



Advanced Reasonable Accommodations

Undue Financial and Administrative Burdens and Fundamental Alterations to the Program

Reasonable Accommodation Requests: Determining Undue Financial and Administrative Burden and Fundamental Alterations to the Program

Note: There is no clear-cut test to determine what constitutes an undue burden or a fundamental change in your program, but the following provides a framework. Consult your 504/ADA coordinator or your lawyer if you have any doubts.

Note: all properties should be in compliance, as applicable, with Section 504, ADA Title II and III, the Architectural Barriers Act, the Fair Housing Amendments Act and state laws (Chapter 151B and the Massachusetts Architectural Access Board Code). Individual accommodations cover situations beyond general compliance.

Some Things to Keep in Mind:

- In general, a change in a rule, policy or procedure is unlikely to cause an undue financial and administrative burden because most such changes are not cost related. Such changes may, however, pose a fundamental change in the housing program because the rules, policies and procedures are designed to carry out the purpose of the housing program or to comply with the general tenancy laws.
- A change to the physical structure of the unit, the common area, or method of communication does not generally fundamentally alter the nature of your program because the goal is to provide quality affordable housing to low and moderate income persons, regardless of disability. Such changes may, however, pose an undue financial and administrative burden.
- You need not make structural changes to the common areas if there is an equally effective administrative solution, provided your program as a whole is accessible in accordance with your property's Transition Plan. Also you need not make structural changes to a unit if your property has the requisite number of accessible units and an administrative solution exists.
- If providing an accommodation would result in an undue financial and administrative burden or fundamental change to the program, you are still required to take any action up to that point. You must also explore other options for meeting the applicant/tenant's needs. Often the ADA Hotline (1-800-949-4232), the Massachusetts Assistive Technology Partnership Center (617-355-7820) or local independent living centers can provide technical assistance on workable solutions.
- In deciding what accommodation will meet an applicant or tenant's needs, you must give primary consideration to what the person with the disability requests. However, you may provide an alternative accommodation if it is equally effective at removing the barrier to equal access or participation.

- You might not be able to provide the same accommodation to the second person as you did to the first person. Each request for an accommodation must be considered on a case-by-case basis because each person's needs are different and the development's financial situation changes over time.
- Housing providers are not required to provide personal devices (i.e. eyeglasses, walkers, canes) but sometimes personal equipment is a less expensive way than physical modification to solve a problem. For example, it may be equally effective, but less expensive to purchase an emergency call device to be worn around the person's neck than to install emergency cords in every room in the unit. Such personal devices would be owned by the housing provider and lent to residents who need emergency cords as a substitute for installing emergency cords.

Factors to Consider in Determining an Undue Financial and Administrative Burden on the Housing Program

To determine if a requested accommodation poses an undue financial and administrative burden, you must know the expected cost and your available financial and personnel resources at the time of the request. You must consider all the relevant factors when assessing undue financial and administrative burdens. Housing authorities and assisted housing providers have different factors that must be considered. The following is based on the HUD Occupancy Task Force Report's chapter on Undue Financial and Administrative Burden, but includes changes to housing finance since the report was written.

Public Housing Authorities (PHAs)

As of this writing, each PHA development has its own budget but the operating budget for each property is folded into a comprehensive document that covers the entire PHA. Subsidy is determined based on PHA-wide calculations and costs are allocated over many properties. The PHA's Action Plan must contain projected costs to cover alterations to units and facilities to address property-based compliance needs and individual reasonable accommodation requests.

Costs associated with individual requests for accommodations generally come out of the development budget unless the request involves major structural changes, such as widening doorways, a roll-in shower, or building a ramp. In such instances, the PHA's capital construction monies may be used if available. In that case, the PHA staff responsible for capital projects usually determines if the accommodation poses an undue financial and administrative burden following whatever consultation process the PHA has established. Most accommodation requests that do not involve major structural changes probably will not pose an undue financial and administrative burden to the development. However, even if a development is not able to afford a change, the PHA as a whole may be able to afford the change. If the site manager concludes that the site can't afford the change, he/she should contact the PHA's 504 Coordinator or follow whatever consultation process the PHA has established to determine whether other PHA resources are available. If the request is not a major structural change, the site manager must examine factors listed below.

Factors the PHA Site Manager Must Consider

The larger the cost, the more factors a PHA may need to consider.

1. The number of units
2. Total number of employees at the site
3. The site budget, including income, expenses and cash flow:
 Note: every public housing site budget should have a line item for reasonable accommodation, but a manager must also look at the other line items as possible resources.
4. Reserves (you may need to contact your housing authority asset manager to determine the availability of these funds)
5. Other funds both within the PHA, such as the Comprehensive Grant Program (Capital Fund Program) and the PHA's Contingency Fund, and outside the PHA, such as government and private agencies.
6. Planned improvements or repairs essential to maintaining decent, safe, sanitary living conditions.

