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Mental Health Services Act Housing Toolkit

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Corporation for Supportive Housing

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Mental Health Services Act, Supportive Housing and Fair Housing

Implementation of California's Mental Health Services Act (MHSA) provides important opportunities to expand the availability of housing for people with mental illnesses and their families. The processes of developing and managing quality affordable and supportive housing can be daunting, and housing sponsors, service providers and property managers must do so in compliance with the nation's fair housing laws. These laws are designed to ensure that people who have faced discrimination in the past are treated fairly in the housing market. Fair housing laws have implications for all stages of the process of developing and managing housing for people with disabilities, including which groups or individuals can be targeted, how housing units are marketed, how prospective tenants are selected and how to deal with behavioral issues that impact tenancy. Project sponsors who intend to develop and operate housing that is reserved for people with a particular disability, such as mental illness, need to be aware that using MHSA funds in combination with federal funding can raise some complex legal issues that must be reviewed before making final decisions about the design and financing for a project.

Fair housing as it applies to supportive housing is very complex and in many ways an unsettled area of the law. The following are brief discussions of some of the key areas where careful consideration of fair housing requirements is needed when planning for the development and management of supportive housing for people with disabilities. For more substantive discussions, see *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing, California Edition*, published by the Corporation for Supportive Housing (CSH). This document is available online at www.csh.org or by calling CSH at (510) 251-1910. Another useful resource is the Bazelon Center for Mental Health Law, in particular *What "Fair Housing" Means for People with Disabilities* and other information available on the housing issues page. An additional resource is *"Safe at Home: A Reference Guide for Public Housing Officials on the Federal Housing Laws Regarding Admission and Eviction Standards for People with Criminal Records"* published by the Legal Action Center. See www.lac.org

This discussion is not intended to replace sound legal advice or consultation with government agencies. When planning for the development of supportive housing, seek legal counsel and review specific issues with your intended public sector funders.

Blending Funds and Reserving Housing for People with Disabilities

Many supportive housing providers seek to serve a designated special needs population, such as people who are homeless, people with disabilities such as mental illness, or people with substance use problems. There are many legal issues related to limiting tenancy to a specific group of people, even if the group constitutes a protected segment of the population, such as those with disabilities

due to mental illness. One of the most complicated legal issues relates to blending funding sources and the limitations on reserving housing for people with disabilities. (See Chapter Four and Appendix 3 of *Between the Lines* for more information about reserving housing for designated populations and blending funding, respectively.)

When a project sponsor wishes to reserve housing, or some part of the housing, for people with disabilities, the following questions should be asked:

- Which fair housing laws apply to the project?
- What funding is received by the project and does the funding source either prohibit or authorize reserving the housing for a specific population of tenants?

If a project **does not** receive federal funding, the ability to reserve housing for people with disabilities is governed by the Fair Housing Act and state and local fair housing laws (and if a state or local governmental housing program is involved, Title II of the ADA). The Fair Housing Act prohibits discrimination against disabled people and, in its preamble, states that a housing provider may legally restrict occupancy to people with disabilities. Federal regulations implementing the federal Fair Housing Act imply that it is permissible to designate units or entire developments as available only for people with disabilities as provisions of the regulation allow housing providers to ask questions to determine whether an applicant for housing meets the requirements for a disabled unit, including questions regarding whether the applicant has a particular type of disability if the unit or development is targeted to a specific population.

However, if a project **does** receive federal funding (e.g., McKinney SHP and Shelter Plus Care, HOPWA, Section 811 and Section 202¹, etc.), an additional fair housing law, Section 504 of the Rehabilitation Act of 1973, applies. Section 504 permits federally funded housing to be limited to disabled persons **only** if the housing is limited by federal statute or executive order to serve people with disabilities. For example, a project funded under the McKinney Shelter Plus Care, the Section 811, or the Housing Opportunities for People with AIDS (HOPWA) programs may exclude people **without** disabilities.

Section 504, however, also limits a housing sponsor's ability to reserve its housing or a part of its housing for people with one particular disability, unless this sub-targeting is specifically authorized in a federal statute.

For example, the Shelter Plus Care program is limited by statute to people who are homeless with disabilities, "primarily persons who are seriously mentally ill, have chronic problems with alcohol, drugs, or both, or who have acquired immunodeficiency syndrome and related diseases." Although the implementing

¹ Low-income housing tax credits or loans of the proceeds of tax-exempt bonds are currently not considered federal financial assistance for Section 504 purposes.

regulations for Shelter Plus Care allow housing providers to establish an admissions preference for one or more of the statutorily targeted populations, the regulation also states that housing providers cannot prohibit other eligible disabled homeless persons who are not in the provider's narrower target group from residing in the housing unless the provider can show that there is a sufficient demand for the units from the targeted population **and** that other eligible disabled persons would not benefit from the primary supportive services provided. These conditions are extremely difficult to satisfy. Therefore this rule is interpreted to permit targeted marketing to a member of the narrower target group, for example homeless people with mental illness, but not to permit exclusion of any other disabled homeless people. This practice has come to be known as "targeting, but not excluding" a narrower sub-group of a statutory authorization to serve all disabled people.

