

## Housing Law Bulletin

# Increasing the Usability of Housing Choice Vouchers for People with Disabilities

By Michael Allen

Senior Staff Attorney, Bazelon Center for Mental Health Law

### Introduction: The Importance of Community Integration

Among all people in the country with “worst case housing needs,” people with disabilities are recognized as having the greatest needs.<sup>1</sup> That is because disability is highly correlated with poverty, leaving people with disabilities facing insurmountable affordability problems.<sup>2</sup> As a result, they disproportionately depend on subsidized housing programs to afford rental housing and to avoid institutionalization in hospitals, nursing homes and board and care homes.

People with disabilities experience project-based housing in a manner much different than people without disabilities. Even though public housing authorities and private owners of federally-assisted housing have an obligation to make five percent of units fully accessible to people with mobility impairments,<sup>3</sup> and to make other physical and program changes to ensure accessibility,<sup>4</sup> project-based housing is also associated with a concentration of people with disabilities, thus undermining the objective of their full integration into “the American mainstream.”<sup>5</sup> In fact, the proliferation of “special needs” programs for people with disabilities has seemed to ignore the integration mandate that has been at the heart of the Fair Housing Act (FHA) since its passage in 1968, and that is the essence of the Americans with Disabilities Act (ADA), which requires that public services be offered in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>6</sup>

People with disabilities want decent, safe and affordable housing that is both physically accessible and accessible to community services and community activities, including employment, transportation, education, health care and civic life. In short, most people with disabilities say they do not want “special needs” housing but rather

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1 U.S. Department of Housing and Urban Development, RENTAL HOUSING ASSISTANCE—THE WORSENING CRISIS (March 2000), available at <http://www.huduser.org/Publications/AFFHSG/WORSTCASE00/worstcase00.pdf> (last visited May 1, 2006).

2 See Technical Assistance Collaborative, *Priced Out in 2004: The Housing Crisis for People with Disabilities* (2005), available at [http://www.tacinc.org/Docs/HH/Priced\\_Out\\_in\\_2004.pdf](http://www.tacinc.org/Docs/HH/Priced_Out_in_2004.pdf) (last visited May 1, 2006).

3 24 CFR §§ 8.22, 8.25.

4 24 CFR § 8.33

5 H.Rpt. 100-711, *reprinted at* 1988 U.S.C.C.A.N. 2173, 2179 (1988)

6 28 C.F.R. § 130(d)

housing that looks like where you and I live, and they don't want their use of health care or personal care services to define the location or appearance of their housing.<sup>7</sup>

That is why the Housing Choice Voucher Program (HCVP) is so attractive for people with disabilities: it promotes community integration by allowing them to choose housing virtually anywhere in the community. In addition to its general features that would be attractive to all poor people looking for the obvious opportunities that come with living in "better" neighborhoods, HCVP offers a number of unique opportunities for people with disabilities, some explicit in federal regulations, and some through the "reasonable accommodations" mandate of the FHA, ADA and Section 504 of the Rehabilitation Act (Section 504), all of which will govern the administration of the HCVP program, whether housed within a public housing authority or in another freestanding public agency.<sup>8</sup> This mandate can allow people with disabilities to use the program in unique ways which are unavailable to people without disabilities. The balance of this article will focus on those unique features.

In 1988, HUD first promulgated accessibility rules to govern what was then called the "Section 8 Voucher program," under the authority granted by the Rehabilitation Act of 1973. Promulgated as 24 C.F.R. §8.28, those rules require Housing Choice Voucher Programs (HCVP) to be accessible to people with disabilities:

### **Disability Access Issues in the HCVP**

Consistent with the ADA's "most integrated setting" mandate, HCVP administrators must ensure that local programs are run in a fashion that is accessible to people with disabilities, in every phase of the program, including marketing, housing search, leasing, rent levels, occupancy and maintenance of the voucher.

#### **Marketing**

Because of their receipt of federal funds, local HCVPs are required to "affirmatively further fair housing."<sup>9</sup> In addition, administrators are required, "in providing notice of the availability and nature of housing assistance for low-income families under program requirements, [to] adopt suitable means to assure that the notice

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<sup>7</sup> Yeich, S. Mowbray, C.T., Bybee, D., et al (1994). The Case for a "Supported Housing" Approach: A Study of Consumer Housing and Support Preferences. *Psychosocial Rehabilitation Journal*, Vol. 18, No. 2. See also St. Louis Five Year Strategy Consolidated Plan, 2000-2004 (housing preference for a great many people with disabilities is non-congregate housing in the community), available at <http://stlouis.missouri.org/5yearstrategy/index.html>

<sup>8</sup> For more detail on these concepts, see Bazelon Center for Mental Health Law, *What Fair Housing Means to People with Disabilities* (May 2003), available at <http://www.bazelon.org/issues/housing/publications/wfhm.pdf>.