The difference between the cost of the accommodation and the amount available from all sources after other demands are weighed (expenses in #3 and improvements/repairs in #6) shows what the property can afford up to the point of undue burden. The property may be able to afford some, but not all, of the costs. In this case, the site manager will have to see if funds from the PHA as a whole can supplement funds available from the site.

Other Important Considerations

1. Have you obtained any necessary bids from entities familiar with providing physical access for people with disabilities?
2. Can cost reductions be achieved without compromising the effectiveness of the accommodations?
3. Have you sought technical assistance?

Factors for Requests that Involve Major Construction at PHAs

1. Reserves: In the current fiscal year, will the PHA make a deposit to reserves, make a withdrawal to reserves or break even? If a surplus is projected, are there known demands against these funds? Will using reserves result in the PHA not being able to maintain at least 25% of the required level or seriously impact the PHA's efforts to increase reserve levels as required by HUD through PHMAP?
2. Is a budget revision required and possible?
3. Will the request pose any serious negative impact on the PHA's financial stability in the current budget year?
4. Will the request require removing a load-bearing wall? (This is not required.)
5. Will the request cause a significant change to a critical element of the PHA's long-range plan, including any necessary physical changes identified in the property's 504/ADA Transition Plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health or safety systems be postponed). If so, can it be revised?

6. Will the request impair the ability of the PHA to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe, and sanitary living conditions?
7. Will there be a substantial increase in administrative workload? For example, in the current budget year does the accommodation prevent the PHA from:
 - a. performing essential management duties expressed in the lease (e.g. reexaminations or required unit inspections);
 - b. performing administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance)
 - c. meeting the program operating requirements as expressed in the Annual Contributions Contract, other agreements, or the PHMAP performance indicators; or responding to a court order?
8. Will there be a negative impact on services provided by the PHA and mandated by the lease or other agreements? (Exclude services provided by third parties where such services are not under the direct control or funded by the PHA's operating budget).

Assisted Housing

Assisted housing uses property-based financial management. Resources from properties under common ownership may not be mixed. The ownership entity is unique to each property, as are the income and expenses. Each property has a separate regulatory agreement and subsidy contract which may be "layered" (have more than one type of subsidy).

Factors the Assisted Housing Property Manager Should Consider

1. The number of units;
2. Total number of employees at the site;
3. The site budget, including income, expenses and cash flow;
4. Replacement reserves; (You may need to contact your asset manager to determine the availability of these funds). HUD Handbook 4350.3 indicates that burdens exist when residual receipts are insufficient to cover the cost of structural changes and replacement reserves cannot be replenished within one year. In those circumstances, the handbook states that "Generally, an owner would not be required to make structural changes." The key word here is "generally": the handbook does not offer any absolutes with respect to declaring undue burdens. The Handbook implies that an undue burden is approached when a rent increase is required to make a structural change but doesn't say that a rent increase is an undue burden. See 4350.3, p. 2-70 and 2-71. NOTE: If replacement reserves repeatedly do not have enough money to pay for accommodations, it may be necessary to consider a rent increase or some sort of refinancing as a way to generate sufficient reserves to meet reasonable accommodation requests and other property needs)
5. Other funds from government and private agency sources;
6. Whether the request will cause any serious negative impact on the property's financial stability in the current budget year, including the ability to meet FHA, HUD, other government, or private lender requirements to operate in sound financial condition as expressed in regulatory, management, subsidy or financing agreements;
7. Whether the request will require removing a load-bearing wall; (This is not required.)
8. Whether the request will cause a significant change to a critical element of the development's Capital Needs Plan, including any necessary physical changes identified in the

property's 504/ADA transition plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health or safety systems be postponed) and whether the plan can be revised;

9. Whether the ability of the development to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe, and sanitary living conditions will be impaired;
10. Whether there will be a substantial increase in administrative workload - for example, if, in the current budget year, the accommodation prevents the development from:
 - a. Performing essential management duties expressed in the lease (e.g. reexaminations or required unit inspections);
 - b. Performing administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance)
 - c. Meeting the program operating requirements as expressed in the Annual Contributions Contract, other agreements, or the PHMAP performance indicators; or responding to a court order?
11. Whether there will be a negative impact on services provided by the development and mandated by the lease or other agreements; (Exclude services provided by third parties where such services are not under the direct control or funded by the development's operating budget).
12. The difference between the cost of the accommodation and the amount available from all sources after other demands are weighed (expenses in #3 and improvements/repairs in #6) shows what the property can afford up to the point of undue burden. The property may be able to afford some, but not all, of the costs. In this case, the manager must discuss with the applicant or tenant the best use of the available money as described in "Next Steps" section below.