These fair housing provisions mean that when a project sponsor wishes to use Mental Health Services Act (MHSA) funds blended with federal funding to provide housing for people who meet the criteria for MHSA services, a careful analysis is required. MHSA funds can be used to support capital, operating and services costs related to housing only for those disabled by mental illness or serious emotional disturbance (SED) and (when appropriate) their family members. Many federal housing programs are intended to provide housing opportunities to a more broadly defined group of people with disabilities, while these programs may be used for housing that will "target (people with mental illnesses), but not exclude" people with other types of disabilities who could benefit from the supportive services provided. In practice, this means that if a project sponsor wishes to serve those disabled by mental illness and the project is blending MHSA funding with such a federal housing program, it should be sure to also secure other sources of services and/or operating funding that would allow for otherwise eligible disabled people to be served as well. Project sponsors who are using MHSA funding with other state or local funding, or with some federal programs such as Shelter + Care, may find it easier to reserve housing for people with a particular disability, such as those who meet the criteria for MHSA services.

From this discussion, it is clear that reserving housing for people with a particular disability can be a complex legal area, particularly when using federal funds. Sponsors should carefully think through their options and consult their attorney to plan their housing targeting and marketing approach.

Selecting Individual Tenants: Eligibility Criteria and Selection Process

Housing sponsors outline who can access their housing units in their eligibility criteria used to screen prospective applicants and in the selection and intake processes. Eligibility criteria for housing must be related only to the applicant's ability to fulfill the responsibilities of tenancy, mainly paying the rent, maintaining the premises rented, and not disturbing the quiet enjoyment of others.

Fair housing laws provide protections for members of “protected classes” (meaning groups of people who are given special legal protections because they may face discrimination) relative to accessing housing. Fair housing laws prohibit the imposition of “special” eligibility criteria for members of protected classes, for example, independent living readiness, and pre-occupancy requirements that applicants be sober.

Fair Housing Act Regulations set forth questions that may be asked of applicants for housing. They are limited to:

- Questions about an applicant’s ability to meet the requirements of tenancy (or ownership if applicable). This would include inquiries into such things as income if the housing is income-restricted.
- Inquiries to determine whether an applicant is qualified for a housing unit, for example if he/ she has a disability, if the housing is only available to people with a disability or people with a particular disability.
- Inquiries to determine whether an applicant is qualified for a priority available to people with a disability or people with a particular disability.
- Inquiries to determine whether an applicant is a current illegal abuser or addict of a controlled substance.
- Inquiries to determine whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. (Housing providers may also ask applicants if they have criminal convictions, if the request for such information is related to the terms and conditions of tenancy and determining whether the applicant can comply with the lease.)

The philosophy and goals of a supportive housing project may inform which of the above questions are asked and how the answers are used. People with mental illnesses and their families face many barriers in accessing housing and for those with co-occurring histories of mental health and substance use issues, these barriers are compounded. If the goal is to provide housing stability for these clients, screening people out of housing based on a history of substance use is not consistent with that goal. The housing project sponsor should anticipate that clients may still be using illegal drugs or alcohol, or relapse at some point, and plan a service strategy that is responsive to client needs. Rather than using information about prior or current substance use to screen out the applicant, the housing sponsor can use this information to shape the service plan.

Fair housing laws further require that housing providers ask the same screening questions of all applicants and use the same selection and intake processes for all tenants. As indicated above, if there are housing units reserved for people with disabilities or a particular disability, the sponsor is permitted to ask for documenting information to verify an applicant’s qualification for such units, while protecting the applicant’s right to confidentiality. In general a housing provider cannot request information regarding the severity of the disability or the applicant’s medical status, nor require the applicant to provide medical records to

document the disability, other than a doctor's or medical professional's letter stating that an applicant is disabled.

