

FAIR HOUSING and DISABILITY ISSUES

RIGHT TO PARTICIPATE

ACCESSIBILITY

REASONABLE

ACCOMMODATIONS

OLMSTEAD

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What Federal Laws are we talking about?

- **Fair Housing Act (FH Act) - private & subsidized housing**
- **Section 504 of the Rehabilitation Act of 1973 (Section 504) - federal funds**
- **Title II of the Americans with Disabilities Act (ADA Title II) - state/local government**

Requirements

- No discrimination against persons with disabilities
- Design and construction standards for new housing
- Reasonable accommodation
- Reasonable modification at TENANT expense (private housing, no government funds)
- Reasonable modification at MANAGEMENT expense (government funds)

Who is a person with a disability?

Any person who --

- has a physical or mental impairment that substantially limits one or more major life activities;
- who has a record of such impairment; or
- who is regarded as having such an impairment.

DESIGN AND CONSTRUCTION REQUIREMENTS

FH Act Design and Construction Requirements apply to multi-family buildings of 4+ Units built for first occupancy 3/13/91

FH Act Design & Construction

7 requirements:

1. At least one building entrance on an accessible route
2. Accessible and usable public and common areas
3. Doors that allow the passage of a wheelchair (nominal 32")

4. Accessible route into and through each unit
5. Switches, outlets, environmental controls must be accessible
6. Re-enforced bathroom walls so that grab bars can be added
7. Accessible and usable bathrooms and kitchens

Sec. 504 New Construction Requirements

- New Construction (after 7-11-88)
- 5% accessible for mobility impaired & 2% for vision or hearing impaired

Sec. 504 Rehab Requirements

- Substantial Rehab (75% of replacement cost) – treated like new construction
- Other rehab – accessible to extent feasible
- Replacement of individual elements – must be accessible until 5% of units are accessible

Why Reasonable Accommodation?

Since persons with disabilities may have special needs due to their disabilities, in some cases, simply treating them exactly the same as others may not ensure that they have an equal opportunity to use and enjoy a dwelling unit or housing program.

What is a Reasonable Accommodation?

A “reasonable accommodation” in housing is a change, adaptation or modification of a housing unit, policy, program, or service, which will allow a qualified person with a disability to use and fully enjoy the housing, participate fully in the program, or take advantage of the service.

May involve a change in any rule, policy or procedure, as long as the need for a change is linked to disability.

However, modifying the rules does not mean the tenant can violate the lease.

Accommodation Requests

- Applicant or tenant must request accommodation, orally or in writing.
- Must be an identified relationship between requested accommodation and the individual's disability.
- Requests are made and considered on an individual basis, based on particular needs and circumstances.

Is it reasonable?

MUST BE DECIDED ON A CASE-BY-CASE BASIS

Determination depends on the answer to two questions:

- Does the request impose any undue financial or administrative burden on the housing provider?
- Would making the accommodation require a fundamental alteration in the nature of the provider's operations?

Accommodations in the routine of the application process:

- Mailing application rather than requiring applicant to come in person
- Changing the location of an interview if the usual interview office is not accessible
- Allowing applicant to bring someone to assist (paid assistant, friend or relative)

Communications:

- For a large corporate provider, it might be reasonable to put a lease into Braille or provide a sign language interpreter
- For a small housing provider it might not
- It would be reasonable for a small landlord to read the lease aloud to someone who is blind or allow a blind applicant a day to take the lease home and have some trusted person read it.

References

- Applicant has been in long-term hospitalization due to a disability
- No recent landlord references
- Alternate references - employer or clergyperson
- Consider other records – e.g., showing that the applicant pays bills on time

Applicant with negative element in the record

- Complex issues
- Applicant requests as accommodation that landlord consider mitigating circumstances related to disability
- Negative element may be disturbing neighbors, poor maintenance, late rent payments, even a criminal act

Flowers/AIMCO case

HUD ALJ 2001

- Applicant rejected due to negative reference
- Applicant told landlord problem related to mental disability, now on medication & problem would not recur
- Rejected anyway
- ALJ found landlord liable

What if the tenant poses a “direct threat to health and safety”?

- Landlord not required to accommodate a person whose tenancy would constitute a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others.
- Landlord must be able to support such action with recent, credible and objective evidence of the “direct threat”.

Williams case

HUD ALJ 1991

- Landlord inquiries may go to far
- In this case, landlord made inappropriate inquiries regarding the medical condition of tenant living with AIDS
- Landlord's inquiries violated the Fair Housing Act
- Generally, landlord NOT entitled to medical records

Accommodations during occupancy

- Service or companion animal necessary due to disability
- Assigned parking space
- Personal care attendant
- Use of special equipment
- Multiple chemical sensitivity

If requested accommodation is unreasonable, provider still required to provide other accommodations that do qualify as reasonable.

- Example: Disability – multiple chemical sensitivity
- Not using any pesticide may be an unreasonable request.
- Notice to Tenant of when pesticide will be used would be reasonable.

