Reasonable Accommodations in Tenant Selection Processes

Guidelines for the Tenant Selection Process

Note: The following information is adapted from CSH's *Supportive Housing Property Management Operations Manual*, available at www.csh.org/publications.

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

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

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

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

3. If any applicant with a disability or handicap cannot satisfy the requirements of tenancy because of previous rental history, housing providers must, if requested by the applicant:
    - Consider whether any mitigating circumstances related to the disability could be verified to explain and overcome the problematic behavior; and
    - Make a reasonable accommodation that will allow the applicant to meet the requirements.

Note: This document is included within the *Housing Operations* section of CSH's *Toolkit for Developing and Operating Supportive Housing*, which is available at www.csh.org/toolkit2.

4. A reasonable accommodation allows the applicant with a disability to meet essential requirements of tenancy. Applicants and providers are each responsible for working together to identify the specific accommodation that each accepts as reasonable.

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

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

Reasonable Accommodation in Tenant Selection

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

Question 1: What does "reasonable accommodation" mean?

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

The Fair Housing Act prohibits discrimination against persons with disabilities in the provision of housing, but also goes further and creates an affirmative duty for housing providers to

[1] *See* 42 U.S.C. 3604(f)(3)(A); 24 CFR 8.24(a); and 28 CFR 35.150.
[2] *See* 42 U.S.C. 3604(f)(3)(B).

accommodate persons with disabilities. "Failure to accommodate" is a separate and distinct charge under the Fair Housing Act. In other words, housing providers must make changes to their rules, policies and procedures that will allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. Such accommodations, or changes, need only be "reasonable" in the sense that a housing provider is not required to undergo great financial and administrative hardship in order to provide the accommodation. Nor must a housing provider make a fundamental alteration in the nature of its program.[3] However, the provider must bear some costs and make some special provisions for persons with disabilities. Some accommodations may also place a burden on the tenant to participate in the accommodation. For example, if a housing provider is asked to make a change in tenant acceptance policies to allow a disabled tenant with past behavior problems to reside in the housing, it is reasonable for the provider to require the tenant to demonstrate ongoing treatment or services for the underlying condition that caused the behavior problem. Housing providers are not required to inform tenants of their rights to a reasonable accommodation, but a statement in the application form informing applicants of these rights is a prudent practice that may eliminate some discrimination claims and initiate communication between the applicant and the provider before a claim is filed.

If a project receives federal funds, it is also subject to Section 504 of the Rehabilitation Act of 1973. Section 504 includes an implicit reasonable accommodation requirement which generally has a broader scope than the Fair Housing Act provisions, requiring a housing provider in certain instances to pay for necessary physical modifications to a disabled tenant's unit. If non-federal public funds are received, the assisting public agency's obligations under Title II of the ADA impose a similar reasonable modification requirement on the provider.

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

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

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

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

In the applicant screening process housing providers have two levels of requirements for reasonable accommodation. First, the screening process itself must be accessible to all applicants. For

[3] *See* Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397, 410-12 (1979).

example, if an applicant is hearing impaired, the housing provider will need to provide sign language interpretation or some other method for communicating with the applicant in order to ensure that the applicant has an opportunity to participate in the tenant selection process.

The housing provider's second responsibility in applicant screening is to determine if there is a reasonable accommodation available that would allow the applicant to occupy the dwelling, either by physically modifying the housing unit or changing the rules of the program. It should be noted that housing providers do not have an affirmative obligation to ask applicants if they need a reasonable accommodation, but housing providers also should not ignore obvious disabilities. Nor do housing providers have to try to determine what the reasonable accommodation might be. But if an applicant requests a reasonable accommodation as part of the screening process, the housing provider is required to consider the request and implement the accommodation if it does not fundamentally alter the nature of the housing program and does not cause an undue financial burden on the housing provider. Additionally, the reasonable accommodation must be an accommodation that is related to the applicant's residency in the housing and is designed to enable the applicant to reside in and have full enjoyment of the housing. For example, if an applicant requests as a reasonable accommodation that the housing provider allow the applicant to occupy the most desirable unit in the development because it has a nice view that will lend inspiration to the applicant, this may not be a reasonable accommodation even if the applicant has a disability which would entitle the applicant to an accommodation. Conversely, if the applicant requests the best unit in the development because it is the only unit that can accommodate the applicant and the applicant's live-in care attendant, the housing provider should honor the request, even if units are usually assigned randomly.

If an applicant requests a reasonable accommodation, a housing provider may request documentation or some proof of the disability and the link between the disability and the requested accommodation. The housing provider may not, however, require an applicant to submit medical records as proof of his or her disability; such records are private. Instead, the housing provider should request a doctor's letter, an SSI award letter or some similar verification. Even when the housing provider is seeking proof of the applicant's disability, the provider may not ask about the particular type or severity of disability or other specifics, unless the housing is designated for only a particular disabled population, or unless the specific information relates to the provision of an accommodation.[4]

A safe way for a housing provider to elicit information about applicants' disabilities in a nondiscriminatory manner is to disclose to all applicants—whether or not they appear disabled—information about the housing provider's duty to make reasonable accommodations. Additionally, in informing an applicant that the housing provider has rejected the application, a general information statement regarding the availability of reasonable accommodations should be included.

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

[4] *See* Robards v. Cotton Mill Associates, 1998 WL 321714 (Me.), June 18, 1998 (holding that a landlord can require physician's authorization that an applicant is disabled, but cannot require the applicant to provide a description of the disability).