Other Important Considerations

1. Have you obtained any necessary bids from entities familiar with providing physical access for people with disabilities?
2. Can cost reductions be achieved without compromising the effectiveness of the accommodations?
3. Have you sought technical assistance?
 Note: Assisted housing providers and disability rights advocates disagree on whether providing an accommodation is an undue burden if it prevents the owner from receiving his/her distribution (a return on his/her investment). Many providers believe that this return should be calculated as a cost of doing business (a bill that must be paid) before money is available to be used for a modification. Many advocates argue that owners should receive a distribution if there is surplus cash after meeting all the property's obligations including providing accommodations. HUD has not taken a position.

Next Steps If Undue Financial and Administrative Burden is Established

If, after considering all the factors above, a PHA or assisted housing provider concludes that providing an accommodation will pose an undue financial and administrative burden, the entity must still explore the following:

1. When can the accommodation be programmed into modernization or other planned renovations?
2. What work can be done up to the point of undue financial and/or administrative burden? When can the rest of the work be done? Does it make sense to set aside the currently available money and add to it in the next budget cycle to fully fund the change?
3. Can the resident or some other outside party make up the difference between what the housing provider can afford and the full cost?
4. Are there methods that would improve access even if full access were not achieved?
5. What is the applicant/resident's preference among these alternatives?

Fundamental Alteration in the Nature of the Program for Both PHAs and Assisted Housing Providers

Determining whether a request poses a fundamental change in your housing program is not a cost based test. It requires you to identify the purpose of your housing program and how you achieve that purpose. PHAs and assisted housing providers' purpose is to provide safe and sanitary housing for low and moderate income tenants who meet program eligibility requirements. The primary ways they achieve this purpose include applicant processing, lease enforcement, physical maintenance, some service provision, and administrative and financial procedures to ensure program stability and regulatory compliance. The tenant's essential lease provisions include maintaining a safe and sanitary unit, not interfering with other tenants' quiet enjoyment, not engaging in criminal activity, paying rent on time, and complying with other reasonable rules. Changes that would require fundamental changes in these or other essential elements of the program, such as lowering admission standards, waiving essential lease requirements or otherwise fundamentally changing the program would not be required. Likewise, most changes in the types of services the housing provides would be a fundamental change although changes in how the housing services are provided generally would not be a fundamental change.

For example, if a resident asks you to provide housekeeping services because she cannot clean or reach or open the trash chute because of her disability, you may refuse because providing housekeeping services would fundamentally change the type of services you provide. It would be reasonable to assist the resident in arranging housekeeping services. It is also necessary for you to figure out with the resident how she or someone can empty her trash because your trash removal system is a barrier for the resident. The resident must, however, comply with her lease with the accommodation.

What to Consider in Deciding if an Accommodation Requires a Fundamental Change in the Nature of the Program

In deciding whether an accommodation request would alter the fundamental nature of the program, you should consider whether the accommodation:

- requires the admission of an ineligible family or individual;
- lowers tenant selection standards;
- reduces the obligations of tenancy or the lease compliance standards, as expressed in the lease and in landlord/tenant law;
- requires significant services that are not part of your housing program; or
- requires any other significant change in the standard way your type of housing is provided.

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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24 CFR 8.24 - Existing housing programs.

eCFR

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§ 8.24 Existing housing programs.

(a) General. A recipient shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not -

(1) Necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the recipient shall take any action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods. A recipient may comply with the requirements of this section through such means as reassignment of services to accessible buildings, assignment of aides to beneficiaries, provision of housing or related services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. A recipient is not required to make structural changes in existing housing facilities where other methods are effective in achieving compliance with this section or to provide supportive services that are not part of the program. In choosing among available methods for meeting the requirements of this section, the recipient shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) Time period for compliance. The recipient shall comply with the obligations established under this section within sixty days of July 11, 1988 except that -

(1) In a public housing program where structural changes in facilities are undertaken, such changes shall be made within the timeframes established in § 8.25(c).

(2) In other housing programs, where structural changes in facilities are undertaken, such changes shall be made within three years of July 11, 1988, but in any event as expeditiously as possible.

(d) Transition plan and time period for structural changes. Except as provided in § 8.25(c), in the event that structural changes to facilities will be undertaken to achieve program accessibility, a recipient shall develop, within six months of July

11, 1988, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including individuals with handicaps or organizations representing individuals with handicaps. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum -

- (1)** Identify physical obstacles in the recipient's facilities that limit the accessibility of its programs or activities to individuals with handicaps;
- (2)** Describe in detail the methods that will be used to make the facilities accessible;
- (3)** Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;
- (4)** Indicate the official responsible for implementation of the plan; and
- (5)** Identify the persons or groups with whose assistance the plan was prepared.

(Approved by the Office of Management and Budget under control number 2529-0034)

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