DISCLAIMER

The users of this manual and other educational information presented by NAHMA, including but not limited to association like training courses, should understand that the information provided is not a substitute for legal advice by competent attorneys. Since fair housing issues are fact specific, the educational information presented should not be relied upon as a source of legal advice or as legal authority with respect to any individual circumstances. Housing providers should seek competent legal advice in developing specific fair housing policies, procedures and practices. Attorneys should review any documents prior to use on your property.

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Members of the Fair Housing Course Task Force – C. Terry Ross, Gwen Volk, Nancy Hogan, Jimmy Kerr, Roxie Munn of Roxie Munn, Inc., Harris Davis of N & H Enterprises, Inc., Johrita Solari of Solari Enterprises, Inc., Karen Steinbaum of SK Management Co, LLC, and Randy Lenhoff of Seldin Companies for the extraordinary contribution of time and energy in developing the concept and soliciting proposals for the course and in reviewing and providing comprehensive feedback to the authors on every aspect of the course.

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CHAPTER 1

WHY WE STUDY FAIR HOUSING LAW

I. Introduction[1]

Learning about our nation's fair housing laws is important for many reasons. Here are the three most important.

II. Fair Housing is "The Right Thing To Do"

On April 11, 1968, seven days after Dr. Martin Luther King Jr. was assassinated in Memphis, Tennessee, President Lyndon Johnson signed the nation's first Fair Housing Act into law. Declaring it to be

> "the policy of the United States to provide . . . for fair housing throughout the United States. . . ."

the Act prohibited private and public housing providers from discrimination on the basis of race, color, religion, and national origin.

- The Act was amended in 1974 to prohibit discrimination on the basis of sex (gender) and in 1988 to prohibit discrimination against families with children under the age of 18 and individuals with disabilities.
- In 1973, Congress extended further protection to persons with disabilities living in federally financed projects by enacting Section 504 of the Rehabilitation Act of 1973.

Subsequent presidents have all stated that the right to live wherever one wants and can afford, remains at the heart of the American dream.

- Yet, decades after passage of the original Fair Housing Act, numerous studies have shown that discrimination in housing remains a compelling national problem.

One court recently observed, "the hallmark of a great society—a true racially and ethnically integrated community—is an elusive goal that unfortunately still has not been achieved in most urban and suburban communities."

III. Fair Housing is Good Business

As our society becomes more and more diverse, the federal government has recognized that fair housing can never become a truly integral way of life in our country without the involvement of the housing industry – developers, contractors, realtors, managers, agents, and so on.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

The National Affordable Housing Association (NAHMA) has been at the forefront of providing training for real estate professionals since the early 1990s with the development of its certification level course, “Fair Housing and Section 504 Compliance”. It also published a “Fair Housing Guidebook” for managers and owners of multifamily housing which is in its fourth edition. The NAHMA Fair Housing Committee has been actively working to promote fair housing training and increased awareness of fair housing.

IV. Fair Housing Violations Can Be Costly

The National Fair Housing Alliance (NFHA) (www.nationalfairhousing.org) released its 2014 Fair Housing Trends report on August 13, 2014, “Expanding Opportunity: Systematic Approaches,” which highlights how the Federal government and non-profit organizations have increased systematic fair housing enforcement through broad-based approaches and traditional case-by case practices According to the report results, fair housing complaints, amounting to 27,352 in 2013, have remained steady compared to recent years. HUD estimates that the number of reported complaints represents less than one percent of 4 million instances of housing discrimination that occur each year.

Key Findings in the report:

- Complaints about discriminatory advertising with language such as “no kids” or “no service animals,” for example, increased by 52 percent
- Homeowners insurance discrimination complaints increased by 59 percent from 2012 to 2013
- Real Estate sales complaints increased by 19 percent
- 27,352 housing discrimination complaints were filed nationwide in 2013;
- Private, nonprofit fair housing organizations investigated 69 percent of all complaints, more than twice as many as all governmental agencies combined.
- The highest incidence of all types of housing discrimination occurred in regions with the most segregated metropolitan areas.
- The Department of Justice identifies under the several settlements under Rental and Sales Discrimination and that sum does not only include money awarded to individual litigants or to federal, state or local government enforcement agencies.
- On April 10, 2014, the court entered a consent decree in *United States v. S-2 Properties, Inc.* (W.D. Pa.). The complaint, filed on September 30, 2013, alleged that a corporate owner and leasing agent violated the Fair Housing Act on the basis of race. The case originated after a series of three tests were conducted by the Department of Justice's Fair Housing Testing Program between February and April 2013 at Baldwin Commons, a 100-unit rental complex in Pittsburgh. The complaint alleges that white testers were shown apartments and were offered the opportunity to rent them while black testers were told that the same apartments were unavailable to rent. Under the consent decree, the defendants will pay a civil penalty to the United States of $15,000, develop and maintain non-discrimination housing policies and attend fair housing training.
- On February 4, 2014, the Division filed a complaint in *United States v. Wallschlaeger* (S.D. Ill.), a case alleging discrimination based on race and familial status by the owners and operators of a mobile home park in Effingham, Illinois. The case is based on evidence developed by the Division's Fair Housing Testing Program.

- On January 8, 2014, the court entered a consent decree in *United States v. Stonebridge (N.D. Tex)*, a Fair Housing Act pattern or practice case against the owners and operators of Stonebridge Apartments, a 184-unit complex outside of Dallas. The complaint, which was filed on April 5, 2013, alleged that the defendants denied apartments to persons of Middle Eastern and South Asian descent, misrepresented apartment availability on the basis of race and national origin, and segregated those persons who were not denied into designated buildings. The consent decree requires training of staff, the adoption of fair housing policies, termination of the apartment manager, $210,000 in damages, and $107,000 in civil penalties.
- On January 8, 2014, the court entered a consent decree in *United States v. Allegro Apts* (E.D. Wis.), a case that was referred to the Division by HUD. The complaint, which was filed on December 2, 2013, alleged that the owners of a 96-unit residential rental property in Racine, Wisconsin violated the Fair Housing Act on the basis of disability by refusing to rent an apartment to a woman who used an assistance dog. The consent decree requires the defendants to adopt a new assistance animal policy, attend fair housing training and pay $8,500 to the HUD complainants.
- On December 30, 2013, the court entered a consent order in *United States v. Edwards* (D. N.H.), a Fair Housing Act case that was referred to the Division by HUD. The complaint, filed on December 16, 2013, alleges that the defendant discriminated on the basis of familial status by enforcing a policy that prohibited children in rental housing and by conditioning a tenant's continued residence on his finding alternate accommodations for his daughter. The consent order contains injunctive relief and requires the defendant to pay $5,385.50 in damages to the complainant and a $250 civil penalty to the United States.
- On December 12, 2013, the court entered a consent decree in *United States v. 61 Main Street Corp.* (S.D.N.Y). The complaint, filed on December 2, 2013, alleges discrimination based on race or color. The consent decree includes injunctive relief and payments by the defendants of $60,000 into a settlement fund to compensate aggrieved persons and $32,000 to the United States in civil penalties.
- On November 25, 2013, the United States Attorney's Office filed a Fair Housing Act complaint in *United States v. Greenbrier Village Homeowner's Ass'n (D. Minn.)*, alleging that the owners and managers of a condominium complex in Minnetonka, Minnesota enacted unreasonable and discriminatory rules applicable to families with children.
- On October 25, 2013, the Division filed a Fair Housing Act complaint in *United States v. Martin Family Trust* (N.D. Cal.) alleging that the owner, manager, and staff of Woodland Garden Apartments discriminated against five complainant families and a local fair housing organization on the basis of familial status and engaged in a pattern or practice of discrimination against families with children.
- On October 3, 2013, the Division filed a Fair Housing Act complaint in *United States v. Toone* (E.D. Tex.), alleging that the owners of an RV park discriminated on the basis of sex against a transgender RV resident and her roommate.
- On September 30, 2013, the Division filed a Fair Housing Act complaint in *United States v. Housing Authority of the City of Ruston* (W.D. La), alleging that the Housing Authority has engaged in a pattern or practice of racial discrimination in the placement of new residents in its public housing complexes and in the granting of transfers to residents of the authority's properties. The complaint alleges that the result of these discriminatory policies has been the preservation of the original de jure segregation in effect when the authority began operating in the 1950s.

- On September 30, 2013, the Division filed a complaint in *United States v. Zaremba Management Co.* (N.D. Ohio), alleging that the owner and managers of an apartment complex in Cleveland, Ohio violated the Fair Housing Act by discriminating on the basis of familial status. This matter was developed by the Division's Fair Housing Testing Program.
- On September 9, 2013, the court entered a consent decree in *United States v. Wilson* (W.D. Ky.). The complaint, filed on August 27, 2013, alleges that defendants violated the Fair Housing Act by discriminating against African-American apartment seekers and making statements indicating a preference for families without children for certain available apartments. This matter was developed by the Division's Fair Housing Testing Program. The consent decree contains civil penalties of $22,000.
- On August 15, 2013, the court entered a consent decree in *United States v. Highland Management Group, Inc.* (D. Minn.). The complaint, filed on August 13, 2013, alleged that defendants discriminated against Somalis in violation of the Fair Housing Act. Evidence developed by the Division's Fair Housing Testing Program showed that Somali testers were told to make appointments to see apartments, whereas white testers were shown apartments when they walked in. The consent decree contains injunctive relief and civil penalties of $30,000.
- On August 15, 2013, the court entered a consent decree in *United States v. Townhomes of Kings Lake HOA, Inc.* (M.D. Fla.). The complaint, filed on October 9, 2012, alleged that the homeowners association and property manager of a 249-townhome community in Gibsonton, Florida discriminated against families with children, in violation of the Fair Housing Act, by maintaining and enforcing an unlawful occupancy limit policy. The consent decree provides for $45,000 in damages to the named aggrieved persons, $85,000 for a settlement fund, $20,000 in civil penalties, and standard injunctive relief.
- On August 1, 2013, the court issued a final judgment in *United States v. Hylton* (D. Conn.), a Fair Housing Act race discrimination case that was tried to the court on March 27 and 28, 2013. The complaint, which was filed on October 7, 2011, alleged that the Hyltons, a black married couple, violated the Fair Housing Act by refusing to allow a mixed-race couple to sublet their unit to a black woman with children, because they did not want "too many blacks" at the property. On May 1, 2013, the court issued a ruling ordering that a judgment of $31,750 be entered in favor of Jermaine and Taika Bilbo ($1,750 for the loss of their security deposit, $15,000 for emotional distress and $15,000 in punitive damages) and that a judgment of $44,341.05 be entered in favor of DeMechia Wilson ($4,341.05 in economic damages, $20,000 for lost housing opportunity and $20,000 in punitive damages). On July 26, 2013, the court issued an order for injunctive relief containing a general injunction, fair housing poster and logo requirements, the requirement to adopt and implement a nondiscrimination policy, mandatory fair housing training and reporting and recordkeeping requirements for three years. This case is on appeal.
- On June 27, 2013, the court entered a consent order in *United States v. Lawrence Properties* (M.D. Ala.). The complaint, filed on September 7, 2012, alleged that defendants violated the Fair Housing Act by refusing to rent a lot at a mobile home park to an African American woman and her family. The complaint also included a pattern or practice allegation based on three former employees' statements that the defendant owner stated that he did not want to rent to African Americans. The consent order provides for $25,000 in damages for the HUD complainants, a $10,000 civil penalty and injunctive relief.
- On June 24, 2013, the court entered a consent order in *United States v. Altoona Housing Authority* (W.D. Pa). The complaint, filed on December 14, 2012, alleged that the housing

authority evicted an African-American tenant with less due process than was given to white tenants with similar or more severe lease violations. The consent order requires the housing authority to implement a complaint policy, attend fair housing training, pay $35,000 to the HUD complainant and provide the HUD complainant a housing choice voucher that is immediately portable outside the jurisdiction of the housing authority.

And there is no end in sight.

Simply put, knowledge of fair housing laws has never been more important.

C H A P T E R 2

HOW OUR LEGAL SYSTEM WORKS

I. Introduction[1]

Understanding how our legal system works will assist students in understanding the interrelationship among fair housing statutes passed by Congress, regulations, handbooks and other forms of guidance issued by federal agencies, and state, county and local fair housing laws.

II. Organization Of The Federal Government

Because our nation was founded as a federation of independent colonies, the U.S. Constitution established a balance of power between the newly formed states and federal government.

- In addition to setting forth the boundary between federal and state law, the Constitution also established a "separation of powers," or a system of "checks and balances" within the federal government itself.

Thus the Constitution created the three branches of government we are familiar with today – the legislative branch (Congress), the executive branch (the President and Executive Agencies), and the judicial branch (the Supreme Court, lower Appellate Courts and Trial Courts).

The legislative branch creates laws known as "statutes."

- The Fair Housing Act and The Rehabilitation Act of 1973 are the two principal statutes we will study.

The executive branch, including executive agencies, like the Department of Housing and Urban Development (HUD), the Department of Agriculture's Rural Housing Service and the Department of Justice (DOJ), to name only three, are, among other things, empowered by the Constitution to implement and administer statutes.

The Constitution empowered the judicial branch to hear, among other things, legal disputes (cases) that involve questions of constitutional or statutory law. This often requires courts to interpret those laws and their application in specific instances.

Of course courts are prone to interpret laws differently. The ultimate arbiter of the law in this country is The Supreme Court of the United States, whose decisions take precedence over all other judicial bodies.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

III. Agency Specific Laws

Although executive branch agencies possess only those powers delegated to them by statute, these can be quite substantial. Statutes frequently mandate that federal agencies promulgate rules and regulations that amplify more general statutory provisions.

- In passing the Fair Housing Act, for example, Congress directed HUD to issue interpretive regulations.
- Congress also empowered HUD to investigate and enforce violations of the Act.

In addition to constitutional law, statutory law and regulatory law, our nation's body of laws also includes such things as executive orders and agency notices or directives.

- Executive orders consist of presidential instructions to one or more executive agencies regarding their operations and policies.

In turn, many federal agencies employ a system of notices, handbooks and operation manuals to communicate with staff and program participants regarding agency expectations in the areas of program operations and the further application and implementation of agency regulations.

- One agency that has taken full advantage of such a system is HUD. HUD's Directive System is comprised primarily of handbooks. Handbooks, such as HUD's Occupancy Handbook 4350.3 REV-1, are a key source of understanding how HUD requires its programs to operate.
- HUD's handbooks contain rules that program participants must follow, as well as advice regarding what program participants may or may not do.