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

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

Property owners and managers may also deny housing to anyone whose tenancy would constitute a direct threat to the health and safety of others. Determining that someone poses a direct threat to others must be based on past behavior rather than a sense that the person might be violent or destroy the property. Thus, an applicant's history of eviction from other housing for violent behavior might be sufficient grounds for denying occupancy. However, if the applicant merely displays behavior at the intake interview that the interviewer finds inappropriate or scary, but which does not constitute threatening behavior, and there is no documented previous history of threatening behavior, then it would not be appropriate to deny occupancy to the applicant on the basis of posing a threat to others. If a reasonable accommodation would eliminate the threat to others, then such an accommodation should be offered to the applicant.

In at least two reported federal court decisions, courts have refused to evict tenants with disabilities who physically assaulted other tenants because the owner of the housing failed to show that there was no reasonable accommodation that could be provided that would remove the threat to others.[5] These court decisions do not indicate whether the tenants requested an accommodation before the eviction, which should be a requirement since without such a request, the owner has no way of knowing whether the violent behavior is the result of a disability. Also, these courts did not give any indication of what the reasonable accommodation would be in this situation. Determining a reasonable accommodation in such a situation will require owners to weigh the needs of the individual tenant versus the needs of all the tenants to live in a safe environment. An example of a reasonable accommodation for a violent tenant might be to allow the tenant to remain in the housing as long as the tenant is receiving counseling on the violent behavior. Such an accommodation would be reasonable only if the accommodation adequately ensured the safety of the other residents.

[5] Roe v. Boulder Housing Authority, 909 F.Supp.814 (D.Col. 1996); Roe v. Sugar Mill Associates, 820 F.Supp. 636, 639-40 (D.N.H. 1993).

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

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

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

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

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

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

As a reasonable accommodation, the housing provider should focus on the applicant's current behavior and ability to meet the terms of the tenancy. The landlord will need to know what mitigating circumstances exist, and whether past alcohol or drug use was responsible for the applicant's criminal conviction and bad tenancy history. The landlord can ask an applicant to explain the bad tenancy history and criminal conviction, essentially inviting an applicant's disclosure of the disability.

If the applicant does not have a reason for the past behavior that is related to a disability, then the housing provider may deny the application. If the housing provider rejects an applicant because of past negative behavior, the provider should disclose that an applicant's disability could entitle the applicant to a consideration of mitigating circumstances and to a reasonable accommodation.

If the applicant gives a reason for past poor behavior that is related to a disability, the provider must consider whether a reasonable accommodation is appropriate. For example, if the applicant shows that negative behavior was caused by alcoholism, and the applicant is participating in a program that addresses this condition, it may be reasonable for the provider to waive its policy that all applicants with poor tenancy histories be rejected for tenancy.

Question 6: Can a housing provider exclude tenants with disabilities because they need care and supervision?

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

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

The Cason case has generally been read to mean that you cannot have an independent living requirement in any housing development, whether or not funded by Section 202. (It should be noted that HUD's 202 manuals and recommended forms and leases continue to contain independent living requirements, although they appear to be invalid based on Cason.) However, this does not mean that a housing provider must allow occupancy to a tenant who clearly cannot care for him or herself and is not receiving the assistance necessary to enable the occupant to reside in a non-licensed housing unit. If the applicant cannot meet the terms and conditions of tenancy and the only reasonable accommodation that would allow the tenant to reside in the housing unit is for the housing provider to provide care and supervision, this would not be a reasonable accommodation. An accommodation is only reasonable if it does not require a fundamental alteration in the housing provider's program. The provision of care and supervision, which in most states would require licensing under applicable state licensing laws, would be a fundamental alteration. However, if the applicant requires care and supervision and has made arrangements to receive this care and supervision, the housing provider would be required to accept the applicant, even if the care and supervision arrangements may violate the rules of the development.

For example, in a recent court case, a housing development had specific rules about who could have keys to the main entrance of the building and was threatening eviction of a resident for giving a key to a care attendant. The court found that allowing the care attendant to have a key was a reasonable accommodation.[6] This same decision provides clear guidance on how housing providers can deal with care and supervision issues. According to this trial court decision, providers can ask questions to determine if an applicant meets the criteria for the development, including whether the applicant is disabled, if this is a criteria. The provider may also inform applicants that the provider does not provide personal care services. However, housing providers may not (a) inquire into the severity of disabilities to determine if the applicant needs services that the provider is not required to provide; or (b) prohibit a tenant from arranging for services. It should be noted that this guidance from the trial court is not binding on other courts and other courts may interpret care and supervision issues differently.

[6] Niederhauser v. Independence Square Housing Corporation, No. C96-20504 RMW (N.D. Cal. August 25, 1998) (order granting in part and denying in part plaintiff's motion for summary judgment).

If the tenant's disability requires a live-in care attendant, the housing provider may have to waive occupancy rules to allow the live-in attendant. However, a waiver of health and safety code requirements, such as allowing a live-in care attendant in a room limited by law to one person, would not be reasonable if it violates applicable building code requirements.

Note: CSH's *Toolkit for Developing and Operating Supportive Housing* includes more information regarding applicant screening processes, under *Tenant Screening, Selection and Move-In* within the *Housing Operations* section of the *Toolkit*, at www.csh.org/toolkit2operations.