<sup>9</sup> 42 U.S.C. §3608(e). See also Executive Order 12892 (January 17, 1994), available at <http://www.hud.gov/offices/fheo/FHLaws/EXO12892.cfm>

reaches eligible individuals with handicaps.”<sup>10</sup> This affirmative marketing requirement is made explicit because of HUD’s concern that programs would not otherwise take active steps to advise people with disabilities of the availability of rental subsidies. In concrete terms, the regulation might require a voucher program to: (1) partner with centers for independent living; (2) provide applications in accessible formats; (3) visit the home of a person with a disability to deliver an application or provide assistance in completing it; or (4) allow more time to fill out the application.<sup>11</sup>

HCVPs are also required to “encourage participation by owners, include encouragement of participation by owners having accessible units....”<sup>12</sup> That means that voucher programs have to take *affirmative* steps to reach out to private owners, and cannot simply wait for landlords to sign up. This is particularly important for people with mobility impairments who need units that are accessible. Finally, programs must, when extending assistance to a household that includes a person with a disability, “include a current listing of available accessible units known to the PHA and, if necessary, otherwise assist the family in locating an available accessible dwelling unit.”<sup>13</sup> At least one housing authority has been sanctioned by HUD for failing to take such affirmative steps, and ordered to develop a list of accessible units in the jurisdiction and to make it widely available as part of its Section 504 obligation.<sup>14</sup>

Beyond these regulatory requirements, voucher programs are subject to the general obligation under the FHA, ADA and Section 504 to provide reasonable accommodations to people with disabilities, when requested, in order to ensure equal opportunity to participate in the HCVP program. By their very nature, accommodations involve changes in rules, policies, practices or services where such may be necessary to afford equal opportunity to participate in the program. Because these are exceptions to generally applicable rules, they may not specifically be mentioned in the administrative plan of an agency. Rather, people with disabilities who need exceptions must affirmatively ask for them.<sup>15</sup> Of course, voucher agencies should communicate their willingness to accept accommodation requests and to consider them expeditiously. Not all requests for additional flexibility or outreach in marketing have been held to be reasonable. For instance, a housing authority has been found to meet its civil rights obligations by working closely with disability advocacy groups in reopening its waiting

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10 24 C.F.R. §8.28(a)(1).

11 Technical Assistance Collaborative, *Section 8 Made Simple*, 2d ed. (2003), available at [http://melvilletrust.org/pdfs/TAC\\_Sect8\\_2ndEd.pdf](http://melvilletrust.org/pdfs/TAC_Sect8_2ndEd.pdf) (last visited May 1, 2006)

12 24 C.F.R. §8.28(a)(2).

13 24 C.F.R. §8.28(a)(3).

14 See *Pierce v. Department of Housing Services of Washington County*, HUD Section 504 Case No. 10-96-04-019-370 (letter decision from Deputy Assistant Secretary Floyd O. May, dated March 9, 2001)(copy on file with National Housing Law Project).

15 See, e.g., Bazelon Center for Mental Health Law, *What Fair Housing Means for People with Disabilities* (May 2003), available at <http://www.bazelon.org/issues/housing/publications/wfhm.pdf> (last visited May 1, 2006).

list, but was not required to take additional steps to ensure that an application is available to a specific applicant at a specific time.<sup>16</sup>

### Housing Search

People with disabilities often face obstacles to finding appropriate housing, either because of the difficulty of getting out to see available units, or because there are fewer units on the market that are accessible, meet housing quality standards and are within the HCVP payment standard. Recognizing these facts, the Section 504 regulations require HCVPs to “[t]ake into account the special problem of ability to locate an accessible unit when considering requests by eligible individuals with handicaps for extensions of Housing Certificates or Housing Vouchers.”<sup>17</sup> In other words, voucher agencies should be prepared to routinely offer extensions on the life of vouchers when people with disabilities have difficulty in finding appropriate units or getting under lease. In fact, some housing authorities provide as much time as necessary to find a unit. Such policies may or may not appear in the agency’s administrative plan.