An important note about state and local laws: Housing providers are invariably subject to federal, state and local civil rights laws whose specific obligations frequently differ.

- The general rule is that housing providers are obligated to comply with the strictest federal, state or local law that is applicable to them; however, this training course is simply not able to cover the variety and complexity of the state and local laws that exist across the country.

Although we have included a summary of the most important state fair housing laws in Appendix 2, we strongly recommend that you consult with your own attorney should any questions arise about the laws in your area.

C H A P T E R 3

PRINCIPAL FEDERAL FAIR HOUSING LAW

I. Introduction[1]

This chapter outlines the two principal federal fair housing laws – The Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 – and briefly discusses Title VI of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. This chapter also includes a brief description of the regulations and handbook HUD has issued to implement these laws.

II. The Fair Housing Act[2]

The original Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968, or simply as "Title VIII," prohibited discrimination in residential real estate transactions, but only when the discrimination was based on a person's race, color, religion, or national origin, commonly known as "protected classes" or "protected categories."

The original Fair Housing Act made it illegal to:

- Refuse to rent or negotiate for "or otherwise make unavailable or deny" a dwelling unit.
- Discriminate in the "terms, conditions, or privileges of a sale or rental" of a dwelling unit or in the "provision of services or facilities in connection therewith."
- Make or publish any discriminatory statement in regard to a dwelling unit.
- Misrepresent the availability of a dwelling.

In 1974 the act was amended to include "sex" (or gender) as a protected class.

- However, the most significant changes to the original Act came about in 1988 with passage of the Fair Housing Amendments Act.
- The 1988 amendments expanded both the original Act and the 1974 amendments by including two new protected classes – "handicap" (or disability) [3] and "familial status."

Apart from investigating complaints of housing discrimination and acting as a mediator or conciliator if the parties wished, HUD had virtually no enforcement authority until the Fair Housing Amendments Act of 1988 became law. These new provisions are discussed in detail in Chapter 11.

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[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.
[2] The complete text of the Fair Housing Act may be found in Appendix 3A.
[3] Although both acts use the term "handicap," the term "disability" is synonymous and preferred, and will be used in the remainder of this training wherever possible.

III. Section 504 of the Rehabilitation Act of 1973

A. The Federal Financial Assistance Requirement

In 1973 Congress added Section 504 to the Rehabilitation Act.[4]

- In a nutshell, Section 504 makes it illegal for entities that receive federal financial assistance to discriminate against "qualified handicapped individuals."

While the Fair Housing Act applies to all non-exempt housing, Section 504 prohibits discrimination on the basis of disability in any program or activity that receives financial assistance from any federal agency.

To understand which housing providers are covered by Section 504 – and why –it is important to understand what the term "federal financial assistance" means.

- HUD defines the term to mean "any grant, loan, contract or any other arrangement" provided by the Department.

- HUD also defines federal financial assistance to include community development funds in the form of proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974.

Perhaps the most well known form of federal financial assistance involves participation in one of HUD's multifamily housing programs.

The following are examples of housing programs that are considered to be recipients of federal financial participation, and therefore subject to Section 504. This list is not inclusive of all such programs.

- Title I Community Development Block Grants (Housing & Community Development Act of 1974)

- Title I Property Improvements Loans and Manufactured Home Loans (Title I of the National Housing Act)

- HOME Investments Partnerships Program, Title II of the Cranston-Gonzalez National Affordable Housing Act.

- Lower-income public housing programs (including operating subsidies, modernization and Indian housing and comprehensive Improvement)

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[4] Section 504 of the Rehabilitation Act of 1973 states: No otherwise qualified individual with handicaps … shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance….

- Section 8 Lower-income Rental Assistance (U.S. Housing Act of 1937), including New Construction, Moderate Rehabilitation, and Substantial Rehabilitation Programs
- Section 8 Certificate and Voucher Programs. The recipient is the provider of the certificate or voucher (often a PHA)
- Rent Assistance Payment Program
- Rent Supplement Program
- Section 107 Grants (Housing and Community Development Act of 1974)
- Section 108 Loan Guarantees (Housing and Community Development Act of 1974)
- Section 202 Supportive Housing for the Elderly (Housing Act of 1959)
- Rural rental housing for the elderly and families of low and moderate income persons, Section 515, Administered by the Rural Development Agency
- The section 236 Interest Reduction and Rental Assistance Payments program
- Section 207 Multifamily Rental Housing (National Housing Act)
- Section 213 Cooperative Housing (National Housing Act)
- Section 221(d)(2) Homeownership Assistance for Low- and Moderate-Income Families (National Housing Act)
- Section 221(d)(3) Multifamily Rental Housing for Moderate-Income Families (National Housing Act)
- Section 223(f) Existing Multifamily Rental Housing (National Housing Act)
- Section 232 Nursing Homes, Intermediate Care Facilities, and Board and Care Homes (National Housing Act)
- Section 234 Condominium Housing (National Housing Act)
- Section 255 Home Equity Conversion Mortgage (HECM) (National Housing Act)
- Section 811 Supportive Housing for Persons with Disabilities (Housing Act of 1959)
- Below Market Interest Rate Program (BMIR)

In contrast to the above programs, federal financial assistance does not include any HUD-provided contract of “insurance or guaranty.”

- Thus, participation in the Section 231 program, which provides mortgage insurance for elderly housing, does not constitute the receipt of federal financial assistance.

- Nor does federal financial assistance include benefits received under the Low Income Housing Credit (Tax Credit) program or any other benefits, credits or incentives received as a result of programs created by the Internal Revenue Service.

Recipients of federal financial assistance include any entity that receives federal financial assistance directly from HUD or through another recipient.

However, recipients do not include the residents themselves, who are considered the ultimate beneficiaries of the assistance.

Nor are housing providers that receive Section 8 payments from a recipient, invariably public housing authorities, on behalf of eligible families or through a voucher program considered recipients.

Providers that receive "project-based" Section 8 assistance, however, are recipients of federal financial assistance.

B. What Makes Section 504 Different From the Fair Housing Act?

Although The Fair Housing Act and Section 504 share many similarities, it is important to understand their differences.

- For example, while both acts prohibit certain types of discriminatory conduct against persons with disabilities, Section 504 applies only to certain covered entities (called "recipients").
- Section 504 also requires recipients to take affirmative steps to ensure their compliance with the Act.

Instead of placing the emphasis on prohibited conduct, Section 504 emphasizes the need for housing providers to afford persons with disabilities an equal opportunity to participate in their housing programs and related services.

IV. HUD's Rules and Regulations

A. Fair Housing Act Regulations

HUD's fair housing regulations were issued by the Department pursuant to its authority to administer and enforce the Fair Housing Act.

The regulations, which are found in Title 24, Part 100 of the Code of Federal Regulations (written as "24 C.F.R. Part 100"),[5] sets forth the Department's "interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions."

The regulations provide more detailed description of the types of discriminatory acts that the Fair Housing Act prohibits.

[5] The complete text of HUD's Fair Housing regulations may be found in Appendix 3B.

B. Section 504 Regulations

Similarly, HUD's Section 504 regulations, found at 24 C.F.R. Part 8,[6] implement the Department's administration and enforcement of Section 504 with respect to all "applicants for, and recipients of, HUD assistance in the operation of programs or activities receiving such assistance."

HUD's Section 504 regulations require that housing providers take affirmative action with respect to their community outreach program as well as access to their facilities and services.

HUD's regulations also require housing providers to evaluate their own compliance and make any necessary modifications in their rules or behavior.

C. HUD's Occupancy Handbook for Multifamily Programs, 4350.3 REV-1

HUD's Occupancy Handbook for Multifamily Programs is written for tenants, owners and managers of HUD-subsidized multifamily housing programs, as well as for HUD staff and contract administrators.

- The handbook sets forth in some detail the requirements and procedures housing providers must take to ensure that eligible applicants are selected for occupancy, that tenants receive meaningful access and the proper level of assistance, and that tenants are treated fairly and consistently.

Chapter 2 of the handbook, entitled "Civil Rights and Nondiscrimination Requirements" provides an overview and analysis of key federal civil rights and nondiscrimination requirements. It also includes examples to help explain these requirements and notes how to address circumstances when federal, state, and local requirements overlap.[7]

V. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin. In simple terms, Title VI was intended to ensure that public funds are not spent in a way that results in discrimination on the basis of race, color or national origin.

- Although the Fair Housing Act applies to virtually all types of residential housing, both Title VI and Section 504 apply only to recipients of federal financial assistance.[8]

Title VI contains virtually all of the same prohibitions covered by the Fair Housing Act, namely:

- It is illegal to segregate, restrict or deny a person any housing, accommodations, facilities, services, or other benefits on the basis of race, color or national origin.

- It is illegal to provide any housing, accommodations, facilities, services, or other benefits to a person on the basis of race, color or national origin, which are different, or are provided in a different manner, from those provided to others.

- It is illegal to discriminate in occupancy, admission, enrollment, eligibility, membership, or other requirements or conditions of housing.

As you can see, a housing provider that is covered under Title VI (race, color and national origin) and Section 504 (disability) will also be covered under the Fair Housing Act (race, color, religion, national origin, sex, disability and familial status).

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[6] The complete text of HUD's Section 504 regulations may be found in Appendix 3C.
[7] Chapter 2 of HUD's Occupancy Handbook may be found in Appendix 3D.
[8] HUD's Title VI regulations are found at 24 C.F.R. Part 1.

VI. The Americans With Disabilities Act

The Americans with Disabilities Act prohibits discrimination against individuals with disabilities in private sector employment and public services, including public accommodations, transportation, and telecommunications. Provisions of the ADA that affect housing providers are:

A. Employment

Employers with 15 or more employees may not refuse to hire qualified employees who have disabilities, and must provide reasonable accommodations where needed to enable the person to perform essential job functions.

B. Public Accommodations

Leasing offices and the parking lots that serve the office and other areas used by the public (in contrast to areas used by residents and their guests) are considered to be public accommodations.

If the leasing office was built prior to January 1993:

- The housing provider is required to remove architectural barriers to persons with mobility, visual and hearing impairments, if such changes are “readily achievable,” meaning without great difficulty or expense.
- Although alterations are not required, when they are made, they must follow to the ADA Accessibility Guidelines (ADAAG)[9] "to the maximum extent feasible".

If the leasing office was built after January 1993:

- The ADA requires that the premises be fully accessible according to ADAAG.

The ADA, when it is applicable to “recipients” does not supersede Section 504. In other words, where both laws apply to a housing project, the project must be in compliance with both laws.

[9] The ADA Accessibility Guidelines (ADAAG) may be found in Appendix 3E.

CHAPTER 4

PROTECTED CATEGORIES UNDER THE FAIR HOUSING ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

I. Introduction[1]

While fair housing laws prohibit "discrimination," it is important to recognize that discrimination per se is not illegal – in fact, having the capacity to discriminate is essential to being human. When we choose to buy Coke rather than Pepsi or support one particular sports team over another, we discriminate. We also discriminate when we treat people differently. When we refuse to allow smokers in only certain parts of a building – or not at all – we discriminate.

- By discriminating in these ways, have we violated the law? The answer is no; only certain forms of discrimination are illegal.

II. Federally Protected Categories

Civil rights laws prohibit discrimination against certain protected "categories" or "classes" of people. While state and local civil rights laws frequently extend protection to additional categories not covered under federal law, *see* Appendix 2, the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973 and Title VI together cover only these seven categories:

1. Race
2. Color
3. National Origin
4. Religion
5. Sex (Gender)
6. Disability
7. Familial Status

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

III. Federally Protected Categories in Detail[2]

1. Race

All recognized races are covered under this category. Although complaints brought by whites are frequently called "reverse discrimination" cases, the law does not recognize that distinction – all races are entitled to the same protection.

- NOTE: HUD funded properties are required by executive order and regulation to maintain racial and ethnic data on applicants and residents.[3]

2. Color

Although the same individual may claim discrimination on the basis of both race and color, color means exactly that – the color or shade of one's complexion and not one's race, and is a separate and distinct category.

Cases involving color only, rather than race and color, typically involve individuals of the same race.

- For example, a light-skinned African-American landlord who rejects the application of a darker skinned African-American may be sued for discrimination based on color.

3. National Origin

National origin refers to the country where one was born as well as the country where one's ancestors come from.

- Thus, national origin discrimination occurs when a landlord disfavors individuals because they or their ancestors come from a particular country.

Again, there may be some overlap among race, color and national origin claims.

- For example, a light skinned Indian landlord who rejects a darker skinned Pakistani may be sued for race, color and national origin discrimination.

Recipients of federal financial assistance are also subject to affirmative obligations to ensure equal access to their programs and activities by "LEP persons," those who do not speak English as their primary language, or who have a limited ability to read, write, speak, or understand English. HUD issued final guidance on this subject.[4]

[2] Students will note that "ethnicity" is not one of the seven protected categories, although the term does relate to elements of one's racial background and cultural ties.
[3] Appendix 4 contains the Race and Ethnic Data Reporting Form that must be used by HUD funded properties.
[4] The complete text of HUD's final LEP guidance may be found in Appendix 7.

4. Religion

Cases involving discrimination based on religion include those filed by individuals who observe a particular set of religious practices that may differ from that of the housing provider, or those who observe no religious practice at all.

- For example, a landlord who advertises for "Christian tenants" violates the rights of Muslims, Jews, and others, as well as those who have no religious affiliation at all.

- NOTE: Landlords who have refused to rent to certain individuals based on their own deeply held moral or religious beliefs, for example, a fundamentalist Christian landlord who refuses to rent to an unmarried couple, have begun to use religion as a defense to housing discrimination claims.[5]

5. Sex (Gender)

A. In 1974 the Fair Housing Act was amended to insure that each and every act that would be discriminatory if taken against a person because of his or her race, color, national origin or religion, would henceforth be discriminatory if taken against a person because of his or her gender.

- As a result, landlords who refuse to rent to women because "they cannot make any repairs to the unit" or who refuse to rent to men because "they are less apt than women to keep their unit clean" violate the Fair Housing Act.

Cases involving sexual harassment are becoming more common. Sexual harassment cases involve two distinct types of violations:

1. "Quid pro Quo" sexual harassment, where sex is made a condition of tenancy or continued tenancy.

