

Fair Housing Information Sheet # 2: Structural Modifications In Public And Section 8 Housing

The ADA and structural modifications in public and Section 8 housing

A housing authority is a public entity under Title II of the ADA, and thus its services, activities and benefits must be accessible to individuals with disabilities. Whether and to what extent a housing authority must make its dwelling units accessible under the ADA depends on whether the dwellings are considered new construction, previously constructed but undergoing alterations, or previously constructed but not undergoing any alterations.

In the case of new construction or alterations on previously constructed dwellings begun after January 26, 1992, the dwelling units and common areas must be accessible to and usable by persons with disabilities. Compliance with either the ADAAG or UFAS standards is acceptable (UFAS contains specific requirements for residential dwelling units; ADAAG does not). A housing authority may choose which standard to use, but it must be consistent and apply only one standard to an entire building.

Existing facilities must meet the program accessibility requirement, which means that, viewed as a whole, these facilities must be accessible to and usable by persons with disabilities, although not all buildings or dwelling units must be accessible. The housing authority may achieve program access by such methods as transfers to alternate units, assignment of aides or redesign of equipment. Structural changes are not required unless there is no other way to provide services. 28 C.F.R. § 35.151. Even when structural modifications are required, they may be made on a limited basis, such as one building or meeting room.

Landlords who accept Section 8 payments are not public entities subject to Title II. The housing authority's administration of its Section 8 program, however, must meet the program access requirement of Title II.

Section 504 and structural modifications in public and Section 8 housing

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, is applicable when housing is built or rented with the use of federal funds. Therefore, both public housing and Section 8 housing are covered under the HUD regulations implementing Section 504, 24 C.F.R. Part 8. A housing authority that administers a Section 8 program is a covered entity, although a private landlord that accepts tenants through the Section 8 program is not. 24 C.F.R. § 8.3 (definition of recipient).

Under the HUD regulations implementing Section 504, new multi-family housing (five or more dwelling units) designed or constructed after July 11, 1988 must be readily accessible to and usable to individuals with disabilities. This standard is met if a minimum of 5 percent of the total dwelling units, but not fewer than one unit, is accessible for individuals with mobility impairments. An additional 2 percent of the total units, but not fewer than one unit, must be accessible for persons with hearing or vision impairments. 24 C.F.R. § 8.22(b). It is possible for HUD to prescribe a higher number of accessible units if requested and upon demonstration of need. 24 C.F.R. § 8.22

If substantial alterations are made to a project that has more than 15 units, these same rules apply. A "substantial" alteration is one that costs more than 75 percent of the cost of replacing the entire facility. 24 C.F.R. § 8.23. Lesser alterations must be made accessible to the maximum extent feasible. If changes to single elements within a dwelling unit, when taken together, constitute an alteration to the unit, the entire unit must be made accessible. Once 5 percent of the units are accessible for individuals with mobility impairments, there is no further requirement unless HUD prescribes a higher number. 24 C.F.R. § 8.23.

Structural changes are not required in existing facilities where other means exist for making the program or services accessible to individuals with disabilities. 24 C.F.R. § 8.24. As under Title II, moving a person to an available accessible unit is a viable alternative. A covered entity, however, is not required to make any changes that would fundamentally alter the nature of the program or result in undue administrative or financial burden. The cost of structural changes must be borne by the covered entity.

The Fair Housing Act and structural modifications to public and Section 8 housing

Under the FHA, new multi-family (four or more units) housing designed and constructed for first occupancy after March 13, 1991 must be built in accordance with the Fair Housing Accessibility Guidelines. 24 C.F.R. § 100.205; 24 C.F.R. Appx. II, IA (Fair Housing Accessibility Guidelines). There is no requirement, however, that alterations be made in an accessible manner. In addition, if structural modifications are required to a pre-March 1991 dwelling unit or to common areas to make them accessible, such modifications must be paid for by the person with a disability. 24 C.F.R. § 100.23.

Some Other Questions

What does "accessible" mean?