Service or companion animal

- Needed due to disability
- Not a pet, no-pet rule does not apply
- Landlord may not prohibit based on size
- Landlord may not require training
- Landlord may have rules for animals

Blue Meadows case

HUD ALJ 2000

- Reasonable for management to require medical verification of need for dog to pull wheelchair
- Reasonable for management to require specific information about the type of dog, its training, and its temperament

Parking

- Assigned parking space
- Space in a particular location
- Needed due to disability
- Landlord must assign space, even if all other spaces are unassigned

Cummings v. Dedham Housing Authority

- HUD ALJ 1991
- Disabled tenant denied reserved parking space by HA on grounds HA could not reserve spaces for all who would want them
- Court ordered HA to reserve space closest to tenant's unit & pay tenant \$12,100 for physical pain, emotional distress, and inconvenience

Special Equipment

Twinbrook village case

HUD ALJ 2001

- Special equipment - motorized wheelchair
- Landlord required users of motorized wheelchair to carry special liability insurance
- ALJ found this requirement to be a violation of the Fair Housing Act

**When is there a duty to
accommodate?**

Courthouse Square case

HUD ALJ 2001

- To trigger the duty to accommodate
- Tenant must request accommodation and explain how it is related to disability
- Unless the disability and need for accommodation are “obvious”

Landlord may not ignore accommodation request, but:

- Applicant/tenant must request accommodation
- Landlord not required to figure out need for accommodation if not requested
- Landlord may require verification of disability and need for accommodation
- Tenant must comply with lease

**Section 504 of the
Rehabilitation Act,
Title II of the Americans with
Disabilities Act,
and *Olmstead* Compliance**

Olmstead Decision

- June 1999 Supreme Court ruling in *Olmstead v. L.C.*, 527 U.S. 581 (1999)
- Held: ADA Title II prohibits unjustified segregation of persons with disabilities
- Public entities must serve persons with disabilities in community settings rather than institutions when appropriate, taking into account resources available and the needs of others with disabilities

Relationship to 504

- HUD 504 regulations require the most integrated setting possible 24 CFR 8.4(d)
- Persons with disabilities transitioning from institutional to community-based settings have a rights to equal opportunity in housing and in all HUD-assisted programs and activities

Disability-Specific Housing

- **Generally prohibited** unless authorized by specific statute or Executive Order
- **Non-disabled** may be excluded from a program limited by law to persons with disabilities
- **A program may be limited by law** to specific class of persons with disabilities, excluding other disabled

Narrow Exception

- 504 regs permit a very narrow exception for segregated, separate services absent statutory authorization
- **Only if necessary to provide persons with disabilities housing or services as effective as those provided to others.**
24 CFR § 8.4(b)(1)(iv)
- Exception is rarely applicable

Title II of the ADA

- Principle of integration under Section 504 was carried forward in the ADA
- ADA Title II prohibits discrimination against persons with disabilities in all services, programs, and activities of public entities. 42 USC § 12132
- Implementing regs 28 CFR part 35

After Olmstead Decision

- Significant DOJ litigation to move individuals out of institutional or segregated environments
- Institution (e.g., psychiatric hospital, nursing home) is segregated living
- Other unjustified segregated living environments – any institution-like setting or segregated housing

Federal Agency Actions

- DOJ Statement on Enforcement of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*,
http://www.ada.gov/olmstead/q&a_olmstead.htm
- HHS is revising regulations
- HUD is developing a statement on the integration mandate

Integrated Settings

- Mainstream; access to community activities and opportunities; choice of daily life activities
- Scattered-site housing with availability of supportive services
- Not located in a facility that provides institutional treatment or custodial care, or on grounds of, or next to, an institution
- Not a housing complex designed expressly around a diagnosis or disability

Segregated Settings

- Populated exclusively or primarily by persons with disabilities;
- Regimentation; lack of privacy or autonomy; policies limiting visitors; limits on ability to engage freely in community activities and manage activities of daily living; or
- Provide for daytime activities primarily with other individuals with disabilities

Actions to Support *Olmstead* Implementation

- Two types:
- Actions PHAs and other grantees can always take
- Remedial Actions – actions PHAs and other grantees generally cannot take unless specifically authorized by HUD, to remedy past discrimination

Under Existing Authority

- No outstanding *Olmstead*-related litigation or settlement that requires remedial activities
- HUD encourages PHAs to direct resources to persons transitioning from institutions or at risk of institutionalization
- Local admission preferences for persons with disabilities in general, targeted preferences for persons with disabilities ready to exit institutions or at risk of institutionalization

PIH Notice 2012-31 (HA)

- Local preference
- Dedicate non-elderly disabled (NED) vouchers under PIH Notice 2011-32
- Leverage 811 funds within public housing
- Develop accessible housing waiting lists
- Enhance outreach & flexible procedures
- Requests for extensions of HCVs
- Service-based resources: Centers for Medicare and Medicaid Services (CMS)

Maximize Appropriate Use of Accessible Units

- Outreach
- Track applicants who need accessible units
- Prioritize transfers for accessibility
- Prioritize accessible units for applicants who need accessible units
- Incorporate transfer clause in leases when non-mobility impaired households occupy an accessible unit

Other Activities

- Effective communication with applicants, tenants, members of the public
- Extend limited application periods
- Avoid “first come first serve” line ups
- Allow flexible application procedures or locations

Not Permitted

- Programs using HUD resources that only provide housing to persons with specific disabilities in large-scale housing with large percentage occupied by the target populations
- Directing HUD resources to target populations in HUD-assisted housing without HUD approval

Remedial Actions

- Remedial Actions for Past Segregation
- It may be necessary and appropriate to offer tenant selection preferences within certain programs to specific populations as a remedial measure to meet *Olmstead* obligations
- Requires HUD coordination and approval – Jeanine Worden, OGC, and Sara Pratt, FHEO