2. "Hostile Environment" sexual harassment, where a tenant is harassed (by management, staff or even by another neighbor) to the point where continued tenancy is made virtually unbearable.

B. Violence Against Women Reauthorization Act of 2013 (VAWA).

HUD has treated some violations of VAWA to also be violations of the Fair Housing Laws.

This federal law applies to the following:

- Project-based Section 8
- Housing Choice Vouchers – Housing Choice Vouchers
- Supportive Housing for the Homeless
- Section 6 Public Housing
- Section 202 Programs (except Direct Loan and 202/162)
- Section 811 Programs
- HOPWA
- Section 236 Programs

[5] A number of courts have addressed this issue, yet no single conclusion has emerged. Again, we recommend you consult your own attorney to see what the courts in your jurisdiction have said.

- Section 221(d)(3) BMIR Programs
- HOME
- LIHTC
- RHS Housing Programs

Under VAWA, an applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy.

The Landlord may request in writing that the victim, or a family member on the victim's behalf, certify that the individual is a victim of abuse and that the certification be completed and submitted within 14 business days, or an agreed upon extension date, to receive protection under the VAWA. Failure to provide the certification or other supporting documentation within the specified timeframe may result in eviction. HUD has provided a form (Form HUD-5382) for the VAWA Certification.

6. Disability

According to a 2005 study by the National Fair Housing Alliance, a consortium of civil rights advocacy groups, disability cases now account for the majority of reported complaints.

- A person with "a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of having such an impairment or being regarded as having such an impairment" is disabled under both the Fair Housing Act and Rehabilitation Act.

Major life activities include walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself.

Persons with disabilities include persons who have physiological disorders or conditions, cosmetic disfigurements, or anatomical losses affecting one or more or the body's systems. The terms includes, but is not limited to diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, organic brain syndrome, emotional or mental illness and specific learning disorders. Individuals with developmental disabilities, persons who are HIV positive or persons with full-blown AIDS, alcoholics, and persons recovering from an addiction to illegal drugs, may be included as well.

The law also applies to individuals who have a history of such impairments as well as those who are perceived as having an impairment.

- Thus, a person with a speech impairment who the landlord believes is developmentally disabled and thus not competent to sign a lease, may still be covered because he or she is perceived to be developmentally disabled.

- A person who is thought or perceived to have HIV and is denied housing because of this perception is protected from this discrimination even though he does not actually have HIV.

Persons who are “associated” with a disabled person, such as a family member or friend, are also covered.

- However, individuals who pose a direct threat to the health or safety of other individuals or to property are not considered disabled even though they meet the statutory definition.

Coverage under Section 504 of the Rehabilitation Act of 1973 is virtually identical to coverage under The Fair Housing Act, with one exception:

- Section 504 refers to persons with disabilities who are “otherwise qualified” for the program, service or activity in issue.

To be otherwise qualified means the individual must meet the essential eligibility requirements of the program, service or activity in question, including, for example, requirements for tenancy.

While individuals with disabilities are, under certain circumstances, entitled to “reasonable accommodations” (exceptions or changes in rules, policies, practices, or services) and “reasonable modifications” to physical structures (*see* Chapter 9, Section III) individuals with disabilities are never excused from meeting their housing provider’s rules of tenancy.

7. Familial Status

Familial Status should not be confused with Marital Status, which is not a protected class. Under the Fair Housing Act, "familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.”

The Act also protects “any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.”

IV. HUD’s Policy on Sexual Orientation, Gender Identity and Marital Status

Sexual orientation, gender identity and marital status are not protected classes. However, HUD’s policy is to ensure that all programs are open to eligible individuals and families regardless of sexual orientation, gender identity and marital status.

The policy prohibits asking about sexual orientation and gender identity for purposes of eligibility. Voluntary reporting is permitted under this policy. Violations of this policy are handled through HUD program enforcement. This policy applies to HUD assisted and insured properties.

CHAPTER 5

KEY PROVISIONS OF THE FAIR HOUSING ACT

I. Introduction[1]

The Fair Housing Act makes it illegal to discriminate in a broad range of residential real estate transactions and activities. This chapter discusses the Act's most important prohibitions.

II. Transactions Covered by the Fair Housing Act

1. Refusing to rent a unit to a member of a protected class
2. Making discriminatory statements
3. Using discriminatory advertising
4. Imposing discriminatory terms and conditions on a member of a protected class
5. Harassment (including sexual harassment)
6. Retaliation
7. Steering
8. Denying reasonable modifications or accommodations to a person with disabilities (which is covered separately in Chapter 9).

III. Refusing To Rent To A Member Of A Protected Category

Refusing to rent to someone because of their membership in a protected class also includes refusing to negotiate for the rental of a unit or falsely claiming that a unit is unavailable. For example:

- A housing provider denies the application of a Hispanic family because the family has poor credit. Later that day, the same housing provider approves the application of a non-Hispanic family with equally poor credit.

- An African American applicant is told that the two-bedroom unit he called about that morning was just rented. In fact, the unit is still available.

Delay and discouragement of an applicant can also be viewed as denial or refusal to rent. For example:

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

- Property A takes an excessively long time (2 weeks) to screen a Hispanic applicant and make the decision of whether to accept his application, so the applicant accepts a unit at property B. If Property A normally screens applicants within 1 week, the applicant could move into Property B and then file a complaint that Property A's delay was merely a ploy to discourage him from living at Property A because of his national origin.

- A family with young children is informed during its initial interview that the property does not have any families with young children and many of the existing residents work late at night and do not like to be disturbed by early morning noise. The family could file a complaint alleging that the property was attempting to discourage it's application on the basis of familial status.

Questions Pertaining to the Protected Status of the Property's Residents

It is common for applicants to inquire, "What kinds of people live here?" This question is often an attempt by the applicant to learn the race, national origin, or number of children of the property's residents. It is important to not provide information on the protected status of your property's residents because in doing so, it is very easy to either encourage or discourage the applicant based upon his/her protected status. For example,

- Connie, an applicant asks the manager, "Do you have many Asians that live here?" The manager truthfully answers "no." The answer may discourage Connie or other members of her household because they are Asian.

The best answer to this type of question is "we rent to anyone who meets our selection criteria, and if you do, we'd love to have you. Would you like an application?" Change the subject and move on with the interview. If the applicant continues to ask questions about the protected status of the residents, it is appropriate for the housing provider to say "fair housing law prohibits me from answering that question or providing that information."

IV. Discriminatory Statements

The Fair Housing Act makes it illegal to make a statement that indicates a preference or limitation based on a protected class. It means that the statements you make about your property in writing, over the phone or in person must not be discriminatory. For example;

- A maintenance man who mentions to a prospective tenant waiting in the office (or even a passer-by) that "only real Americans' live in his apartment complex, has likely violated the Fair Housing Act.

- An elderly resident who has proudly practiced her racial bigotry for 80 years may believe that it is acceptable for her to make racist comments loudly to her friends while she sits in the lobby of her apartment community. It is management's obligation to meet with this resident and inform her that not only is she violating the Fair Housing Act, but if her conduct continues, she will be barred from the lobby and common areas of the property.

It is also important to use care when describing your resident population. Employees must avoid describing the property in terms of the ethnic or racial composition of your residents.

V. Discriminatory Advertising

A. HUD's Published Guidance

At one time HUD's fair housing regulations contained a section devoted exclusively to discriminatory advertising. Although removed from the Code of Federal Regulations, these provisions continue to provide important guidance to housing providers.[2]

- HUD "strongly suggests" that housing providers not use terms that indicate the race, color, religion, national origin, gender, disability, or familial status of the owner, manager or residents of a building.

- HUD recommends that certain "catch" words or phrases not be used, such as "restricted, exclusive, private, integrated, traditional, board approval or membership approval."

- HUD recommends that housing providers not use any symbol or logo that implies or suggests a discriminatory preference or limitation. Or that housing providers describe the location of a property in terms that might indicate the racial or ethnic mix of a neighborhood.

At the same time, the failure to use certain media may be viewed to be discriminatory.

- For example, the use of English language media alone when non-English language or other minority media is appropriate for the housing provider's service area may be discriminatory.

- Similarly, the selective use of human models in advertisements may be discriminatory if only certain racial or ethnic groups are used.

B. Newspaper and Other Forms of Advertising

In addition to newspaper advertisements, such things as rental applications, flyers, brochures, leases, signs, banners, posters, billboards, newsletters, your property's web site, and even pictures in your office, may be discriminatory if they contain discriminatory statements. For example:

- A housing provider places an ad in the newspaper that says, among other things, "no children or pets."

- The manager of an assisted housing project places an ad in the newspaper that says the building is in "a traditionally Christian neighborhood."

- An advertising brochure contains pictures of residents, all of whom are white adults.

[2] Because HUD's advertising regulations, once codified at 24 C.F.R. Part 109, were designed simply "to assist" persons in complying with the Fair Housing Act, Part 109 was removed from the regulations as part of the government's "streamlining" effort. However, these same provisions continue to be important guidance to this day. The former Part 109 may be found in Appendix 5A. Additional advertising guidance may be found in Appendix 5B.

- A web site of an elderly property that is sponsored by a religious organization contains extensive religious references and symbols.

- A newsletter for residents of an elderly property contains religious statements and the sponsoring church's activity schedule.

C. Equal Opportunity Logo and Fair Housing Poster

In this case HUD's fair housing regulations are markedly different depending on whether your property is federally funded or market rate.

- Federally funded properties are required to use the Equal Opportunity Logo in all print advertisements.

- Federally funded properties are also required to display a fair housing poster that is 11 inches by 14 inches, in a prominent place in their facility.

Fair Housing posters are available in English and Spanish and may be obtained, among other places, from local and regional HUD offices. Although the Spanish version is not required, housing providers may want to display posters in both languages for marketing and outreach purposes.[3]

- While market rate properties are also required to display a fair housing poster, their use of the Equal Opportunity Logo is entirely voluntary.

That said, HUD will look favorably on market rate properties that use the logo as positive evidence of their compliance with the Fair Housing Act.

D. Affirmative Fair Housing Marketing

To ensure that all HUD funded properties are marketed to all segments of the community, especially segments least likely to apply, all HUD funded properties are required to develop and follow an Affirmative Fair Housing and Marketing Plan.

A plan that is more than ten years old should be replaced with a new plan, then submitted to HUD's Office of Housing for approval.

- Plans should be reviewed periodically, but at least every five years, to determine whether the make up of the surrounding community has changed such that marketing efforts should be changed as well.[4]

VI. Discriminatory Terms Or Conditions

It is illegal to discriminate in the terms, conditions or privileges, or in the provision of services or facilities, in connection with the rental of a unit. This prohibition contains a number of different types

[3] Requirements regarding the Fair Housing Poster and Equal Opportunity Logo may be found in Appendix 5C.
[4] HUD's Affirmative Fair Housing Marketing Plan form is set out in Appendix 5D.

of potential violations, including the use of different application criteria or procedures or the use of different provisions in leases. For example:

- A housing manager requires a family with children to put down a larger security deposit than applicants without children.
- The same housing manager conducts credit and criminal background checks on individuals with Spanish names but not on individuals with Anglo names.
- It often takes a property longer to perform the maintenance work orders of African-American residents than white residents.
- A property institutes a curfew of 9:00 for all children under age 18, thereby discouraging families with children from living it the property.
- A property charges a higher security deposit for persons who use wheelchairs.
- A property requires residents who use electric carts to obtain liability insurance.
- Disabled residents who live above the first two floors of a high-rise community are required to sign a waiver of liability in case of an emergency evacuation.

VII. Harassment

A. Harassment Based on Protected Category

The Fair Housing Act prohibits threatening, intimidating or coercive verbal or physical conduct that occurs because of an individual's membership in a protected class. It is necessary for management to take seriously an allegation of harassment by one resident against another. The housing provider can be held liable if the allegation is true and one resident harasses another resident because of the residents protected status (race, color, religion, national origin, sex, familial status or disability). It is necessary in these situations for management to "investigate" the allegation and carefully document its actions. For example, if Rose complains to the manager that Sally has been harassing her because she is Jewish, the manager should take the following actions:

1. Interview both Rose and Sally and keep notes of the content of the interviews.
2. Talk with anyone who either party identifies as a witness.
3. Check with other staff members to see if they have seen or heard anything about the situation between Rose and Sally
4. Send letters to both parties reminding them that the community practices fair housing and equal opportunity and it is illegal to harass a resident based upon his/her religion, and if proven such action would be a violation of the lease. If the manager is unable to form a belief about the facts of the situation, merely invite both parties to keep you informed of any further conflicts.

5. Keep a complete record of these actions by management in both residents' files.

Keeping Accurate Records of Complaints with and by Residents

Sometimes because there is so much paper work it is easy to procrastinate keeping thorough documentation of conflicts with and among residents. It is very important, however, that you create and maintain records of any and all conflicts with residents and complaints by one resident against another. The records don't need to be lengthy, just accurate, and maintained in a manner that makes them accessible if needed in the future.

- For example, if a maintenance employee sees a resident's child damaging playground equipment, the maintenance employee should tell the child to stop and then immediately report the incident to the manager. The manager should ask the maintenance employee to fill out a statement including the date, time, what he saw, and anyone else that was present at the time. Then the manager should contact the resident to report the situation. The manager should also fill out a contact form to include the content of her conversation with the resident. If deemed appropriate, a lease violation form should be sent to the resident. If the resident storms into the manager's office after receiving the lease violation form, the manager should document the "meeting" including a precise description of the language used by the resident and a description of her behavior. The manager should be careful to not make any assumptions or attempts to diagnose the resident's mental problems in this record. For example, the manager's records should not say "Mrs. Smith was again exhibiting her paranoid behavior and calling me names." Instead, a more accurate description is "Mrs. Smith came into my office on June 15 shouting that she hated my Black guts, and threatening that she was going to kick my ass if I didn't stop lying on her son. She pounded on my desk and knocked some papers on the floor. I told her if she didn't remove herself immediately, I would call the police." This type of behavior by a resident is worthy of a second lease violation form and perhaps a lease termination action. This would depend upon how these types of confrontations have been handled with other residents, because consistency is very important. At the minimum this incident should result in 4-6 records included in this resident's file.

