



Bazelon Center for Mental Health Law

**Fair Housing Information Sheet #13
Live-In Aides as Reasonable Accommodations Under the Fair
Housing Act and Related Laws**

February 2005

Live-In Aides as Reasonable Accommodations Under the Fair Housing Act and Related Laws

(Compiled and written with the support of the Technical Assistance Support Center, National Association of Protection and Advocacy Systems)

Q. My client needs a live-in aide to help her perform activities of daily living. Her landlord is resisting and requiring a full screening of the aide, as if she were a new applicant for housing. Does the Fair Housing Act, or do other federal laws, protect my client's right to have a live-in aide? What, if any, conditions can the landlord impose?

A. With the passage of the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the mandate on state and local governments to serve people with disabilities in the most integrated setting has been clearly enunciated. But as people with serious physical and mental impairments leave large institutional settings, rehabilitation centers, nursing homes, and congregate housing seeking mainstream rental housing, many will need assistance with activities of daily living. Some will need only occasional support from social services or health providers, who will visit as needed and whose access is protected by the federal laws discussed below. Some tenants with disabilities, however, because of the extent of their need for assistance, may need live-in aides to allow them to live successfully in the community. But many landlords have rules that, while not intended to discriminate against people with disabilities, may make it harder to get an aide.

Depending on the kind of housing involved, as many as three federal laws – the Fair Housing Act, the ADA, and Section 504 of the Rehabilitation Act of 1973 – may apply to the issue of live-in aides. In addition to prohibiting intentional discrimination, each of these laws also requires covered landlords to provide reasonable accommodations (*i.e.*, changes in rules, policies, practices, or services) so that applicants and tenants with disabilities may have an equal opportunity in housing.

There are four basic kinds of rental housing generally available to people with disabilities:

- ! **Public Housing:** Units owned and managed by a local public housing authority (PHA) that operate under federal rules that prioritize occupancy for low- and moderate-income people and establish minimum requirements for accessibility. Public housing will be subject to the FHA, ADA and Section 504.

- ! **Project-Based Subsidized Housing:** Units owned by private entities who receive either a mortgage subsidy or a monthly operating subsidy for specific units, or both, in order to make them affordable for low- and moderate-income people. These units will be subject to the FHA and Section 504. Because they are not owned by a public entity, the ADA will not apply.

- ! **Housing Choice (formerly known as “Section 8”) Voucher Program:** A rental subsidy program in which tenants are awarded vouchers and are permitted to rent from any landlord who is willing to comply with basic standards concerning rent reasonableness and housing quality. Units rented under this program will likely be subject to the FHA,¹ but not the ADA or Section 504.²

- ! **Privately Owned Units:** Units owned by private entities where there is no federal funding at all. These units will

¹ The FHA exempts certain small landlords. *See* 42 U.S.C. §3603(b)(1) and (2).

² HUD’s Section 504 regulations state: “An entity or person receiving housing assistance payments...on behalf of eligible families under a housing assistance payments program or a voucher program is not a recipient or subrecipient merely by virtue of receipt of such payments.” 24 C.F.R. §8.3 (definition of “Recipient”). Thus, a landlord who receives no federal funds except for payments under the Voucher program is not governed by Section 504 rules.

be governed only by the FHA.

Regardless of housing type, landlords are interested in maintaining well-run, financially viable housing that meets the needs of residents. As a consequence, landlords have adopted screening criteria to ensure that people who live in rental housing can meet the basic obligations of tenancy, which include: (1) paying the rent; (2) basic housekeeping requirements; (3) not interfering with the quiet enjoyment of other residents; and (4) complying with other rules that are designed to promote health and safety or harmonious living. When it passed the FHA, Congress endorsed such screening criteria, but said they should not be used in a way that discriminates on the basis of disability.³

The federal government has adopted rules specifically permitting live-in aides in public housing, most forms of project-based housing, and in units rented under the Voucher program. *See, e.g.*, 42 U.S.C. §1437a(b)(3)(B); 24 C.F.R. §§5.403, 5.653, 960.202(a); 24 C.F.R. §236.1; HUD, *Occupancy Requirements of Subsidized Multifamily Housing Programs*, HUD Handbook 4350.3 REV-1, Figure 3-6, ¶3-22E.6.d (May 2003) (hereafter “*Occupancy Requirements*”); HUD, *Public Housing Occupancy Guidebook* ¶2.2 (June 2003). These rules were devised, in part, to recognize the special obligation of these subsidized programs to provide reasonable accommodations to people with disabilities. For instance, 24 C.F.R. §982.316 provides:

“...a family that consists of one or more elderly, near-elderly or disabled persons may request that the PHA approve a live-in aide to reside in the unit and provide necessary support services for a family member who is a person with disabilities. The PHA must approve a live-in aide if needed as a reasonable accommodation in accordance with 24 C.F.R. Part 8 [HUD’s Section 504 regulations] to make the program accessible to and usable by a family member with a disability.”