Furthermore, having a services component in housing does not entitle a provider to ask additional eligibility questions, even if they are uniformly asked of all applicants. Questions asked of applicants must relate to lawful conditions of renting housing. In practice, this means that psychosocial histories and questions typically part of psychosocial evaluations should **not** be used in making tenant-selection decisions. The successful operation of supportive housing sometimes requires obtaining some psychosocial information in order to provide appropriate and needed services to the tenant. Psychosocial information not related to a tenant's ability to pay rent, maintain the premises or allow peaceful enjoyment of the property should be asked only after the applicant has been offered tenancy, thus ensuring that none of the information obtained by a social service provider in order to provide social services is used for housing decisions. (And, since services in supportive housing are generally voluntary, tenants are not required to provide such psychosocial information or agree to participate in services as a basis for obtaining or maintaining the housing.) For this and many other reasons, it is best to have separate organizations (or divisions within an organization) provide social services and property management functions such as tenant screening and intake. However the project is structured, sponsors must ensure that property management files and supportive services files are maintained separately.

Property managers may refuse to accept applicants, including disabled 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. (Although insufficient income is not an allowable condition to refuse tenancy in a project funded by the federal Supportive Housing Program.)

Housing providers may also deny housing to an applicant with a criminal conviction history if the conviction involved crimes of physical violence to persons or property, drug-related crimes, or other criminal activity that would adversely affect the health or safety of other tenants if the crime occurred in the housing development. In addition, HUD's "one strike" policy requires exclusion of people with two specific types of criminal convictions (related to methamphetamine production on public housing premises and crimes subjecting an individual to lifetime registration as a sex offender) from many federally funded housing projects. And, a housing provider may exclude people who are current users of illegal drugs based on the applicant's answer to such permitted questions.

The Fair Housing Act and ADA create a dilemma for housing providers, as these laws do not provide for how a housing provider determines whether someone is a current drug user. The implementing regulations of the ADA and the "one-strike"

regulations appear to provide the only available standard in their similar definition of current illegal drug use as “illegal use of drugs that occurred recently enough to justify a reasonable person’s belief that a person’s drug use is current or that continuing use is a real and ongoing problem.” A practical approach would be to establish a standard of time of being drug-free (e.g., ask if applicants have used illegal drugs within the past 6 months), but also to provide the opportunity for applicants to provide mitigating information or request a reasonable accommodation (e.g., applicant has successfully completed a drug treatment program).

It is important to note that the federal laws governing public housing agencies, and thus many forms of housing assistance, offer broad discretion to local housing authorities and by extension, housing sponsors. Project sponsors are encouraged to make individualized determinations about each applicant, taking into consideration the nature and relevance of the person’s criminal history as well as treatment and other rehabilitative efforts.

Lastly, fair housing laws impose a duty on housing providers to provide reasonable accommodation in the screening process for applicants who are disabled. (See “Reasonable Accommodation” section below.)

Waiting Lists

Due to high demand and relative low supply, waiting lists are part of start-up and ongoing management of affordable, supportive housing. Oftentimes, a sponsor is integrating different tenant populations using multiple funding sources with different eligibility requirements. Maintaining separate waiting lists for different targeted tenant populations, however, raises potential for fair housing violations as this practice may have the effect of discriminating against applicants with disabilities (i.e., MHSA target population) by not making all units for which they are eligible available to them.

A better approach to waiting list management would be to maintain a single waiting list in which an applicant’s MHSA eligibility is noted: when a MHSA-assisted unit is vacant, the highest MHSA-eligible applicant on the waiting list is offered the unit, and when a non-MHSA unit is vacant, the applicant at the top of the waiting list (whether or not MHSA-eligible) is offered the unit, if they are otherwise qualified (i.e., qualify under the restrictions for the other units such as income requirements, etc.). Another acceptable approach would be to maintain a separate MHSA waiting list, but also to permit MHSA-eligible applicants to apply for the general waiting list as well as the MHSA waiting list.

Reasonable Accommodation

Federal and state fair housing laws create an obligation (or “affirmative duty”) for housing providers to accommodate persons with disabilities during the tenant selection process and throughout a tenant’s occupancy.

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 modification to their units. 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.
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.

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. However, the provider must bear some costs and make some special provisions for people with disabilities. Some accommodations may also place a responsibility 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, who would otherwise have been rejected for housing because of past behavior problems which resulted from his/her disability, to reside in the housing, it is reasonable for the provider to require the tenant to demonstrate participation in ongoing services that will address the underlying condition that caused the behavior.

Housing providers are not required to inform tenants of their rights to a reasonable accommodation, but a statement in application and rejection forms informing applicants of the right to and availability of reasonable accommodations is prudent practice. Although housing providers do not have an affirmative obligation to ask applicants if they need a reasonable accommodation, they should not ignore obvious disabilities. And since housing providers are required to make reasonable accommodations for people with disabilities under certain circumstances, they should have well thought-out, documented reasonable accommodation policies and protocol for considering and granting/rejecting reasonable accommodations. A safe way for a housing provider to invite and consider information about applicants’ disabilities in a nondiscriminatory manner is to disclose to all applicants – whether or not they appear to be disabled – information about the housing provider’s duty to make reasonable accommodation.