- Sue, a resident, reports that Paul, a teenage resident, has been harassing William, a young disabled child that lives in Sue's building. When you ask Sue to put the complaint in writing, Sue refuses explaining that she is afraid of Paul. The fact that Sue will not put the complaint in writing does not free management of its responsibility to investigate the situation. The staff person who talks with Sue should put Sue's allegations in a written report. The housing provider should interview William and his parents to find out whether he is being harassed by Paul, and if so, whether the harassment involves William's disability. If William and his family confirm the harassment, management should meet with Paul and his parents and then confirm the contents of the meeting in a letter. If the situation warrants, a lease violation should be issued to Paul's parents. Williams's parents should also receive a letter describing management's actions and reminding them to report any further problems to management.

Although it is never a good idea to guarantee confidentiality of a resident's complaint, you can attempt to protect the identity of the resident who complains by obtaining the same information from a more

director source or from multiple sources without implicating the resident. And remember, the fact that a resident will not put a complaint in writing does not release management from taking prompt and appropriate action by conducting its own investigation into subject of the complaint.

While harassment based on race, national origin, and religion may be the most familiar type of harassment, at least from a historical perspective, allegations of sexual harassment are increasing.

B. Sexual Harassment[5]

There are two types of sexual harassment – ‘‘quid pro quo’’ harassment and “hostile environment” harassment.

- “Quid pro quo” harassment results when submission to unwelcome sexual advances and requests for sexual favors is made a term or condition of obtaining housing, or in maintaining the provision of services of existing housing. For example, a resident manager tells a tenant that he will excuse all late rent payments if she will have sex with him.

- “Hostile environment” harassment arises when the unwelcome conduct is so severe or pervasive that it results in the creation of an environment that a reasonable person would find intimidating, hostile or offensive.

Although the law recognizes these two distinct types of sexual harassment, instances where the discriminatory conduct will support both types of claims are not uncommon.

- While the “typical” case involves a male landlord and a female tenant, sexual harassment includes both opposite-sex and same-sex discrimination if the discriminatory conduct occurred because of the victim’s sex.

Sexual harassment claims may be filed by individuals who were not the target of the harassment itself. Persons who were denied a benefit granted because of the sexual harassment may be “aggrieved persons” as well.

Housing provider employees should never agree to keep complaints of sexual harassment “confidential,” as management is legally required to take appropriate actions in response to any information concerning sexual harassment.

VIII. Retaliation

It is illegal to coerce, intimidate, threaten, or interfere with any person who wishes to exercise any of his or her fair housing rights, or because that person aids or encourages any other person to exercise his or her fair housing rights. For example:

[5] In 2000, HUD published proposed regulations devoted exclusively to sexual harassment cases. Although HUD has yet to issue final regulations, the proposed regulation may be found in Appendix 5E.

- A tenant who believes he has been discriminated against tells management that he is going to file a complaint with HUD. The manager decides to "teach him a lesson" by ignoring his maintenance requests.

- A tenant who is not disabled (Tenant A) believes that his next door neighbor (Tenant B) is being discriminated against because he is disabled. Tenant A tells Tenant B that if he files a complaint with HUD, he will be a witness for him at trial. The manager finds out and for the first time begins to send past due rent notices to both tenants.

Note: As these examples illustrate, it is not uncommon for a housing provider to successfully defend against an initial complaint of housing discrimination but lose a subsequent complaint alleging retaliation filed by the same tenant. While management should not excuse lease or rule violations committed by any tenant, it is essential for housing providers to carefully consider taking any adverse action that might also be construed as inconsistent or retaliatory against a prior complainant.

IX. Steering

It is illegal to restrict or attempt to restrict the housing choices of a person because of the person's protected status. This includes assigning a person to a particular section or particular floor of a building. Simply put, steering is illegal even if it occurs because of a housing provider's genuine concern for the welfare of the applicant. For example

- A qualified elderly applicant with a child is told that she and her child would be much happier living in a development where more children were present.

- The manager of a multi-building complex thinks it's a good idea if tenants who share the same ethnicity live close to each other. As a result, management makes an effort to concentrate Native Indian tenants in Building A, while Hispanic and Anglo tenants are concentrated in Building B.

X. Disparate Impact

Disparate impact is the legal theory that prohibits practices that have an adverse impact on members of a protected class, even if there is no intentional discrimination.

Under the doctrine of disparate impact, normal practices in the development, rehab and management of housing may be considered discriminatory and illegal if they result in disproportionate "adverse impact" on certain classes of persons, even if the practices are not intended to discriminate.

Fair Housing violations cannot be based solely on statistical disparities. Pursuant to HUD's Disparate Impact Regulations, a burden-shifting analysis is to be employed to determine whether a housing provider's policy or practice results in a disparate impact. Accordingly, a plaintiff will have to demonstrate that a defendant's, or housing provider's, policy or practice actually caused the disparity, whereupon the housing provider would need to then prove that the challenged policy or practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interest. However, if a housing provider successfully proves the challenged policy serves one or more substantial, legitimate, nondiscriminatory interest, a plaintiff will have an opportunity to demonstrate that the provider's legitimate purpose can be accomplished through a policy or practice with a less discriminatory effect.

CHAPTER 6

SPECIAL ISSUES REGARDING FAMILIAL STATUS UNDER THE FAIR HOUSING ACT

I. Introduction[1]

The inclusion of "familial status" as a protected category in the 1988 Amendments to the Fair Housing Act led to several new areas of concern for the housing industry.

II. Occupancy Restrictions

A. Introduction

Occupancy restrictions covered in this chapter are not those that explicitly prohibit children from living in a particular development. In contrast to the restrictions discussed in Chapter 5, this chapter deals with occupancy rules that are "facially neutral."

- If an occupancy rule speaks only in terms of the number of persons allowed to reside in a particular unit, usually by reference to the number of bedrooms (or sleeping areas) in the unit, then the rule is facially neutral.

B. Fair Housing Act Requirements

The Fair Housing Act does not mandate that housing providers adopt any particular occupancy policy.

- In fact, owners and managers are free to implement any occupancy policy they wish, so long as the policy is "reasonable." Unfortunately, the word "reasonable" is not defined anywhere.

Shortly after the 1988 amendments to the Fair Housing Act took effect, many housing providers, especially those that wished to keep their "all adult" status but were too smart to ban children explicitly, began to use occupancy rules that were so restrictive that families with children were still prevented from living there.

- For example, a formerly all adult community with one and two-bedroom units might establish a one person per bedroom policy, thus eliminating any possibility that a family of two parents and one child could live there.
- Other providers established a "one plus one" occupancy policy, meaning that the maximum number of individuals allowed in a two bedroom unit would be three (or one person per each bedroom, plus one).

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

HUD's official policy on occupancy restrictions is contained in a document commonly known as "The Keating Memorandum."[2]

The Keating Memorandum began simply enough as a 1991 internal HUD memorandum written by then General Counsel, Frank Keating (later Governor Keating of Oklahoma). The memo was intended to address the difficulties HUD fair housing officials were having in determining when facially neutral occupancy policies were being used to disguise familial status discrimination.

- Simply put, the Keating memo set forth a relative "safe harbor" for facilities that employed a "two person per bedroom" occupancy standard.[3]

However, the memo also discussed several other factors that investigators should use to determine whether an occupancy policy is reasonable or discriminatory.

- They include the size, design and configuration of the unit in question, the ages of the children involved, and the existence of any relevant state and local occupancy codes.

Another important factor mentioned in the Keating memo is the existence of any evidence of discrimination outside the parameters of the occupancy policy itself.

- Thus, HUD staff was told that discriminatory advertisements or statements by management and any other types of extrinsic evidence of discrimination can and should be factored into a final determination.

The Keating Memo was explained, revised, rejected, and finally replaced by subsequent administrations, until Congress itself stepped in.

- In 1998, against HUD's wishes, Congress mandated that HUD follow the criteria set forth in the Keating Memorandum.

And so it remains the standard today.

A note about gender restrictions – many housing providers still make an effort to prohibit opposite sex children from sharing the same bedroom. Whether their objection is based on moral grounds, something they think HUD required in the past, or something they thought they heard in a fair housing seminar, it is illegal to impose restrictions of that type. On the other hand, if the family wishes, it is not illegal to permit a family with opposite sex children to qualify for a larger unit so that the children can have separate bedrooms.

C. Special Allowances for Infants

Occupancy codes in a number of states exclude infants and very young children in any calculation of occupancy limits. As a result, fair housing advocates and some HUD and DOJ attorneys argue that under the Keating memo's "special circumstances" factor, the presence of infants or young children should also be considered. For example,

[2] The Keating Memorandum may be found in Appendix 6.
[3] As far as we can determine, no court or administrative judge has ever set aside an occupancy policy that meets the Keating Memorandum's safe harbor provision.

- An apartment complex has a two person per bedroom occupancy policy. A family of two parents and three children (one of whom is an infant) applies to rent a two bedroom unit. If the infant is not counted, as suggested above, then the family must be allowed to rent a two bedroom unit.

State occupancy codes differ widely about age limits.

- Similarly, some advocates have argued that an infant is any child younger than six months, while others argue that an infant may be as old as two.

Although there are no known court decisions requiring properties to adopt an occupancy policy that excludes infants or children of any particular age, housing providers should be aware that policies that do not make allowances for infants or very young children may be challenged.

D. Some Practical Advice Regarding Occupancy Rules

Establishing a "reasonable" occupancy policy – i.e. a policy that is both fair to the housing provider and one that will not unfairly limit the availability of units to families with children – is not as simple as it may sound.

- On one hand, housing providers with every good intention wish to have the fewest possible number of occupants in their facility.
- Housing advocates on the other hand often argue for occupancy standards that are based on local codes.

Local and state occupancy codes specify the maximum number of occupants that are permitted per square foot of living or bedroom areas. Some local codes are useful to housing providers in developing occupancy policies while other codes are not because application of some codes result in excessively high numbers of persons permitted in an apartment.

- The provisions of local and state occupancy codes should be consulted when developing an occupancy policy. However, adherence to local occupancy codes is not required.

Let's return to Keating memo. While a two person per bedroom rule is generally both a safe harbor and the industry standard, it may be discriminatory to reject a family of two adults and one small child that requests to live in a one bedroom apartment that also happens to have a den.

- Thus, a housing provider that has "loft units," or units that contain dens or other "extra rooms" which could be used for sleeping, may not be "safe" using the two per bedroom standard in every situation.
- On the other hand, if a facility has none of the special characteristics mentioned in the Keating memo, then a two per bedroom policy would be appropriate (and safe).

III. Housing for Older Persons Exemption

A. Applicability to HUD-Assisted Elderly Housing[4]

At the same time that Congress extended fair housing protection to families with children, Congress also created several ways in which housing providers could qualify for an exemption to those rules.

- Because a facility that is able to meet one of the Housing for Older Persons Exemptions is not subject to any of the familial status provisions of the Fair Housing Act, it is critically important to understand which properties can – and which cannot – meet one of these exemptions.

To start, HUD policy prohibits federally assisted elderly housing from refusing admission to otherwise eligible families.

- As a result, a HUD-assisted elderly property will never be able to qualify for an exemption to the Fair Housing Act's familial status prohibitions unless and until HUD changes its policy.
- Sally Williams applies to live in a Section 202/8 property. Sally is 64 but has legal custody of a granddaughter, age thirteen; no one who lives in the property is younger than 65, and the property considers itself to be an "elderly only" facility. Still, the project must admit Sally and her granddaughter because they are an "eligible family" under the Section 202 program.

On the other hand, properties that do not participate in federally assisted elderly housing programs – i.e. properties that are privately funded and supported, or those that were developed using tax credits only, may qualify for one of these exemptions. For example:

- Colin and Alison (both age 65) apply for admission to a market rate elderly complex. The couple has a son who is 16 years old. If the property meets the requirements for housing for older persons described below, it can legally reject the family because of the presence of the son.

B. State and Federal Housing Programs

In order to qualify for this exemption, the Secretary of HUD must determine that the housing in question is designed and operated for occupancy by elderly persons. .

- To date, no HUD Secretary has ever determined that a federal housing program qualifies for this exemption. In fact, as noted above, properties that receive a federal subsidy must not deny housing to an eligible family with children.

C. 62 and Older Housing

Housing that is intended for and solely occupied by persons 62 years of age or older may qualify for this exemption.

[4] It is important to note the important distinction between whether or not a particular property is eligible to meet one of the Housing for Older Persons Exemptions and whether or not a particular applicant is eligible to meet program eligibility requirements. For questions regarding applicant eligibility, housing providers are encouraged to check the program requirements under which they operate.

- "Solely occupied by persons 62 and older" means that every occupant of the project, including spouses, must be at least 62.
- In addition, all unoccupied units must be reserved for persons 62 years of age or older.

Units occupied by employees, however, are exempt from this age requirement, provided the employees perform substantial management or maintenance duties at the site.

Again, it is important to remember that HUD assisted elderly housing cannot qualify for this exemption.

D. 55 and Older Housing

This is the most common type of housing for older persons. In order to meet this exemption, two principal requirements must be met:[5]

- First, at least eighty percent of the units must be occupied by someone who is 55 years of age or older.
- Second, any property claiming the exemption must adhere to policies and practices that conform to a number of regulatory requirements.

It is also important to note that a property claiming the exemption must be able to prove that it met both of these requirements on the day that the alleged discrimination took place.

- For example, a facility that rejects a family with a child on January 1st, but cannot prove it met the exemption on that day, or can only prove that it met the exemption on January 2nd, will be subject to the rules prohibiting familial status discrimination.

It is also important to keep in mind that a facility that does not meet these two requirements can never evict or refuse to rent to a family with children in order to reach the eighty percent requirement. Nor can it advertise in a way that discourages families from applying or renting.

a. The 80 Percent Rule

At least eighty percent of the occupied units in a facility must have at least one resident who is at least 55 years of age – not 54 or 54 and one-half – at least 55. Units that are temporarily vacant (e.g. where the resident is hospitalized) must be included in the overall count.

Certain units do not have to be counted, however. Vacant units, units occupied by employees or units occupied by care givers for residents who are disabled do not have to be counted.
With those rules in mind, the math should be relatively simple:

- Take the total number of units occupied by at least one person who is 55 or older (let's say that number is 80) and divide by the total number of "countable" units (let's say that number is 100).

[5] In 1995 Congress made significant changes to the 55 and older exemption. The most significant change was elimination of the "substantial services and facilities" requirement.

- In this example, the requirement is met because .80 or 80 percent of the units are occupied by at least one person 55 or older.