With the basic entitlement to have a live-in aide clear, most of the issues facing a tenant with a disability relate to documenting the need for an aide,

³ *See* H.Rpt. 100-711, at p. 30, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2191.

landlord screening of the aide, determining the appropriate size unit, and sanctions for the improper behavior of an aide. Each of HUD's subsidized housing programs has its own set of statutes, regulations, handbooks, and other legal requirements, but many share the federal definition of a live-in aide:

Live-in aide means a person who resides with one or more elderly persons, or near-elderly persons, or persons with disabilities, and who:

- (1) Is determined to be essential to the care and well-being of the persons;
- (2) Is not obligated for the support of the persons;
and
- (3) Would not be living in the unit except to provide the necessary supportive services.

24 C.F.R. §5.403.

Under HUD's definitions, a live-in aide is one whose primary residence is in the subsidized unit of a tenant whose disability requires the presence of the aide. The aide does not become a permanent member of the household and has no claim to stay if the tenant dies or otherwise leaves the subsidized unit. *See, e.g., King v. Menachem*, 450 N.Y.S.2d 933 (N.Y. 1981). While the tenant may be entitled to live in a larger unit so that the aide can have a separate bedroom, 24 C.F.R. § 982.402(a)(6) (Voucher), the aide's income is not counted in the calculation of the tenant's eligibility or rent obligation. 24 C.F.R. §5.609(c)(5). Despite the apparent rigidity of the definition given above, relatives are not automatically disqualified from serving as live-in aides.⁴

⁴ *But see HUD's Live-In Aides and the Housing Choice Voucher Program Fact Sheet* (August 2003), available at www.tacinc.org/cms/admin/cms/_uploads/docs/Final_Live-in_Aide.pdf, n. 7, at 5-6 (describing this issue as "one of the most complicated for PHAs to address.").

While aides are not considered full members of a subsidized household, a landlord has an obvious interest in ensuring that a person living in the unit will comply with many of the reasonable requirements imposed on the tenant. PHAs and private owners of project-based subsidized housing have a legitimate interest in screening for criminal history, a history of disturbing other tenants, or financial improprieties in subsidized housing, and can refuse to approve a live-in aide. *See, e.g.*, 24 C.F.R. §982.316 (Voucher program). In the public housing and Voucher programs, PHAs have discretion to add other criteria for approval of a live-in aide, if those criteria are properly included in the local Administrative Plan. 24 C.F.R. §982.551(h)(4) (Vouchers).⁵ In some programs, like Section 202 and Section 811 housing, HUD permits owners to require evidence that the tenant requires the assistance of a live-in aide and that the assistance cannot be provided by other non-residents. *Occupancy Requirements, supra*, n. 6 at ¶3-16 (this handbook appears also to require a HUD determination and a certification of a physician that the live-in aide is essential to the care and well-being of the tenant).

Most of the reported cases on live-in aides deal with the issue of whether the aide is permitted to stay after a tenant dies or vacates the unit, and these cases construe HUD's housing program rules rather than the FHA, ADA, and Section 504. There appears to be only one case construing these federal civil rights laws in the context of live-in aide, and it is of questionable authority. In *Robinson v. Gorman*, 145 F. Supp.2d 201 (D. Conn. 2001), a tenant with a disability rented a unit in a two-unit residential dwelling. The owners lived in the other unit, thereby exempting them from coverage under the FHA and their state fair housing law. The lease was subsequently renewed, and the owners apparently agreed to participate in the Voucher program, with the tenant paying 30 percent of her

⁵ The Minnesota Housing Finance Authority, for instance, has developed suggested "Live-in Aide Criteria" for private owners in the Voucher program, encouraging them to "(1) require that the live-in aide provide information for the management agent to complete the Minnesota Housing Finance Agency's "Live-in Aide Housing Agreement." The Agreement requires dated signatures of the tenant, live-in aide, and management agent; (2) the live-in aide's vehicle information, *e.g.*, type, model, color, year, and license number; (3) that the live-in aide complete the Minnesota Housing Finance Agency's Attendant Care verification form; (4) that the live-in aide sign for the property's security key, unit key, etc.; and (5) that the live-in aide sign for the property's house rules.