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 housing unit.

Reasonable Accommodation and Applicant Screening

In the applicant screening process, housing providers have two levels of requirements for reasonable accommodation.

The screening process itself must be accessible to all applicants. For 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 the applicant has an opportunity to participate in the tenant selection process.

The housing provider must consider whether there is a reasonable accommodation available that would allow the applicant to occupy the housing unit, either by physically modifying the housing unit or changing the rules of the program. If an applicant requests a reasonable accommodation as part of the screening process, the housing provider is required to consider the request and implement it if it does not fundamentally alter the nature of the housing program and does not cause an undue financial burden on the housing provider. 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 the best vacant unit in the development because it is the only unit that can accommodate the applicant and his/her live-in care attendant, the housing provider should honor the request, even if vacant units are usually assigned randomly.

If an applicant requests a reasonable accommodation in screening, a housing provider may request documentation or some proof of the disability (see above for acceptable methods for documenting disability) and the link between the disability and the requested accommodation.

Reasonable Accommodation and Acceptance/Rejection of Applications for Tenancy

As indicated above, a housing provider may refuse to accept applicants for occupancy if the applicant does not meet the requirements for occupancy adopted by the housing provider, provided they are legal and equally applied to all, including rejecting anyone whose tenancy would constitute a direct threat to the health and safety of others. (Determining that someone poses a direct threat to the health and safety of others must be based on past behavior that has been documented or verified, rather than a sense that the person might be violent or destroy the property.) Before denying an applicant occupancy, however, it is good practice for the housing provider or property manager to provide opportunities for applicants to provide additional information about conditions or behaviors demonstrated by the applicant that are causing the denial that 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.

For example, a tenant may have a bad tenancy record (that would otherwise be the basis for his/her application being rejected) as a result of a failure to take proper medication. If the tenant provides evidence to the housing provider that s/he has made arrangements to ensure s/he will take the needed medication, such as receiving medication management assistance, the housing provider may need to waive rules requiring rejection of the application for bad tenancy records. Again, although housing providers are not required to seek out information to determine whether the applicant's bad tenancy record is the result of a disability, it is a good business practice to include in notices rejecting applicants for bad tenancy records a statement that if the basis for rejection is the result of a disability, the applicant may be entitled to a reasonable accommodation.

Another common situation is where an applicant has a history of poor tenancy that stems from alcohol abuse. The housing provider, in reviewing the prospective tenant's application, may find the applicant undesirable for tenancy because of this past behavior. However, because alcoholism is a "handicap" under the Fair Housing Act, the housing provider has a duty to consider making a reasonable accommodation if requested by the applicant and where s/he can demonstrate that the past poor behavior is related to his/her alcoholism. If the applicant can demonstrate to the housing provider actions that address the underlying cause of the poor behavior, namely alcoholism, it may be reasonable for the provider to waive its policy that all applicants with poor tenancy histories be rejected for tenancy. A similar analysis applies to addiction to illegal substances; however, current use of illegal drugs is not considered a disability. (See discussion above in "Selecting Individual Tenants.")

Reasonable Accommodation and Occupancy

A tenant's need for a reasonable accommodation can arise any time during his/her tenancy. The housing provider has the same obligation to consider the request for a reasonable accommodation once the tenant is already occupying the unit as the provider had during the screening process. In addition, the obligation exists whether or not the tenant disclosed his/her disability during the screening process.

Reasonable accommodation for people with mental disabilities is guided by the same principles as accommodations for tenants with physical disabilities: the housing provider must make changes in rules and policies to enable the tenants with disabilities equal access to housing. For example, extra soundproofing or carpeting may be necessary to accommodate a tenant disabled with mental illness who paces loudly in their unit in the middle of the night. As with physical disabilities, the limitations on this duty arise from the cost of the accommodations and the countervailing rights of other tenants.

If a tenant has substance use problems and requests a reasonable accommodation, the housing provider must consider the request and grant it

unless the accommodation fundamentally alters the housing program or places an undue burden on the owner. However, it would not be a reasonable accommodation to allow a tenant to continue the illegal use of drugs on the premises. Current use of illegal drugs is specifically exempted from the definitions of disability, so a current user would not be entitled to a reasonable accommodation solely by virtue of drug addiction. A housing provider does need to consider accommodating drinking-related behaviors that can accompany alcoholism under the reasonable accommodation requirements. It is important for housing providers to carefully consider the issues related to accommodating a tenant's struggle with substance use in the context of the overarching goal of supporting clients with co-occurring disorders to obtain and maintain housing. A "best practice" approach incorporates services tailored to tenant needs rather than a focus on screening out applicants with complex histories.