In order to meet the eighty percent rule, housing providers must verify the ages of its occupants. Verification is essential if a facility is ever required to prove its entitlement to the exemption. While critically important, verifying the ages of occupants should not be difficult.

- First, any kind of government identification will suffice. Driver's licenses are probably the most common example.
- The residents themselves may self-verify by affirming their ages in writing. A piece of paper that contains the sentence, "I, name and address of resident, hereby certify that I am 55 or older" will also suffice.

Housing providers will want to make copies of any documents they rely on should their exemption ever be challenged.

- While housing providers should make a summary of its records available to its residents, the actual records themselves are private and must be kept confidential.

Residents who refuse to tell you their age much less provide proof can make things difficult. In that case, it is permissible for the housing provider to obtain an affidavit from a neighbor or friend who knows the resident's age.

Keep in mind that the 80 percent requirement is the minimum standard that must be met.

- In other words, a facility that meets all minimum requirements (including the intent requirement discussed below) can choose to have 85, 95 or even 100 percent of their units occupied by persons 55 or older.

b. Policies and Procedures Requirement

The law further requires that in order to meet this exemption, housing facilities must "publish and adhere to policies and procedures that demonstrate the intent . . . to meet the 55 and Older Exemption."

Intent may be demonstrated in any number of ways.

- The most common are using signs, advertising brochures and similar items that state that the facility is "Housing for Persons 55 and Older" or any reasonable variation on that including using the terms "senior" or "retirement" community.
- Lease provisions that restrict occupancy to persons 55 and older are also a good way to demonstrate the requisite intent.

Be careful: Projects that publish and adhere to the above requirements, but that fail to meet the eighty percent requirement may be liable for discriminatory statements or advertisements.

CHAPTER 7

SPECIAL ISSUES REGARDING NATIONAL ORIGIN

I. Post 9/11 Guidance

A. Background[1]

Heightened concerns over the possibility of future terrorist attacks have led many housing providers to reevaluate their application and screening procedures.

- While housing providers recognize their responsibility to safeguard their residents and facilities, their responsibility to comply with the Fair Housing Act and other civil rights laws remains unaffected.

Still, HUD has reported a dramatic increase in the number of complaints from individuals who are, or are perceived to be, Arab, Muslim, Sikh or South-Asian American.

- At the same time, the FBI has warned that multifamily housing could be a potential target and has requested that owners and employees not be shy or overly reticent about reporting persons that may pose a possible risk.

B. Screening and Rental Procedures

Although applicants for housing cannot be screened on the basis of race, color, religion, sex, national origin, disability, or familial status, screening applicants solely on the basis of their citizenship status (which is not a federally-protected category) is permissible.

- Accordingly, asking housing applicants to provide documentation of their citizenship or immigration status does not violate the Fair Housing Act, as long as these same criteria are applied equally to all applicants.
- In other words, if you require proof of citizenship or immigration status from one applicant, you must require the same information from all applicants.

It is also permissible for housing providers to screen for prior criminal history, although such screening should be for convictions, not simply arrests.

As always, housing providers are not obligated to approve anyone who does not meet their reasonable financial qualifications, as long as the same standards are applied to all applicants.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

C. Special Rules for HUD Assisted Properties

By law, only U.S. citizens and eligible non-citizens may benefit from federal rental assistance. Compliance with these rules ensures that only eligible families receive a subsidy. All applicants for assistance in HUD-funded programs other tan 202 PRAC, 811 PRAC, 202 HAC, and 221d3 must be given notice of the requirement to submit evidence of citizenship or eligible immigration status at the time of application.[2]

D. Rules and Privileges of Tenancy

An increase in harassment complaints from tenants of Middle Eastern decent makes it important for housing providers to enforce their rules prohibiting harassment in a nondiscriminatory manner.

While housing providers must continue to be responsive to tenant complaints, they need to be aware that complaints from some of their residents may actually be motivated by race, religion, or national origin.

- Consequently, housing providers should be careful to take action against residents only on the basis of objective concerns.
- Equally as important, housing providers can never permit harassment of any resident by any other resident because of the resident's race, religion, national origin or other protected status.

The Fair Housing Act does not protect tenants who are unruly or who pose a danger to other residents.

- Landlords are allowed to take action against anyone whose behavior is disruptive to other tenants or the property, including evicting such persons from the property.
- Landlords must consistently apply the same procedures to all tenants.
- Any disciplinary action must be on the basis of a person's behavior or other violations of property management rules, and not on race, national origin, religion, sex, color, disability, or familial status.

II. Persons with Limited English Proficiency (LEP)[3]

On August 11, 2000, Executive Order 13166, titled "Improving Access to Services by Persons with Limited English Proficiency," was issued. Essentially, this executive order directed all federal agencies to develop a plan for providing meaningful access to federal programs for LEP persons and to ensure recipients of federal assistance take reasonable steps to also provide meaningful access to this population.

On January 22, 2007, HUD issued its Final Guidance of LEP "to help recipients of federal financial assistance take reasonable steps to meet their regulatory and statutory obligations to ensure that LEP persons have meaningful access to HUD programs and activities." The Final Guidance provides for a four-factor analysis to determine what language groups should be assisted on a property. It

[2] For further information on this topic, see HUD Handbook 4350.3 REV-1, Chapter 3, Section 1, paragraph 3-12.
[3] The complete text of HUD's final LEP guidance may be found in Appendix 7.

further recommends, but does not require, that HUD recipients develop a Language Assistance Plan and describes the key components of the plan. The guidance also establishes a “safe harbor” for translation of written materials.

HUD has translated numerous documents in additional languages. The Fair Housing Poster now is available in 13 languages. HUD-translated documents are available at the following link: http://www.hud.gov/offices/fheo/lep.xml.

CHAPTER 8

KEY PROVISIONS OF SECTION 504 OF THE REHABILITATION ACT OF 1973

I. Introduction[1]

Although similar to the Fair Housing Act because it protects persons with disabilities from discrimination, Section 504 of the Rehabilitation Act of 1973 contains a number of important requirements not found in the Fair Housing Act.

II. Statutory Requirements

Section 504 of the Rehabilitation Act of 1973 ("Section 504") states:

> No otherwise qualified individual with handicaps … shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[2]

Congress decided to let each federal agency that provides funding develop its own Section 504 regulations.

- Thus, entities that receive financial assistance from HUD (called "recipients") must comply with HUD's Section 504 regulations, which are found at 24 C.F.R. Part 8.[3]
- Entities that receive monetary assistance in the form of Rural Development funds under Section 515 of the Housing Act of 1949, 42 U.S.C. §1485, must comply with the Department of Agriculture's Section 504 regulations, which are found at 7 C.F.R. §§ 15b.1 - 15b.42.

Compliance with Section 504 is required of all housing that is developed or managed with funds received directly from a federal agency.

- Compliance with Section 504 is also required of all housing that is developed or managed with federal funds received indirectly through an intermediary (for example, a state agency).

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.
[2] For a complete discussion of what it means to be a "recipient" of federal financial assistance, please see Chapter 3, Section 3.
[3] HUD's Section 504 regulations may be found in Appendix 3C.

A property that participates in a HUD or Rural Development housing program including, but not exclusive of, Project-Based Section 8, Section 202/PRAC, Section 202/8, Section 811/8, or Rural Housing's 515 or 515/8 program is a recipient of federal funds subject to Section 504.

In contrast, a private landlord who accepts tenant-based Section 8 vouchers in lieu of rent is not a recipient (either directly or indirectly) of federal financial assistance and therefore is not required to comply with Section 504.

- On the other hand, the entity that issues Section 8 vouchers, such as a public housing authority, is a "recipient" under Section 504.

In addition to private landlords who accept tenant-based vouchers, Section 504 is not applicable to properties that participate solely in the Low Income Housing Tax Credit Program (LIHTC) and receive no other type of Federal financial assistance. While LIHTC properties must comply with the Fair Housing Act, they are not "recipients" and therefore need not comply with Section 504.

- On the other hand, a LIHTC property that also receives funds under HUD's HOME Program, is a recipient and must comply with Section 504. (For additional information regarding "tax credit" or LIHTC properties, *see* Chapter 11.)

While the statute provides only a general prohibition against discrimination on the basis of disability, HUD's Section 504 regulations provide a detailed description of the kinds of affirmative activities that properties must undertake to avoid Section 504 violations.

III. Section 504 Coverage

Section 504 contains the same prohibitions against discrimination as those set out in the Fair Housing Act with regard to disabled individuals.

- One important distinction, however, concerns Section 504's use of the term "otherwise qualified individual with handicaps," rather than the simpler definition contained in the Fair Housing Act, which uses of the term "individual with handicaps."

In order to be an "otherwise qualified individual with handicaps," Section 504 requires that the individual meet the essential eligibility requirements of the program or activity. When housing is involved, the individual must meet the same requirements for tenancy as any other applicant. For example,

- A mobility impaired applicant applies to live in a Section 811 project designed for developmentally persons with disabilities. If the applicant is not developmentally disabled, he or she does not meet the projects eligibility requirements and may be denied admission on that basis.

Thus, under Section 504 housing providers may not refuse to rent to an otherwise qualified person with a disability, may not impose discriminatory terms and conditions on a disabled applicant or tenant, may not steer disabled applicants to special areas of a building, or take any other adverse action against a person because of his or her disability.

IV. Affirmative Requirements

The regulations require housing providers to afford disabled individuals an equal opportunity to participate in all housing programs and related services. Consequently, all marketing and community outreach, access to common areas and facilities, access to individual units, management and employment policies and procedures must ensure equal treatment and access for otherwise qualified persons with disabilities.

The regulations describe the following affirmative activities and their respective Section 504 requirements:

A. Outreach and Notice Requirements

The regulations require recipients to take affirmative measures to insure effective communication with applicants, beneficiaries, and members of the public. This may include, but is not limited to, conducting outreach that will reach persons with disabilities.

- One method of insuring compliance is by working with state and local organizations that serve or represent persons with disabilities.

Another area of compliance is communications.

- "Auxiliary aids" can be made available to persons with hearing or speech impairments. These include telephone handset amplifiers, and telephones that are compatible with hearing aids

- For the rental office telecommunication devices for deaf persons or any other device that is "equally effective" can be provided. It is usually deemed "equally effective" to use the local telephone company's relay service to communicate with hearing impaired persons rather than obtaining a TDY.

Written assurances of compliance with Section 504 must be given by new housing providers even before funding begins. Continuing notices of compliance must then be provided to participants, beneficiaries, applicants, and employees. Notices must be made available and accessible to persons with impaired vision or hearing and, where applicable, to trade unions or professional organizations holding collective bargaining agreements with the housing provider. Notices must also include the name of the provider's "Section 504 coordinator," whose duties are described in Section E of this chapter.

B. Access to Housing Programs

1. Requirements Applicable to All Projects

a. Accessibility

As a general matter, recipients must ensure that their programs and services are readily accessible to and usable by persons with disabilities. While each and every program and activity need not be

accessible, there must be sufficient accessibility so that persons with disabilities have an equal opportunity to participate in and benefit from the program as a whole.

- Housing providers subject to Section 504 cannot provide or require persons with disabilities to accept housing that is different or separate from housing provided to non-disabled individuals.

Moreover, when an accessible unit becomes vacant, before offering the unit to an individual without a disability, the unit must be offered to a current occupant of the project who requires the unit's accessibility features. If no such occupant exists (or a qualified occupant refuses the accessible unit), the unit must be made available to a qualified applicant on the waiting list. For example,

- Happy Towers has a vacant one bedroom accessible unit. Steve, who is an existing resident with a pending request to transfer to an accessible unit, must be offered the unit before anyone else. If Steve decides he doesn't want to transfer after all and there are no other pending transfer requests, management must offer the unit to Michael, the first person on the waiting list who is eligible for an accessible unit. This may mean that applicants on the waiting list who do not need an accessible unit will be "skipped over." If Michael decides he doesn't want the accessible unit either, then he simply retains his place on the waiting list until a standard unit becomes available.

There may be times when a non-disabled resident is housed in an accessible unit. In this situation, the resident should have signed a lease addendum stating that he or she will agree to move into a standard unit should the accessible unit be needed by a resident or applicant. For example,

- Pam lives in an accessible unit but is not disabled. Paul, also a resident, has a stroke and requests an accessible unit. At this point, Pam would be transferred into the next available standard unit (at her expense if it is so stated in the lease addendum), while Paul would be transferred, at management's expense,[4] into the accessible unit.

For nondisabled residents who moved into accessible units without addendums to their leases, with proper notice addendums can be added to their leases at the next recertification.

b. Reasonable Accommodations and Modifications

As a general rule Section 504, like The Fair Housing Act, requires housing providers to "reasonably accommodate" the known physical or mental limitations of their residents and any applicants.

- Unlike The Fair Housing Act, Section 504 requires recipients to provide such accommodations to its employees (and any otherwise qualified applicant for employment).

- Unlike The Fair Housing Act, recipients are also required to provide "reasonable modifications" to any equipment or device that would enable the employee (or applicant) with disabilities to perform the essential functions of his or her job.

[4] *See* HUD Handbook 4350.3 REV-1, Chapter 7, Section 7-16.

Perhaps the most important distinction between The Fair Housing Act and Section 504 in this area is Section 504's requirement that the cost of providing any such accommodation or modification be borne by the property, subject to the exception discussed in subsection c., below.

- In contrast to Section 504, the cost of any reasonable accommodations or modifications provided under The Fair Housing Act is the responsibility of the resident, not the housing provider.

c. The "Fundamental Alteration or Undue Financial and Administrative Burden" Exception

Housing providers subject to Section 504 must furnish and pay for every reasonable modifications their residents are entitled to – with one important exception.

- Housing providers are not required to provide any modification that requires a "fundamental alteration in its program" or one that poses "an undue financial and administrative burden."

Applying this exception to real-life situations is hardly an easy task, and one that housing providers and courts have struggled with since 1979, when the Supreme Court first formulated the exception. Each case is highly fact specific and must be determined on a "case-by-case" basis. As the Supreme Court itself has said:

> an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.[5]

Even in cases where this exception applies, however, HUD's regulations still require that the housing provider furnish and pay for:

> any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity receiving HUD assistance.

In other words, while a particular housing provider is not required to provide any modification that would be financially and administratively prohibitive, it does have a continuing obligation to provide a modification that is effective and yet does not impose such burdens on it.