Another issue that arises for people with disabilities is the question of portability of a voucher in order to ensure access to disability supports and services. While portability limitations in the first year are theoretically subject to the reasonable accommodation requirement, the single reported FHA decision in this area held that waiving the one-year waiting period prior to portability to another jurisdiction amounted to an undue burden on the housing authority, and a fundamental alteration of its HCVP.<sup>18</sup>

### Leasing

Because of the difficulty of finding accessible housing in many markets, people with disabilities may find it difficult to get vouchers under lease. As a general rule, the HCVP rules prohibit a voucher holder from renting from a relative.<sup>19</sup> To ensure greater usability of vouchers, HCVP regulations allow a person to rent from a relative who is a resident owner as a reasonable accommodation for her disabilities.<sup>20</sup> However, recent problems with abuse in programs have led HUD to be more vigilant. As a result, housing authorities in many jurisdictions are scrutinizing such requests more closely.

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16 See, e.g., *Louie v. Davis*, 1998 WL 798890 (N.D.Cal. Nov. 5, 1998)(holding that local voucher program had not violated the reasonable accommodation mandate, where it had worked closely with disability organizations to distribute voucher applications when the waiting list reopened).

17 24 C.F.R. §8.28(a)(4).

18 See *Hinneberg v. Big Stone Gap Redevelopment and Housing Authority*, 2005 WL 3117287 (Minn. Nov. 23, 2005).

19 See, e.g., 24 C.F.R. § 982.615(b)(3)

20 24 CFR 982.306(d).

## Rent Levels

The Section 504 regulations explicitly provide that HCVP program must, “[if] necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception rent under Sec. 982.504(b)(2) for a regular tenancy under the Section 8 certificate program so that the program is readily accessible to and usable by persons with disabilities.”<sup>21</sup> Under current HUD regulations and guidance, voucher agencies have unfettered discretion to approve an exception rent that is 110 per cent of the payment standard. Exception rents up to 120 (or higher) must be approved by HUD.<sup>22</sup> However, because every grant of an exception rent reduces funds available, many housing authorities will grant them (or request HUD approval) very grudgingly. That means advocates have to be aggressive in seeking them where they are necessary for their clients to benefit from the HCVP.

## Occupancy

Another way that obstacles to living in community can be overcome is through the use of live-in aides. HUD has adopted rules specifically permitting live-in aides in HCVP.<sup>23</sup> 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. While the tenant may be entitled to live in a larger unit so that the aide can have a separate bedroom,<sup>24</sup> the aide’s income is not counted in the calculation of the tenant’s eligibility or rent obligation.<sup>25</sup> Despite the apparent rigidity of the HUD regulations, relatives are not automatically disqualified from serving as live-in aides.<sup>26</sup> It is clear that a housing authority “*must* approve a live-in aide if needed as a reasonable accommodation in accordance with 24 C.F.R Part 8 to make the program usable by the family member with a disability.”<sup>27</sup> When a live-in aide is present as a reasonable accommodation the housing authority must then provide the Voucher holder with an appropriate unit size certificate.

Structural modifications for accessibility can be expensive, and owners of private units may, therefore, be unwilling to undertake them. Recently, though, HUD explicitly recognized that a housing authority’s administrative fees in its HCVP can be used to modify housing units to make them accessible.<sup>28</sup> The applicable Notice provides that the “administrative fees ... shall only be used for activities related to the provision of section

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21 24 C.F.R. §8.28(a)(4).

22 HUD Accessibility Notice, available at <http://www.hud.gov/offices/fheo/library/LVpihnotice.pdf> (last visited May 1, 2006).

23 24 C.F.R. §982.316

24 24 C.F.R. § 982.402(a)(6)

25 24 C.F.R. §5.609(c)(5).

26 *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](http://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.”).

27 24 C.F.R. § 982.316

28 HUD Notice 2006-05 "Implementation of the 2006 HUD Appropriation Act,"

8 tenant-based rental assistance, including related development activities. Examples of related development activities include, but are not limited to, unit modification for accessibility purposes....”<sup>29</sup>

Finally, although Section 504 regulations explicitly provide that a private landlord does not acquire a Section 504 obligation merely by accepting a voucher.<sup>30</sup> those same regulations also require, “[i]n order to ensure that participating owners do not discriminate in the recipient's federally assisted program, [an HCVP administrator] shall enter into a HUD-approved contract with participating owners, which contract shall include necessary assurances of nondiscrimination.”<sup>31</sup> The practical effect of these provisions is that private owners will not be required to make and pay for structural changes to promote accessibility, but remain liable—by contract and by operation of the FHA—for discrimination against people with disabilities.

### Maintaining a Voucher

Sometimes a disability can make it more difficult to comply with Voucher program requirements, such as those related to recertification or housing quality standards inspections. Voucher agencies may be required, as a reasonable accommodation, to reschedule appointments, provide home visits or even reinstate a voucher that has lapsed because of noncompliance.<sup>32</sup>

### **Can Private Landlord Participation in HCVP be Required?**

Because HCVP is described as a “voluntary” program, conventional wisdom suggests that a private landlord cannot be required to participate by accepting voucher holders as tenants. Two civil rights arguments have been made in an attempt to overcome this view. First, people with disabilities have requested a reluctant landlord to take a voucher as a reasonable accommodation under the FHA, ADA or Section 504. Second, a number of states and localities, and the federal Low Income Housing Tax Credit (LIHTC) program have requirements that may forbid a landlord to turn away a voucher holder because of her status as a voucher holder.

