question of individuals who have a history of illegal drug use if they don't ask it of all applicants.

ii) Whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.[24]

Note: The FHAA's regulations specifically state conviction, not arrest. Therefore, any questions relating to arrest are presumptively illegal under handicap discrimination law.

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constitute a direct threat to property or safety of others. 24 C.F.R. §8.3.
The ADA amended the Rehabilitation Act of 1973 so the two laws would conform. In accordance with one of the amendments, 42 U.S.C. §12211 the term "individual with handicaps" does not include any individual who has alcoholism whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others. This amendment makes no mention of the exception applying outside the employment context, thereby indicating that it does not. HUD has not amended its §504 regulations to indicate that this exception no longer applies outside the employment context.

22 A very good discussion of this principle is found in the preamble to the final HUD regulations for the FHAA. See 54 Fed. Reg. 3245 (2nd column)(1/23/89).

23 24 C.F.R. §100.202(c)(4).

24 24 C.F.R. §100.202(c)(5).

b) In general, the law prohibits housing providers from asking an applicant if he or she has a disability or any question directly or indirectly regarding the nature or severity of his or her disability.[25] A housing provider may only ask an applicant such a question if it is:

i) for the purpose of determining eligibility for housing designated for individuals with disabilities or a certain type of disability,[26] (i.e. housing set aside for individuals with a history of drug use); or

ii) to determine whether an applicant is qualified for priority available to persons with a disability or particular disability.[27]

With respect to alcohol and illegal use of a controlled substance the following questions are *examples* of those that are prohibited:

- Do you have a history of illegally using a controlled substance?
- Do you take any prescription drugs?
- Have you ever taken prescription drugs in the past?
- Have you ever been in rehabilitation for illegal drug or alcohol use?
- Do you drink alcohol?
- Have you in the past attended any self help groups?
- Have you ever been in a detox program?

The same types of questions would presumably be illegal under Title II of the ADA as well. The ADA permits public housing providers to engage in reasonable policies and procedures to ensure that an individual who has a history of illegal use of a controlled substance is not presently illegally using drugs. Presumably it is not "reasonable" for a housing provider to ask individuals who have a history of illegal use of a controlled substance any questions unless the applicant has raised mitigating circumstances/reasonable accommodation. In accordance with the ADA (and the other laws), the focus must be on current illegal use, rather than history.

c) If the applicant would be turned down for housing because of tenancy related behavior or criminal activity, and the applicant raises the history of a disability combined with change of behavior as a mitigating circumstance, the housing provider can then require documentation of a change in circumstance. In such instances, the housing provider may ask questions related to the person's disability in respect to the changes, i.e. treatment.

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25 24 C.F.R. §100.202(c).
26 24 C.F.R. §100.202(c)(3).
27 24 C.F.R. §100.202(c)(4).

Example: A standard landlord reference check reveals that two years ago an applicant blasted her stereo every night, had loud parties four times per week that ran into the early morning hours, and often times banged on the doors of her neighbors asking if they had cigarettes or beer. The housing authority may reject this applicant because such behavior would be violative of other tenants' rights to the peaceful enjoyment of their premises. In response to the application rejection letter, the applicant reveals that during that period of time her alcoholism was not under control, that she has not had a drink in eighteen months and that she no longer engages in bad tenancy related behavior. The landlord may ask her to provide documentation that this is true. The applicant must then provide documentation such as that suggested in Section B.

8) A housing provider does not have to rent an apartment to an individual with a disability 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.[28]

a) This exception was not intended to create or permit a presumption that individuals with disabilities, or with a particular type of disability, generally pose a greater threat to the health or safety of others than do individuals without disabilities.[29]

b) If a housing provider asserts that an applicant with a disability poses a direct threat or substantial risk of harm to others, she must establish a nexus between the individual's tenancy and the asserted direct threat.[30]

i) Such a claim must be based on objective evidence (current conduct or a history of overt acts) rather than generalized assumptions, subjective fears and speculations. Reliance on a past history of disability or manifestations of that disability may become discriminatory if action is taken solely on the basis of a person's record rather than the current situation.[31]

c) If a reasonable accommodation could eliminate or sufficiently reduce the risk to health or safety, the housing entity would be required to provide the accommodation.[32]

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28 42 U.S.C. §3604(f)(9) and 24 C.F.R. §100.202(d)(FHAA); preamble to ADA's Title II Regulations, 56 Fed. Reg. 35701(Column 1)(7/26/1991).