- Margie is a physically disabled resident who uses a wheelchair. She is unable to use her bathtub and claims that she cannot clean her apartment because of her disabilities. She requests that her landlord provide her with a roll-in shower and a cleaning service to assist her in cleaning her apartment. If her landlord does not provide cleaning services for its residents, granting Margie's request would result in a fundamental alteration to the landlord's business.

[5] *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

- Margie's request could also pose a financial and administrative burden on the landlord. If it is structurally feasible to modify Margie's bathroom by removing the tub and adding the shower, the landlord will need to obtain a third party bid to obtain a cost estimate for the modifications. An written analysis should be made of the estimated cost of the modification compared to all available property funds (including the funds in the residual receipts account) to determine whether the modifications pose an undue financial burden for the property. It is usually a simple matter to show how a financial burden also poses an administrative burden. Margie's request for cleaning services also likely poses a financially and administrative burden for the landlord.

In Margie's example, the landlord could suggest as an alternative that Margie contact a social service agency to assist her in locating house-keeping services. Although deference should be given to the resident who is in a better position to judge the effectiveness of any modification the housing provider proposes, if at all possible the housing provider and resident should agree on a modification that satisfies both requirements

(Chapter 9 contains a more detailed discussion of reasonable accommodations and modifications.)

C. Access to Facilities

1. Requirements Applicable to New Construction

HUD requires all "new multifamily housing projects" to be "designed and constructed to be readily accessible to and usable by individuals with [disabilities]." For Section 504 purposes, a project is "new" if it was built on or after June 2, 1988, the date HUD's Section 504 regulations were published.[6]

- For new projects, HUD requires that a minimum of five percent of the total number of units, (or at least one unit, whichever is greater) must be accessible to persons with mobility impairments.

Consequently, at least five percent of the units must either be fully accessible (i.e. usable by persons with physical disabilities) or adaptable (i.e. certain elements, such as kitchen counters, sinks, and grab bars, can be easily altered to accommodate the needs of persons with disabilities). Either way, these units must be on an accessible route (i.e. a route that can be approached, entered, and used by individuals with physical disabilities).

- HUD also requires that an additional two percent of all units (but not less than one unit) be accessible to persons with hearing or vision impairments.

In order for a unit to be considered accessible, it must meet the requirements of the Uniform Federal Accessibility Standards ("UFAS").[7]

[6] It is important to remember that these Section 504 requirements are in addition to, not in lieu of, the Fair Housing Act's design and contraction requirements.
[7] The complete text of UFAS may be found in Appendix 8A.

2. Requirements Applicable to Substantial Alterations of Existing Facilities

A project with 15 or more units built before June 2, 1988 that undergoes alterations, such that the cost of the alterations is 75 percent or more of the replacement cost of the completed facility, is treated exactly as projects designated to be "new construction." For example,

- Happy Village is 50-unit development that was erected in 1975 with Section 8 New Construction funds. Happy Village has no accessible units. In 2005 Happy Village undergoes substantial alterations. Happy Village's replacement cost after the renovations would be $850,000. If the rehabilitation cost is $637,500 or more (at least 75% of $850,000), then the alteration is considered to be "new construction." As a result, 5% of its units or 3 units (any fraction of a unit is rounded up) will need to be made accessible for persons who use wheelchairs, while 2% of the units (or 1 unit) will need to be altered for persons with hearing and visual impairments.

3. Requirements Applicable to Non-Substantial Alterations and Alterations to Single Units

According to HUD, "non-substantial alterations" must be accessible "to the maximum extent feasible", until at least 5% of the units are accessible for persons with mobility impairments, and 2% of the units are accessible for persons with visual and hearing impairments.

- "Maximum extent feasible" means that any alteration to individual units or elements of an individual unit should not "impose undue financial and administrative burdens on the operation of the multifamily housing project." (This exception is discussed in greater detail in Chapter 9.)

In addition, if alterations of single elements in a dwelling unit amount to an alteration of the dwelling unit, the owner must make the entire dwelling unit accessible.

When the owner is not altering the entire unit, 100% of single elements being altered must be made accessible until 5% of the units in the property are fully UFAS accessible.

- However, HUD strongly encourages owners to make 5% of the units in a property accessible up front, as that will avoid the necessity of making every element altered accessible, which may result in having partially accessible units of little or no value for persons with mobility impairments, and is likely to be more costly overall.

HUD also recommends owners include up to 2% of the units for persons with hearing and vision impairments.

4. Requirements Applicable to Common Areas in Existing Facilities

Alterations to common areas or parts of existing facilities that affect accessibility must also be made accessible to and usable by individuals with disabilities, "to the maximum extent feasible."

While recipients are not required to undertake alterations that would impose undue financial and administrative burdens on its operation, federally assisted properties are expected to provide accessible common areas.

D. Self-Evaluations and Transition Plans

Housing providers must make a written evaluation of all current rules, policies, and procedures, and, where necessary, take corrective action, to ensure that no discriminatory barriers exist.

- Simply put, a self-evaluation describes how persons with mobility, visual, and hearing impairments will learn of your property, get to your property, and proceed through the application and screening process.

HUD required all recipients to complete self evaluations by June 1989. Consequently, if not already completed, a self evaluation should be conducted and documented as soon as possible.[8] The regulations require that a copy of your self-evaluation be kept onsite for at least 3 years. Since it can be requested by HUD, a contract administrator, or a member of the public at any time, however, it is a good idea to keep it indefinitely in order to prove compliance with these requirements.

Once the self evaluation of program modifications is completed, if structural modifications are needed, a housing provider should create a transition plan. Transition plans contain a list of all necessary structural modifications.[9]

- HUD required all recipients to complete transition plans by July 1991. Consequently, housing providers that did not meet this deadline and require structural modifications to meet its section 504 requirements should develop a transition plan, including a schedule to complete all modifications as soon as possible.

Transition plans should be updated and revised annually until all modifications are complete. Like the Self Evaluations, the regulations require that transition plans be maintained onsite for three year, but to insure that your property can prove itself in compliance with these requirements, it is a good idea to maintain a transition plan indefinitely.

E. Designation of Responsible Employee and Adoption of Grievance Procedures

A recipient (which includes the owner, managing agent as well as the property itself) with fifteen or more employees must designate at least one person to coordinate its Section 504 compliance efforts. Such employees are referred to as "Section 504 coordinators." For example, Section 504 coordinators are responsible for meeting with any resident who makes a reasonable accommodation request and is not satisfied with management's response.

- Recipients with fifteen or more employees are also required to adopt a grievance policy that provides residents and employees who allege Section 504 violations with a fair and prompt method to resolve their complaints.[10]

Applicants for housing or employment need not be afforded rights under such a grievance policy.

[8] A Model Self-Evaluation Form may be found in Appendix 8B.
[9] A Model Transition Plan may be found in Appendix 8C.
[10] A Model Grievance Policy may be found in Appendix 8D.

F. Personnel and Employment Practices

Housing providers must afford qualified job applicants an equal opportunity to obtain employment as well as provide reasonable accommodations to qualified employees.

Compliance must therefore begin at the application stage.

- Housing providers are permitted to ask questions about an applicant's ability to perform the "job-related functions," but must not ask an applicant whether he or she is disabled or inquire into the nature or severity of a perceived disability. Nor may housing providers require a job applicant to take a medical exam.

However, if the applicant indicates his or her need for a reasonable accommodation, it is permissible to ask the applicant to describe or demonstrate how, with or without a reasonable accommodation, he or she will be able to perform in the job.[11]

[11] For Information about possible accommodations for employees, contact the Job Accommodation Network at 1-800-526-7234.

CHAPTER 9

SPECIAL ISSUES REGARDING PERSONS WITH DISABILITIES

I. Introduction[1]

As we have seen, both the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 afford broad protection of – and even special consideration for – individuals with disabilities. Although the Fair Housing Act and Section 504 differ in many respects, the following requirements are found in both statutes.

II. Resident Eligibility and Screening Criteria

A. General Requirements

Individuals with disabilities must be evaluated using the same objective criteria that the housing provider applies to persons without disabilities.

Landlords are, therefore, permitted to require applicants to furnish information about their financial history, criminal background and renal history, as long as the same information is required for all applicants.

- Because the law does not require housing providers to accept anyone who does not meet a project's standard, nondiscriminatory tenant selection and screening criteria, applicants, whether disabled or not, may be rejected if they have a record of disturbing neighbors, destroying property, or failing to pay their rent on time.

Landlords must not ask applicants if they have a disability or require them to furnish any information that relates to a disability.

- For example, it is illegal for a landlord to ask an applicant if he or she is capable of "independent living" since, among other reasons, the applicant can arrange for outside services should he or she be unable to perform the essential housing related tasks.

B. Exceptions for Applicants Seeking Special Housing or Accommodations

There are three circumstances when it is permissible to inquire about an applicant's disability:

1. If an applicant requests to be housed in a project specifically designed for people with certain types of disabilities, it is permissible to ask if he or she is eligible for the program and verify the information.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

2. If a resident requests an income adjustment for medical or prescription costs, it is permissible to verify the costs associated with the adjustment.
3. If an applicant requests a reasonable accommodation or modification (discussed later in the chapter), it is permissible to request that the applicant provide independent verification of his or her need for the requested accommodation or modification.

C. Special Eligibility Rules for Section 202 and Section 811 Housing

Because certain Section 202 and Section 811 projects are designed to serve persons with one or more specific disabilities, these projects may specify a subclass or subclasses of eligible tenants.

- For example, projects that were funded to house persons with physical disabilities or mobility impairments are permitted to ask questions about and obtain verification of an applicant's qualifications for that specific type of housing.

D. Eligibility of Nonelderly Disabled Applicants in HUD Funded Elderly Housing

Whether nonelderly disabled applicants are eligible for particular HUD funded elderly properties is a complex topic that remains the subject of much confusion and controversy.

The general rule is that applicants must meet both program and project eligibility requirements. While program eligibility is set forth in statues, eligibility for individual projects is dependent on a number of factors.

- To avoid potential fair housing liability, it is essential for housing providers to correctly determine their project's eligibility criteria.

Properties that wish to restrict residents to elderly families only must show that their property was originally designed for occupancy only by elderly families. To do that, housing providers often must review their original funding documents, loan commitments, regulatory agreements, policies and practices.

Correctly determining your project's eligibility criteria is critically important to avoid complaints from improperly rejected applicants. Due to the complexity of this topic, students who wish to learn more are encouraged to read HUD's Occupancy Handbook, Chapters 3-17. Of course, it is always best to seek clarification from supervisors or attorneys familiar with this area of the law.

E. Live-in Aides

As our population ages in place, housing providers have begun receiving an increasing number of requests for full-time live-in aides. Such requests should be treated in the same way that other requests for reasonable accommodations are treated.

A housing provider can request that a resident who is requesting the services of a live-in aide provide verification that the resident is disabled and not able to perform the daily living tasks necessary to meet the terms of the lease.

Similarly, landlords are permitted to screen live-in aides for such things a criminal background and rental history, although screening for rental payment history would not be permissible because the live-in aide is not responsible for making the rental payments.

III. Reasonable Accommodations

A. Introduction

In many cases, ensuring that persons with disabilities have an equal opportunity to use and enjoy a dwelling may require that a landlord treat individuals with disabilities more favorably than individuals without disabilities.

- Thus, both the Fair Housing Act and Section 504 require housing providers to make reasonable accommodations (exceptions or changes) in their rules, policies, practices, or services, when such accommodations may be necessary to afford an individual with disabilities an equal opportunity to use and enjoy a dwelling.

Although each case is different, certain reasonable accommodations have become common place. For example,

- Another housing provider with a no pets policy, allows a deaf tenant to keep a hearing-assist dog in her unit.
- A housing provider, who does not ordinarily provide assigned parking spaces, provides one of its mobility-impaired tenants with an assigned parking space near the front entrance to the building.
- A housing provider installs a strobe smoke detector for a hearing-impaired tenant.

B. Reasonable Accommodation Policies and Procedures

Although HUD requires its subsidized housing providers to have a written reasonable accommodation policy (market rate properties are under no such requirement), the law does not require any housing providers to adopt, or applicants and residents to use, any particular procedure to request a reasonable accommodation.

- However, all housing providers are advised to develop such policies and procedures to ensure consistency and timeliness in responding to reasonable accommodation requests.
- Landlords are also advised to adopt a policy that requires applicants and tenants to make clear the precise exception, change, adjustment, or modification they are requesting, as well as explain the relationship between the requested accommodation and his or her disability.

Reasonable accommodation requests may also be made at any time – during the application process, at lease signing, or after occupancy has begun. Individuals who become disabled during their tenancy may also request accommodations, even if they were not disabled when they signed their leases.

Finally, there is no limit on the number of accommodations a landlord must provide to a particular tenant or applicant.

C. Verifying the Need for an Accommodation

General speaking, housing providers have the right to verify from a reliable third-party source (i.e., a doctor, nurse or other healthcare professional):

1. That the individual requesting the accommodation is, in fact, disabled, and
2. That, because of the identified disability, the individual needs the accommodation to have an equal opportunity to use and enjoy his or her unit as well as property as a whole.

It is important to point out, however, that both HUD and DOJ have taken the position that landlords must not ask for such information in cases where the need for the accommodation is readily apparent or known to the housing provider.[2]

Although the term "readily apparent" is not defined in the memorandum, the memorandum does provide the three examples listed below where the term applied. In cases where those examples may not provide the guidance you seek; your supervisor should be consulted.

> Example 1: An applicant who has an obvious mobility impairment and who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (i.e., difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.
>
> Example 2: A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.
>
> Example 3: An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

D. Reasonableness

Because each case is different, deciding whether a particular accommodation should be provided depends on a variety of factors.

First, is the requested accommodation related to the person's disability? Said another way, is the requested accommodation necessary to alleviate the effects of the person's disability? For example:

[2] The HUD/DOJ joint memorandum "Reasonable Accommodations under the Fair Housing Act" may be found in Appendix 9A.

- A deaf tenant requests a “handicapped parking space” close to the building entrance.

In the above example, the housing provider need not agree to provide the requested parking space because the accommodation is not related to the resident’s disability.