An "accessible" dwelling unit is one that is located on a continuous, unobstructed path that connects accessible spaces and that can be approached, entered and used by a person with disabilities. 24 C.F.R. § 8.3 (definitions). In addition, depending on when the unit was constructed or altered, the unit may also have to meet the UFAS, ADAAG, or FHA standards.

Is it permissible for all of the accessible units to be located in one area?

Accessible dwelling units, to the maximum extent feasible, are to be distributed throughout projects and sites. These units are also supposed to be in a sufficient range of sizes and amenities so that a qualified individual with a disability has a choice that is, as a whole, comparable to that of person without a disability eligible for housing assistance in the same program. 24 C.F.R. § 8.26.

Who has priority on a waiting list to move into an accessible unit?

When an accessible unit becomes vacant, an owner or manager must offer the unit in the following order of priority:

- to an occupant of the same project, or comparable projects under common control, who is a person with a disability and not currently in an accessible unit;
- to an eligible applicant on the waiting list having a disability requiring the accessibility features of the vacant unit; and
- to an eligible applicant who does not have a disability. In this case, the owner may require the applicant to agree to move to a non-accessible unit when one becomes available. 24 C.F.R. § 8.27(b).

There are three preferences that also apply to all individuals seeking public housing regardless of whether they have disabilities. 42 U.S.C. § 1437(d)(1)(A) and 24 C.F.R. § 880.613(c). These preferences are applied in the following order:

- Persons occupying substandard housing, homeless shelters, or who are homeless.
- Persons paying more than 50% of their income for rent.
- Persons who are involuntarily displaced at the time they are seeking assistance.

A person with a disability without one of the preferences must still be given priority over a person without a disability with a preference. *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D.N.Y. 1993).

What about "reasonable accommodations"?

Title II of the ADA, § 504, and the Fair Housing Act all require that reasonable accommodations be made to rules, policies, practices or services, where necessary to allow a person with a disability the opportunity to use and enjoy a dwelling. Note, however, that under the FHA structural changes are covered by the "reasonable modifications" provision, not the reasonable accommodation provision. See 42 U.S.C. § 3604(f)(3)(A). Determining what is reasonable requires an individualized analysis and will vary from case to case, although the statutes are clear that anything that imposes an undue financial or administrative burden or constitutes a fundamental alteration is not required. Examples of modifications that would likely be found reasonable are the addition of a small ramp needed to enter a dwelling unit, installing grab bars, substituting lever door handles or designating a parking space in a first

come-first serve parking lot. Adding an elevator to an existing facility or bypassing the waiting list of either a new or altered facility would most likely be found unreasonable. See, e.g., *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D.N.Y. 1993).

What happens after the 5%/2% requirement is met?

The HUD regulations explicitly state that when a new project has reached the 5%/2% accessibility level or an altered project has 5% of its units accessible, then no more units are required to be accessible. 24 C.F.R. § 8.23. However, the regulations also state that a higher percentage of accessible units may be prescribed by HUD upon request and a demonstration of need. 24 C.F.R. § 8.22. Data that would be effective in showing need is something like census data or a currently effective Housing Assistance Plan. 24 C.F.R. § 8.23(b)(2). In addition, a Housing Authority that is administering Section 8 housing has an obligation to do at least three other things to help those seeking an accessible dwelling unit:

- Provide a list of accessible Section 8 units in the area;
- Provide assistance in locating accessible housing; and
- Request an exception to the fair market rent if necessary to make an accessible unit available.

24 C.F.R. § 8.28.

Are there permissible alternatives to making a unit accessible?

Keep in mind that both Title II and Section 504 require that a "program access" requirement be met, and thus regulations state that an acceptable alternative to making structural modifications in an existing facility is moving a person to an available accessible unit at another site or making alterations on a selective basis. In addition, while tenant meetings and other similar events must be held in an accessible space, not all existing spaces must be made accessible. 24 C.F.R. §§ 8.23(b), 8.24(b).

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For more information, contact the Bazelon Center for Mental Health Law, 1101 15th Street, N.W., Suite 1212 Washington, D.C. 20005-5002. E-mail: mallen @ relmanlaw.com.