29 See the legislative history of the FHAA, 53 Fed. Reg. 45001(Column 3)(11/7/1988) and H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess. 22, at 29-30 (1988). Also see the preamble to the ADA's Title II regulations, 56 Fed. Reg. 35701(1st column)(7/26/1991).

30 H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess. 22, at 29-30 (June 17, 1988).

31 *Id.*

32 The preamble to the ADA's Title II regulations define "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 56 Fed. Reg. 35701 (1st column)(7/26/1991). The preamble then goes

Note: current illegal use of a controlled substance is not a disability under federal handicap discrimination law. As such, the preceding analysis is not applicable to a housing provider's determination that a tenant's current illegal use of a controlled substance poses a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others.

9) A housing provider's duty to provide reasonable accommodation applies to all persons with disabilities, including individuals with alcoholism and individuals who have a history of illegal use of a controlled substance.[33] Therefore, a determination of whether an individual with alcoholism or who has a history of illegal use of a controlled substance is qualified for housing may include reasonable accommodation.

Note: §504 of the Rehabilitation Act treats individuals with alcoholism differently than the FHAA and Title II of the ADA. Section 504 explicitly excludes from its definition of individual with a handicap anyone whose current use of alcohol prevents the individual from participating in the program, or whose participation, by reason of such current alcohol abuse would constitute a direct threat to property or the safety of others.[34] This indicates that reasonable accommodation would not have to be considered. In contrast, the FHAA and Title II do not single out individuals with alcoholism whose use of such substance prohibits them from meeting tenancy requirements for exclusion in its definition of who has a handicap. The FHAA instead provides a general exclusion elsewhere in the statute for any individual whose tenancy would pose 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, provided reasonable accommodation cannot eliminate the threat.[35] The preamble to Title II's regulations states that where questions of safety are concerned the principles established in the regulations implementing Title III of the ADA are applicable and that a person who poses a significant risk to others will not be "qualified" if

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on to state that the "direct threat" language should be interpreted consistent with the United States Supreme Court decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed. 2d 307(1987). Likewise, Congress intended the FHAA to be interpreted consistent with this case. See H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 29 (June 17, 1988).

33 42 U.S.C. §3604(f)(3)(B),24 C.F.R. §100.204(a)(FHAA); 28 C.F.R. §35.130(b)(7)(ADA); 24 C.F.R. §8.33, 24 C.F.R. §8.6(a)(2) and (b) (§504).

34 24 C.F.R. §8.3.
As noted in footnote number 21, the ADA amended the Rehabilitation Act of 1973 so the two laws would conform. In accordance with one of the amendments, 42 U.S.C. §12211 the term "individual with handicaps" does not include any individual who has alcoholism whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others. This amendment makes no mention of the exception applying outside the employment context, thereby indicating that it does not. HUD has not amended its §504 regulations to indicate that this exception no longer applies outside the employment context.

35 42 U.S.C. §3604(f)(9); 24 C.F.R. §100.202(d).

reasonable modifications to the public entity's, practices, or procedures will not eliminate that risk.[36] There is no case law involving the issue of reasonable accommodation and alcoholism under the FHAA or Title II of the ADA.

(B) Given The Legal Principles, What Information During The Admission Process May Housing Providers Require From Individuals With Alcoholism?

Section 5, in Part A above states that housing providers may not discriminate against a person with alcoholism. A housing provider may not assume that an individual who has alcoholism is not qualified for housing by nature of his or her disability. A housing provider must apply the same standard of performance and behavior (tenant selection criteria) to an individual with alcoholism as it holds others. If any unsatisfactory performance or behavior is related to the applicant's disability, the behavioral manifestations of the condition may be taken into consideration in determining whether he or she is qualified. If the individual is unable to meet the tenancy requirements he or she may be denied housing on that basis, provided reasonable accommodation has been considered.