Second, will the request impose an undue financial and administrative burden on the housing provider or require a fundamental alteration in its operations? For example:

- A tenant with severe arthritis requests that management hire a cleaning service to clean her unit. Factors that may be considered in make a reasonableness determination include the nature and cost of the accommodation in relation to the size and budget of the housing program.
- In this example, the landlord may properly deny the request to provide a cleaning service because this type of service is not provided to any other tenant and would, therefore, require a fundamental alteration in its operations

E. Alternative Accommodations

If the housing provider believes the requested accommodation is unreasonable, the housing provider may, but is not required to, propose a substitute accommodation. What is required, however, is that landlords make a good faith effort to find an accommodation that both parties can live with. For example:

- Instead of providing a cleaning service, management agrees to allow the tenant to have a live-in aide.

F. Undue Delay or Failure to Act

Housing providers are obligated to respond quickly to reasonable accommodation requests. An undue delay in responding to a request may be deemed to be tantamount to a denial. Again, the need for a written set of procedures will assist in avoiding undue delays of this kind.

G. Assist Animals

For many years, housing providers have permitted, as a reasonable accommodation to a *no pet policy*, physically disabled residents who required them to have guide dogs and other types of animals that have been trained to perform specific tasks. Over time, HUD interpreted the obligation to provide a reasonable accommodation in the form of making an exception to a provider’s *no pet policy* to permit residents, under appropriate circumstances, to have animals not trained to perform any specific task. These animals are often referred to as therapy or emotional support animals. HUD refers to them as *assistance animals*.

- Because such animals are untrained and largely indistinguishable from family pets, landlords are understandably confused about their obligation, if any, to waive their no pet rules or make exceptions to their size or weight limitations for this type of assist animal.

- Indeed, both the Occupancy Handbook and Public Housing Guidebook define “assistive Animals” to include emotional support animals for people with chronic mental illness.

- As a result, housing providers should consider requests for untrained assist animals no differently than the way they treat requests for trained assist animals, even though untrained animals have not received special training, like guide dogs, and are not certified or licensed by a government authority.

In cases where the disability of an applicant or resident is not obvious or apparent (usually a mental or emotional disability), you have the right to ask for enough information (from doctors, nurses or other health care professionals) to verify that the person requesting an untrained assist animal is actually disabled and that the verifier explain the relationship between the disability and the need for a companion animal.

- Even where the disability is demonstrated and the need for an assist animal has been explained, you do not have to accommodate any animal that is or becomes unruly or disruptive, unclean, and/or unhealthy to the extent that the animal's behavior or condition poses a direct threat to the health or safety of others.

While assist animals are not pets (and are, therefore, not subject to pet deposits and charges), it is proper to require that all animals in your buildings be properly vaccinated by a Veterinary doctor and that their owners properly dispose of all waste and observe all leash and other animal laws in accordance with local health laws.

Until several years ago, HUD and DOJ, which enforces the ADA, seemed to interpret the obligation to permit these assistance animals similarly broadly. However the ADA was revised as a result of which now under the ADA, only service animals, which is defined to include only dogs that are specifically trained, are required. Emotional support animals are explicitly excluded. In addition, now under the ADA, the request to allow a service animal is not treated as a reasonable accommodation.

.V. Reasonable Modifications

With one important difference, both the Fair Housing Act and Rehabilitation Act also require housing providers to permit reasonable modifications of existing premises in order to afford a tenant with a disability full enjoyment of the premises.

In general, requests for reasonable modifications follow the same rules as requests for reasonable accommodations. Once again, although each case presents its own unique set of circumstances, certain reasonable modifications have become commonplace. For example:

- Allowing the installation of grab bars in the bathroom.
- Allowing the installation of a ramp into a building.
- Removing the bathtub and installing a roll-in shower.

As mentioned in Chapter 8, housing providers subject to Section 504 must pay for such modifications themselves (assuming that the modification does not require a fundamental alteration in its program or pose an undue financial and administrative burden).

If the housing provider can demonstrate the requested modification may cause an undue financial and administrative burden, the housing provider may allow the person requesting the accommodation to pay the charges, or a portion of the charges, associated with making the modification or obtain funding from an outside source such as a social service agency.

The Fair Housing Act, on the other hand, states that the individual with the disability requesting the modification assumes all costs. The Fair Housing Act also allows housing providers to obtain assurances from the tenant that the work will be done properly, require the tenant to obtain building permits, and restore the unit to the condition that existed before the modification, but only if unit as modified would interfere with a subsequent tenant's use of the unit.

V. Design and Construction Requirements

A. Fair Housing Act Requirements

In some circumstances, housing providers must make provisions for applicants and residents with disabilities, prior to any specific request for an accommodation or physical modifications to the property.

Any residential building with four or more units that was built for first occupancy after March 13, 1991, must comply with the Fair Housing Act's design and construction requirements for accessibility. These requirements are designed to provide people with disabilities – and particularly, people with mobility impairments – with the widest possible range of available multifamily housing by assuring basic accessibility to multifamily housing.

There are seven basic requirements for housing covered by this provision of the Fair Housing Act. Such housing must have:

- An accessible building entrance on an accessible route
- Accessible and usable public and common use areas
- Usable doors in both common areas and the individual homes
- An accessible route into and through the home
- Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations
- Reinforced bathroom walls for the later installation of grab bars
- Usable kitchens and bathrooms

These requirements apply to all ground floor units in buildings without elevators or to all units in buildings with elevators.

- Unlike Section 504 requirements, these requirements are not triggered by renovation or rehabilitation – only by new construction for first occupancy after March 13, 1991.
- For example, an apartment building constructed in 1990 need not comply with the Fair Housing Act's design and construction requirements even though it underwent total renovation in 2004.[3]

B. Section 504 Requirements

As we learned in Chapter 8, Section 504 imposes additional accessibility requirements o federally financed housing built on or after June 2, 1988.

[3] For additional information, please see HUD's Accessibiity Guidelines at http://www.hud.gov/library/bookshelf09/fhefhag.cfm and HUD's Fair Housing Act Design Manual, wich is set forth in Appendix 9B.

- For federally financed multifamily housing built for first occupancy after March 13, 1991, both the Fair Housing Act and Section 504 requirements must be met.

It is important for all housing providers to remember that meeting the design and construction obligations or the Section 504 accessibility requirements does not relieve the housing provider of the obligation to make reasonable accommodations or to allow further reasonable modifications by residents with disabilities.

C. ADA Requirements

ADA requirements are covered in Chapter 3, Section VI.

C H A P T E R 10

SPECIAL ISSUES REGARDING LIABILITY FOR FAIR HOUSING AND OTHER CIVIL RIGHTS VIOLATIONS

I. Introduction[1]

In addition to understanding how fair housing violations can occur, it is also important to understand the individuals and entities that will be legally responsible (or liable) for committing violations.

II. Basic Principles Of Individual And Corporate Liability

A rental agent, manager or maintenance worker who commits an act of housing discrimination will be liable in their own right for any damages should a complaint or lawsuit result.

- Similarly, any supervisory employee who takes part in or condones the discrimination will be liable as well.

The entity that employs such an agent, manager or maintenance worker is also liable even though it had no active role in the discriminatory act itself.

- Legal dictionaries call this "vicarious liability."

- Vicarious liability is imposed on an employer when one of its employees commits an illegal act in the course of his or her employment.

Vicarious liability is a kind of "no fault" or "strict" liability. Thus, while an employer may mitigate (reduce) its damages if it can show that it provides yearly fair housing training to its employees or that its operations manual explicitly prohibits discrimination of any kind, it will still be liable.

III. Liability Of Corporate Officers, Shareholders And Board Members

Although the principles of vicarious liability apply to corporate entities whose employees commit acts of housing discrimination, these principles do not apply to corporate officers, shareholders or board members who did not participate in the discriminatory acts themselves.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

IV. Corporate Liability For Cases Of "Hostile Environment" Sexual Harassment

Although the principles of vicarious corporate liability apply to situations involving "quid pro quo" sexual harassment in the same way as any other type of discrimination, vicarious liability does not apply in the same way to cases of hostile environment sexual harassment.

- In order to hold management responsible for hostile environment sexual harassment, the person being harassed must show that management either knew or should have known of the problem.

- This requirement protects management from being held responsible when it did not have the opportunity to correct the problem.

Thus, if an applicant or resident complains that the statements or actions of an employee are offensive (even if the term "sexual harassment" is not used) management should immediately conduct an "investigation" of the matter.

- An investigation should include interviewing all relevant parties, documenting the interviews, and responding to the applicant or resident in writing.

If the investigation shows that the employee's conduct was offensive or a violation of company policy, appropriate action should be taken with the employee and documented.

- What kind of "appropriate action" is taken will depend upon the seriousness of the conduct, but it could include counseling by a supervisor, documented with a written admonishment, suspension, change of job assignments, or even dismissal.

If the investigation does not substantiate the allegations of the complainant, the file should be documented with a statement by the supervisor why it appears the allegations were without merit, and an appropriate letter should be sent to the complainant.

- The best way to avoid sexual harassment problems is to conduct regular sensitivity training for all employees on the kinds of statements and actions that can create sexual harassment issues.

Supervisors should also be sensitive to the actions of employees and individually counsel employees that are "overly friendly" or aggressive toward applicants or residents.

While many of the legal actions filed are without merit, it only takes only one legitimate sexual harassment case to devastate an apartment community.

V. Liability For "Neighbor To Neighbor" Harassment

Similar issues of liability arise when one resident accuses another resident of harassment based on membership in a protected class.

Ordinarily housing providers are not responsible for isolated discriminatory acts that occur between tenants.

- If, however, the provider is made aware of discriminatory activities and does nothing to stop or impede the discrimination, the provider could also be liable.

Because of this, management should ensure that any employee who observes possible instances of such harassment document his or her observations.

In addition, in a situation of possible harassment between residents, management should document its efforts to determine whether the harassment occurred and the resulting appropriate action.

C H A P T E R 11

INFORMATION FOR TAX CREDIT PROPERTIES

I. Introduction[1]

The Low Income Housing Tax Credit (LIHTC) program was created by the Tax Reform Act of 1986.

- The program was created as a way to encourage the development of affordable housing, without having to allocate federal funds directly.

The LIHTC program, which is administered by state Housing Finance Agencies, provides a ten-year, dollar-for-dollar reduction in federal tax liability for owners of low income rental housing based on the development cost of low income apartments. Remaining financing typically comes from market-rate first mortgages and low- or no-interest second mortgages, often from HUD's HOME program or other public sources.

The program requires a thirty-year commitment to make units available to individuals whose income is below 50 percent of the area median income.

II. Fair Housing Act Requirements

In accordance with § 1.42-9 of the Income Tax Regulations, 26 C.F.R. § 1.342-9, low income housing tax credit properties are to be rented in a manner consistent with the Act.

- Noncompliance with the low-income housing tax credit provisions must be reported to the IRS by state housing finance agencies under 26 U.S.C. § 42(m)(1)(B)(iii).

In September 2000 an agreement was reached among the Treasury Department (the parent agency of the Internal Revenue Service), the Justice Department and HUD.

- The "Memorandum of Understanding" (MOU) effectively notifies all tax credit communities that they too are subject to fair housing enforcement actions.

The MOU established a mechanism by which certain fair housing enforcement activities undertaken by HUD or DOJ will automatically be reported as an incident of "noncompliance" to the IRS, leaving the IRS the job of informing the individual tax credit property owners of the hazards of fair housing violations.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

- Specifically, the notice that an owner will receive from the IRS will state that a fair housing violation can result in the loss of low-income housing tax credits.

While it's always been clear that violations of the Fair Housing Act can be expensive in terms of fines and damage payments, this new procedure adds to the potential costs of fair housing violations for tax credit properties by specifically targeting a property's basis of financing in the event of fair housing violations.

Under the MOU, HUD and DOJ will notify the appropriate state housing finance agency if any of the following occur with regard to a low-income housing tax credit property:

1. Issuance by HUD of a charge of discrimination under the Fair Housing Act

2. Issuance of a finding of cause to believe fair housing discrimination has occurred by a state or local agency that has been certified as substantially equivalent by HUD

3. Filing of a fair housing lawsuit by DOJ or

4. The entry into a settlement agreement or consent decree with either HUD or DOJ to resolve a fair housing complaint or concern.

The state housing finance agency will report the action to the IRS on Form 8823, the "Low-Income Housing Tax Credit Agencies Report of Noncompliance."

The IRS will then send a notice to the property's owners, warning them that a final decision of violation of the Fair Housing Act (whether by the Secretary of HUD or a substantially equivalent agency following a hearing before an Administrative Law Judge, or by a federal court), can result in the loss of low-income housing tax credits.

Settlements and consent decrees are also reported so that the IRS can notify property owners that breaches of these agreements can also be grounds for the loss of tax credits.

III. Section 504 Responsibilities

Tax credit properties are becoming a more important commodity of the multifamily housing market. Tax credits bring a whole new set of civil rights obligations.

- Besides the Fair Housing Act, to which all housing is subject, some tax credit properties may also receive direct federal assistance, which will trigger coverage under Section 504.

Governing documents, particularly the final application, will determine whether a tax credit community receives federal funds such that Section 504 obligations will apply.

- Some potential sources of federal funds to look for in the application include project based Section 8 funding (not the individual resident's receipt of Section 8 vouchers), Rural Development (Farmer's Home) funding, Section 202/236, CDBG, HoDAG and

HOPE VI.[2] (This is not a complete list; be sure to contact your tax credit advisors if you're unsure.)

Tax credit communities that are also "recipients" of federal funds should read Chapter 8 for a discussion of the obligations under Section 504.

IV. Requirements Imposed by State Finance Agencies - Age Restrictions for Elderly LIHTC Housing

What the federal government requires to meet its Housing for Older Persons exemption is distinct from what a state housing finance agency may require for its tax credit "elderly" properties.

- For example, although the Fair Housing Act requires 80% occupancy by at least one person 55 or older, state housing finance agencies may require that all persons residing in an elderly property be 55 or older. In other states the minimum age may be 62.

In most cases properties that comply with state requirements (which are usually stricter than federal requirements) will also comply with the Fair Housing Act's exemption requirements.[3] For example,

- Happy Village is a tax credit elderly housing property in Pennsylvania that excludes children. Happy Village requires that at least one person in 80% of its units be 55 or older. During its application process, the property received extra credits because it was intended to be an elderly property under the state's rules, which, in this case, requires that all units be occupied by at least one person 55 or older. During lease up the manager tried to ensure that everyone who moved in was at least 55, but he did allow a husband and wife to move in, whose ages were 62 and 52, respectively. The manager knew that housing this couple would not interfere with Happy Village's Fair Housing exemption from familial status requirements. But the manager forgot that he also had to comply with the state's tax credit rules for elderly housing (to say nothing of the assurances made during the application process). After being found out of compliance by Pennsylvania's Housing Finance Agency, the couple with the underage spouse was asked to move.