income for rent and the local PHA making up the difference. Shortly thereafter, the tenant filed suit, claiming that the owners had refused to allow her to have a live-in aide, in violation of her lease provisions and Section 504. The court denied the owners' motion to dismiss, finding that they "received federal financial assistance payments through the Housing Authority." 145 F. Supp.2d 201, 203. The court's analysis seems to be at odds with HUD's exclusion of landlords from Section 504 liability if they accept only subsidy payments under the Voucher program,⁶ but that issue was not raised by the parties to the case, and apparently not considered by the court.

In purely private housing,⁷ the right to a live-in aide is controlled entirely by the FHA and by any applicable state law. The right derives entirely from the landlord's obligation to provide reasonable accommodations in rules, policies, practices, and services, and is subject to all the procedural requirements and defenses applicable to reasonable accommodation requests. In short, the tenant has the initial burden of requesting an accommodation, establishing the existence of a disability and demonstrating that a live-in aide "may be necessary to afford...equal opportunity." 42 U.S.C. §3604(f)(3)(B); *see also* Bazelon Center, *Allocating the Burden of Proof in Disability Cases Under the Fair Housing Act* (March 2004), available at <http://www.bazelon.org/issues/housing/infosheets/reasonableaccommodation.pdf> The burden then generally shifts to the landlord to establish that an "undue burden" or "fundamental alteration" would be caused by granting the accommodation. Absent such evidence, the accommodation is generally considered "reasonable" and must be granted.⁸

⁶ See n. 2, *supra*.

⁷ It is an open question whether units assisted by the Low Income Housing Tax Credit are subject to Section 504. For purposes of this Q & A, it is assumed that tax credit properties are not so covered, and that any argument for a live-in aide in that context will be governed by the FHA.

⁸ For a general discussion of reasonable accommodation under the FHA, *see* U.S. Department of Justice and U.S. Department of Housing and Urban Development, *Joint Statement on Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), available at <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>.

There appear to be no reported FHA cases dealing with live-in aides in private housing. Advocates faced with such a situation, then, must analogize the live-in aide to some other form of accommodation, such as the right to an assigned, accessible parking space, or to an assistance animal in the face of a “no pets” policy.⁹ Advocates must also anticipate landlord arguments that allowing a live-in aide would constitute an undue burden or amount to a fundamental alteration of the service the landlord provides. Unlike subsidized housing, where a tenant with a disability will normally pay a fixed percentage of her income whether she lives alone in a one-bedroom unit, or has a live-in aide and resides in a two-bedroom unit, larger private rental units typically cost more than smaller ones. A request to have a live-in aide *and* a larger unit might be reasonable if the tenant is prepared to pay, but might constitute an “undue financial burden” if the request is that the landlord forego the increased rent. Similarly, advocates should anticipate a landlord argument that a one-bedroom unit might become overcrowded if a tenant stays in place and requests a live-in aide.

As noted above, issues related to live-in aides can arise in a variety of settings and within many different contexts of various federal housing programs. This Q&A is intended only to provide a general overview. For more detailed treatments of these issues, however, *see* HUD’s *Live-In Aides and the Housing Choice Voucher Program Fact Sheet* (August 2003), which is available online at www.tacinc.org/cms/admin/cms/_uploads/docs/Final_Live-in_Aide.pdf, and National Housing Law Project, *HUD Housing Programs: Tenants’ Rights* (3d Ed. 2004), at §2.2.2.10.

Realizing the full promise of *Olmstead* will require making the rental market more flexible in many ways, including the allowance of live-in aides. But this is a body of law that is not well-developed. Advocates are advised to proceed cautiously, and to ensure that disability-based claims for live-in aides are as well-documented as any other reasonable accommodation request.

⁹ The law is well-developed in each of these areas. In its FHA regulations, at 24 C.F.R. §100.204(c)), HUD explicitly mentions these two examples, and the DOJ-HUD *Joint Statement*, n. 8, *supra*, does as well. *See also* Bazelon Center, *The Right to Emotional Support Animals in “No Pet” Housing*, available at <http://www.bazelon.org/issues/housing/infosheets/fhinfosheet6.html>.