If an applicant would be turned down because of a history of negative housing-related behavior, assisted housing providers may give the applicant the opportunity to provide mitigating circumstances. If an assisted housing provider does not make this opportunity generally available, he or she must inform applicants that if the behavior is as a result of a disability the provider will consider reasonable accommodation. Public housing providers must give a rejected applicant an opportunity to provide mitigating circumstances.

In response to the application rejection letter, the applicant may reveal:

- The behavior was not as a result of the disability, but to factors in the individual's life that have been remedied;
- The behavior was as a result of the alcoholism, but there is evidence of treatment and/or behavior change.

At this point in time the applicant must provide the housing provider with documentation to verify what he or she is saying. If an applicant states that his or her negative housing history is as a result of his or her alcoholism a housing provider may verify that the negative behavior was, in fact, as a result of alcohol abuse. A housing provider could then require a person with alcoholism to document that his or her behavior has changed.

Acceptable indications that objectionable conduct will not reoccur may include:

1) Verification from a reliable professional who treated or treats the applicant indi-

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36 56 Fed. Reg. 35701(Column 1)(7/26/1991).

who have demonstrated a pattern of providing inaccurate information.

b) Verification from a self help program (Narcotics Anonymous-Trusted Servant) indicating that the applicant is or was participating in the program, that there is reasonable probability that the applicant will be successful in refraining from the illegal use of a controlled substances, and that the applicant is not currently illegally using a controlled substance.

c) Verification from a probation officer stating the individual has met, or is meeting, the terms of probation or parole in respect to illegal use of a controlled substance;[38]

d) A voluntary interview with a substance abuse screening team made up of local professionals who will indicate that the applicant has a reasonable probability of success in refraining from the illegal use of controlled substances; and

e) Drug Testing: This may be offered as an option for applicants. There are issues related to this option that housing providers should consider:

- Testing should be an option, rather than a requirement because it is unclear whether public housing providers can require applicants with a history of illegally using a controlled substance to take a drug test. (See #4 above). (As noted above it is unclear whether assisted housing providers are covered by Title II);

- If drug testing is selected as an option it should be narrowly tailored to only pick up the illegal use of drugs, and be considered reliable by those in the field. (See #4, Part A above) Testing should only be conducted at facilities which utilize the National Institute of Drug Abuse guidelines;

  — Many controlled drugs may be taken under medical supervision. For example, cocaine is used in eye procedures.

  — The metabolite in some drugs, such as heroine, cannot be distinguished from legally used substances unless the most sophisticated drug testing is utilized; and

- In conducting drug testing, housing providers must abide by the due process standards established in the relevant state case law, and the 4th Amendment to the United States Constitution.

- The housing provider must pay for all costs associated with drug testing unless the costs are otherwise reimbursed as HUD guidance already requires. Such cost is an allowable project expense.[39]

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38 If applicants have been arrested for drug-related crimes, the terms of their probation or parole very often require drug testing, so such a verification is quite worthwhile.

39 See HUD handbooks 4350.3 ¶2-25 and 7465.1 REV-2 ¶4-1(a)(6).

3) **Note:** Differences in individual cultural backgrounds should be considered when determining what is reliable verification.

a) *What is reliable verification that the person will now be able to meet the requirements of the lease?*

i) If the person was in a residential treatment facility he or she could ask someone there to complete a reference form designed to determine the likelihood that he or she can be lease compliant.

ii) The individual could provide another reference who can document recent lease compliant behavior.

iii) A reference from a reliable individual, such as an employer, documenting compliance in another area of life.

iv) A reference from a clergy person or other spiritual leader who has knowledge of the person's behavior in one or more areas of his or her life.

Recommendations:

1) There needs to be more funding for alcohol and drug treatment on demand.

2) There need to be more incentives for the development of alternative housing for individuals in recovery.

3) Treatment facilities need to be made accessible for individuals with disabilities. Accessibility must include physical access as well as the capacity to treat individuals who have a mental illness or are developmentally delayed as well as have a substance abuse problem.

4) Leases should state that an individual who illegally uses a controlled substance on the premises may be evicted.

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