V. A Note About Tax Credit Properties that Receive HOME funds

As noted earlier, tax credit properties that are privately financed are not considered recipients of federal financial assistance such that the requirements of Section 504 of the Rehabilitation Act of 1973 are applicable.[4]

- On the other hand, tax credit properties that participate in HUD subsidized programs are recipients and thus subject to Section 504.

[2] Please see section V of this chapter for additional information regarding the receipt of HOME funds.
[3] Please note, however, that this rule may not apply where the state defines "elderly" to include non-elderly persons with disabilities.
[4] For a complete discussion of what it means to be a "recipient" of federal financial assistance, please see Chapter 3, Section 3.

- Equally important, tax credit properties that also participate in one of HUD's elderly housing programs are ineligible to qualify for the Housing for Older Persons exemption.

One issue that remains unsettled is whether tax credit properties that receive HOME funds are also ineligible for one of the Housing for Older Persons exemptions. Although housing advocates, and even some HUD offices, have taken the position that the receipt of HOME funds requires such properties to admit families with children, HUD has not issued any formal policy statement regarding this issue, nor have there been any court decisions to date.

C H A P T E R 12

CIVIL RIGHTS ENFORCEMENT

I. Introduction[1]

In our final chapter we will learn how government agencies and individual citizens who claim to be victims of housing discrimination enforce their fair housing rights.

II. Fair Housing Act Enforcement

A. Enforcement by HUD

Apart from investigating complaints of housing discrimination and acting as a mediator or conciliator if the parties wished, HUD had virtually no enforcement authority between 1968, when Congress passed the original Fair Housing Act, and March 1989, when the Fair Housing Amendments Act of 1988 became law.

The 1988 amendments changed all of that dramatically. While HUD continues to receive and investigate complaints of housing discrimination, Congress also provided the agency with the authority to charge housing providers with specific acts of discrimination, to bring those housing providers to trial before federal administrative law judges, and to seek monetary and other forms of relief for individual victims of housing discrimination.

HUD's administrative enforcement process begins when an "aggrieved person" files a housing discrimination complaint.

- An aggrieved person is anyone who believes they have or will be injured by an act of housing discrimination. Complaints may be filed by apartment seekers and their spouses, children or roommates, residents who attempt to sublease their unit, owners, agents, fair housing organizations (discussed later in the chapter) or testers (also discussed later in this chapter.)

- The Act says that "any person" alleged to have committed a prohibited act (called "respondents") can be sued – this includes individual landlords, corporations, management companies, leasing agents, neighbors, newspapers, mortgage companies, and even local, state and federal government agencies, including HUD itself.

Complaints must be filed within one year of the alleged violation. Absent extraordinary circumstances, HUD will not accept complaints filed later than the one-year cutoff. Complaints are typically filed using HUD-approved forms, and may be filed in person, over the telephone or via the internet.

[1] The information provided in this chapter and elsewhere in this manual is not a substitute for legal advice; housing providers are reminded to seek competent legal advice in developing specific fair housing policies, procedures and practices.

After HUD reviews the complaint to make sure these requirements have been met, the case is assigned to an investigator. The investigation is designed to determine whether or not there is "reasonable cause" for HUD to believe that an act of housing discrimination occurred.

The Fair Housing Act allows, and in some cases requires, HUD to delegate its investigatory and enforcement authority to state or local fair housing agencies whose laws are "substantially equivalent" to federal law. Such agencies are called Fair Housing Assistance Programs (or "FHAPs") and are discussed later in this chapter in section 3.

The investigation is intended to be a full, fair and impartial gathering of the facts necessary to make a reasoned judgment whether or not discrimination occurred. Investigators will interview the parties and any witnesses to the alleged discriminatory act and gather relevant documents. While HUD stresses the need for voluntary cooperation during its investigation, the Department has subpoena power if necessary.

- During an investigation it is always a good idea for a housing provider to offer the investigator copies of all relevant regulations, handbooks, notices, and other documents that support the housing provider's policies and procedures. If the investigator is an employee of HUD it should not be presumed that he/she is aware of requirements and guidance from HUD's Office of Housing.

Although the Act directs HUD to complete its investigation of complaints "within 100 days after the filing of the complaint, unless it is impracticable to do so," it is extremely rare for HUD to meet that schedule. Many cases remain in HUD's inventory for months if not years before any determination is made.

Once the investigation is complete, one of two things can happen:

- If HUD determines there is reasonable cause to believe that an act of housing discrimination occurred, HUD will issue a "Reasonable Cause Determination" and a "Charge of Discrimination."

- If, on the other hand, HUD determines there is "no reasonable cause" to believe that an act of housing discrimination occurred, HUD will dismiss the complaint and close its file.

Settlement of fair housing complaints (which HUD calls "conciliation") is always encouraged. Indeed, the Act requires that HUD make a good faith attempt to conciliate each and every complaint.

Conciliation, which may occur at any time in the process, and is entirely voluntary – any party may refuse to discuss settlement without prejudicing its case. However, in most cases complainants and respondents make some effort to settle for the same reasons that litigants in court attempt to settle their cases – settling a case is invariably much cheaper and much quicker than resorting to a trial.

If conciliation fails, HUD continues its investigation and eventually must determine whether or not there is reasonable cause to believe that discrimination has occurred. A Final Investigative Report ("FIR") is then completed. After a decision is rendered, any party has the right to request a copy of the FIR.

After completion of the investigation, HUD either makes a determination of cause to believe that discrimination occurred or issues a determination of no cause and dismisses the complaint. If a cause decision is rendered, HUD issues a Charge of Discrimination.

A Charge of Discrimination is like a complaint filed in court. It sets forth the essential facts as well as the legal basis for HUD's reasonable cause finding.

- After a charge is issued, any party named in the complaint, including all complainants and respondents, has the right to "elect" to have the merits of the case decided in federal court rather than in HUD's administrative law system.

It takes only one party to elect. HUD transfers all elected cases to DOJ, which prosecutes the case on behalf of the complainant in the local federal district court. Cases that are filed in federal district court are decided by a judge and a jury if a jury trial is demanded by one of the parties.

If no party elects to go to federal court, the case will be heard by one of HUD's administrative law judges. Although these judges are employed by HUD, and are thus familiar with the Act and HUD procedures, they are "independent" of the Department's political decision makers.

Administrative trials (also called "hearings") although less formal, are conducted in much the same way as any other courtroom trial – witnesses are sworn in, examined and cross-examined by counsel, lawyers submit documentary evidence and briefs, and so on. These hearings occur much quicker than court trials and usually result in less cost to the respondents.

After the trial, the judge will issue his or her decision. If the judge finds that the respondent violated the Act, the judge is likely to order that the respondent pay "damages" to the complainant to compensate the complainant for the out of pocket losses as well as the intangible or emotional injuries caused by the discrimination. The amount of damages depends on the nature and severity of those injuries.

- Actual damages may include moving expenses, rent differentials, loss of wages, and so on.

- In virtually all cases, however, damages awarded for the emotional distress caused by the discrimination dwarf any out of pocket damages.

- Administrative law judges may also assess a fine (or "civil penalty") against the respondent, ranging from $11,000 up to $55,000 depending on whether the respondent has been judged guilty of housing discrimination in the past.

- Additional awards frequently include record-keeping and reporting requirements.

For example, a housing provider found guilty of discrimination in its application process may be required to maintain all rental applications and all other material it receives from applicants, and to send copies of all such documents to HUD or DOJ every four to six months for upwards of five years.

Judges may also award attorney's fees and costs.

Judges routinely enjoin respondents from committing further acts of discrimination and may even order respondents to attend fair housing training.

Finally, any party adversely affected by a final decision may file a petition for review in the U.S. Court of Appeals.

B. Enforcement by the Department of Justice

In addition to having exclusive jurisdiction to prosecute elected cases, DOJ is also authorized to file lawsuits in federal district court that involve a "pattern and practice" of discrimination.

- In contrast to cases that typically involve a single incident of discrimination, pattern and practice cases involve systematic discrimination occurring over a long period of time. It may also include widespread discrimination affecting many individuals.

DOJ is also authorized to commence cases that involve zoning or other land-use issues as well as cases that allege violations of conciliation agreements. HUD also needs DOJ to enforce its subpoena powers.

C. Enforcement by Private Individuals and Fair Housing Agencies

Individual victims of discrimination may choose to bypass the HUD/DOJ system and go directly to court themselves. Cases may be filed by individuals in federal court under the federal Fair Housing Act, or in state court under the appropriate state or local fair housing act. Federal cases must be commenced within two years of the date of the alleged discriminatory act.

- An increasing number of individual victims of discrimination are represented in court by private, non-profit fair housing organizations. These groups often receive funding from HUD under its Fair Housing Initiatives Program (FHIP).

D. Enforcement by State and Local Fair Housing Agencies

HUD also funds state and local fair housing enforcement agencies through its Fair Housing Assistance Program ("FHAP"). To be eligible for assistance, so-called "FHAP" agencies must demonstrate to HUD that its fair housing law is "substantially equivalent" to the Fair Housing Act.

- In jurisdictions where FHAP agencies exist, it is that agency rather than HUD that investigates and if necessary prosecutes cases of housing discrimination.

III. HUD's Section 504 Enforcement[2]

A. Overview of Section 504 Enforcement

HUD's enforcement authority over Section 504 recipients takes two distinct forms:

[2] This section applies equally to HUD's enforcement of Title VI.

- HUD is authorized to investigate complaints of discrimination filed by individuals who allege they are victims of discriminatory behavior by a recipient; and/or

- HUD is authorized to initiate a compliance review of all aspects of the recipient's programs, services and activities – with our without the existence of a filed complaint.

Individuals may file complaints under Section 504 in exactly the same way as individuals file complaints under the Fair Housing Act. Complaints against the same recipient/housing provider may allege violations of both statutes. As a result, HUD will investigate recipients under Section 504 and Title VI during its investigation of a Fair Housing complaint, even when the complainant fails to allege any Section 504 or Title VI violations.

Unlike Fair Housing Act complaints, HUD will keep the identity of complainants confidential unless it has written authorization from the complainant to release his or her name.

Normally, Section 504 complaints must be filed within 180 days of the alleged discriminatory act, although HUD can extend that deadline "for good cause."

If the complainant is disabled within the meaning of Section 504, is otherwise qualified for the program or activity in issue, and the program or activity is one that receives federal financial assistance from HUD, then HUD will accept the complaint for investigation.[3]

- Section 504 investigations are conducted in virtually the same way as Fair Housing Act investigations are conducted; that is, HUD will interview the parties and any witnesses, collect relevant documents and conduct on-site reviews of the recipient's facilities.

Once the investigation is complete, HUD creates a Final Investigative Report (FIR) and issues a Letter of Findings to the recipient.

B. Voluntary Compliance Agreements

Throughout the process, HUD encourages voluntary resolution through the use of written Voluntary Compliance Agreements. A matter may be resolved in this way at any time, even after an adjudication of guilt by an administrative law judge.

- Because the ultimate penalty for a Section 504 or Title VI violation is the termination of federal funding, recipients are given wide latitude to correct violations at any point in the process. Indeed there is no evidence that any recipient has ever been terminated from a HUD program because of a Section 504 or Title VI violation.

IV. Fair Housing Testing As A Means To Uncover Discrimination

Testing as a means to uncover race discrimination in rental housing was first approved by the U.S. Supreme Court in 1982.

[3] For a complete discussion of what it means to be a "recipient" of federal financial assistance, please see Chapter 3, Section 3.

In most cases involving allegations of race or national origin discrimination, testing works this way:

- The process often begins when an African American or Hispanic person complains to a private fair housing organization that he or she had been treated unfairly when attempting to rent an apartment.

- Treating people differently because of their membership in a "protected group" is the most common type of discrimination.

- Complaints like this are usually filed after the individual is actually denied an apartment, although individuals might not wait for a formal rejection but simply complain about the way they were treated.

In order to determine if race or national origin discrimination played a part in the treatment the individual received, the agency will send a comparable white or non-Hispanic person to inquire about renting a unit at the same complex. Testers are usually individuals from the local community who have been specifically trained to conduct fair housing tests. Many are civic-minded volunteers, although some are paid on a per test basis.

- Being "comparable" means that the testers should be – to the extent possible – equally matched with the complainant on their background, employment and rental history and even educational characteristics, differing only in their race or ethnicity.

While it is a federal crime to lie on an application for federal housing, in almost all cases testers may have to lie in any face to face meetings with rental agents about these characteristics. While lying may be inherently wrong, remember that the Supreme Court has justified lying in this context as a powerful means to uncover discrimination.

Using standardized forms that report what transpired during the test, for example, the nature of the assistance given, the number, type and location of units shown, the terms and conditions offered, and so on, investigative agencies are then able to make a determination if discrimination occurred.

- In other words, by isolating race and ethnicity as the only "non-comparable" category, a test may provide persuasive evidence that the reason the white tester was offered a unit that the black applicant was denied, or given better treatment during the application process, was because of the race or ethnicity of the applicant.

Testing for disability discrimination is especially common now and is often not complaint-driven. This means that investigative agencies and private fair housing organizations may test apartment communities for compliance with accessibility requirements before anyone has actually complained about a complex.

V. The Best Way to Defend Against Complaints

Even the most well-intentioned and best-trained housing providers still find themselves accused of housing discrimination on occasion, usually as a result of one or two isolated incidents that occur on their property.

While there is nothing one can do or say to prevent someone who believes they have been discriminated against from filing a complaint, there is something housing providers can do to ensure a good defense when the time comes – keep good records.

- A “good” record is one that sticks to the facts. Incident reports should therefore answer the questions who, what, where, when and why.

- Reports should describe what is seen and heard, not what is thought or believed. For example, “Ms. Jones stormed into my office, shouting in a loud voice, using expletives and vulgar language.” Not, “Ms. Jones was rude and paranoid, as usual.”

- Properties should develop a standardized form that can be used in a variety of situations. In addition to recording the incident itself, make sure management’s response is also recorded.

- Incident reports should be kept in the files of all residents who were involved. In addition, because investigators want to compare the treatment a complainant received in comparison to other residents, creating a separate file in the office where incident reports can be kept chronologically is a good idea as well.