The reasonable accommodation argument got off to a decidedly bumpy start. The few courts that *have* been faced with such a request have met it with resistance. In *Salute v. Stratford Greens Garden Apartments*,<sup>33</sup> for instance, the Second Circuit held that a policy forbidding Section 8 participants from tenancy did not need to be changed to reasonably accommodate individuals with disabilities. The court found that such a change was neither reasonable nor necessary. Similarly, in *Schanz v. Village Apartments*,<sup>34</sup> the

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29 For more information, see Steve Gold, Modifications for Accessibility in Units in the Voucher Program, available at <http://www.stevegoldada.com/stevegoldada/archive.php?mode=N&id=151> (last visited May 1, 2006).

30 24 C.F.R. §8.3 (definition of “Recipient”)

31 24 C.F.R. §8.28(b).

32 See Technical Assistance Collaborative, *Section 8 Made Simple*, 2d ed. (2003), available at [http://melvilletrust.org/pdfs/TAC\\_Sect8\\_2ndEd.pdf](http://melvilletrust.org/pdfs/TAC_Sect8_2ndEd.pdf) (last visited May 1, 2006), at pp. 57-60.

33 136 F.3d 293, 302 (2nd Cir. 1998).

34 998 F.Supp. 784, 786 (E.D.Mich. 1998).

court held that the landlord need not change a "no co-signer" policy to accommodate an individual with a disability whose rent the Hope Network would guarantee.

Despite the refusal of the *Salute* and *Schanz* courts to grant reasonable accommodations in such a situation, individuals in other jurisdictions may still have success on the merits of similar claims. Therefore, a person with a disability who seeks housing should request an accommodation to economic requirements for application if he is unable to meet those requirements because of his disability, but is otherwise capable of complying with apartment rules and regulations. More recently, in *Giebeler v. M & B Associates*<sup>35</sup>, the Ninth Circuit held that an unwilling landlord may be required to accept a co-signer where an applicant with a disability could demonstrate that his inability to meet a minimum income requirement was caused by his disability. The court held that the *Salute* and *Schanz* decisions had been implicitly rejected by the U.S. Supreme Court in *U.S. Airways v. Barnett*,<sup>36</sup> a case construing the ADA's reasonable accommodation requirement in employment. In *Barnett*, the Court held the accommodation mandate may require an employer to treat people with disabilities more favorably in order to afford them equal housing opportunity. *Giebeler* makes it more likely—in the Ninth Circuit and in other courts finding its analysis convincing—that participation in HCVP can be required over a landlord's objection.<sup>37</sup>

Finally, a number of states and localities, and the federal LIHTC program, have provisions requiring landlords to accept Vouchers.<sup>38</sup> While intended to protect all poor people, these provisions are particularly useful to people with disabilities who have acquired vouchers and may face barriers in getting them under lease.

## **Conclusion**

Legal services housing advocates have a number of tools to expand the usability of the HCVP for people with disabilities that are not available outside the disability context. Better deployment of those tools can help people with disabilities to avoid expensive and dehumanizing institutional settings, and help to achieve the community integration required by the FHA, ADA and Section 504.

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35 343 F.3d 1143 (9<sup>th</sup> Cir. 2003).

36 535 US 391 (2002).

37 See also, *Sabi v. Donald T. Sterling Corporation* Case No. BC 313345 (Superior Court of California, County of Los Angeles)(slip op. April 12, 2006)(denying defendant's motion for summary judgment in a case involving a landlord's refusal to accept a Housing Choice Voucher as a reasonable accommodation for a person with a disability)(copy on file with NHLP).

38 National Housing Law Project, *Source of Income Protections in the U.S.* (2005), available at [http://www.nhlp.org/html/sec8/source\\_of\\_income/2005%20Source%20of%20Income%20Statutes%20%5B3.28.05%5D.pdf](http://www.nhlp.org/html/sec8/source_of_income/2005%20Source%20of%20Income%20Statutes%20%5B3.28.05%5D.pdf) (last visited May 1, 2006); 26 U.S.C. § 42(h)(6)(b)(iv); 26 C.F.R. § 1.42-5(c)(1)(xi)(Low Income Housing Tax Credit provisions prohibiting a landlord from turning away an applicant because of status as a voucher holder).