

July 24, 2023

Demetria L. McCain
Principal Deputy Assistant Secretary
Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street SW, Room 5100
Washington, DC 20410-0500

RE: [Docket No. FR-6257-A-01] Nondiscrimination on the Basis of Disability: Updates to HUD's Section 504 Regulations

Dear Ms. McCain,

The Council of Large Public Housing Authorities (“CLPHA”), the MTW Collaborative, and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments to HUD’s Advanced Notice of Proposed Rulemaking (ANPRM) entitled “Nondiscrimination on the Basis of Disability: Updates to HUD's Section 504 Regulations” published in the Federal Register on April 25, 2023 (the “Proposed Rule”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. CLPHA supports the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. CLPHA members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though the practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

The MTW Collaborative represents PHAs participating in HUD’s Moving to Work Demonstration program (“MTW”). The MTW Collaborative monitors and advocates on behalf of MTW agencies’ interests and facilitates the sharing of information, best practices, and innovations between MTW agencies. Our membership includes the initial 39 PHA agencies participating in the MTW program, as well as PHAs newly designated as MTW pursuant to the expansion of the MTW program as authorized by Congress.

BACKGROUND

Section 504 of the Rehabilitation Act of 1973 (Section 504) is a federal law that prohibits discrimination against individuals with disabilities in programs and activities receiving federal financial assistance. This law applies to various sectors, including housing programs such as the Housing Choice Voucher (HCV) and public housing programs. Below is a summary of the Section 504 regulations that apply to these programs:

- *Non-discrimination*: The regulations require that individuals with disabilities have equal access to and opportunities in the HCV and public housing programs. This means that individuals cannot be excluded, denied benefits, or subjected to discrimination based on their disability.
- *Reasonable accommodation*: The regulations mandate that reasonable accommodations must be provided to individuals with disabilities to ensure they have an equal opportunity to participate in and benefit from the programs. This may include modifications to policies, procedures, or practices, as well as physical modifications to housing units, if they do not impose an undue financial or administrative burden on the program.
- *Accessibility*: The regulations require that housing units and common areas in both the HCV and public housing programs be made accessible to individuals with disabilities. This includes ensuring that there are no discriminatory eligibility criteria or rental practices, as well as making reasonable modifications to allow individuals with disabilities to use and enjoy the premises.
- *Program accessibility*: The regulations also address the accessibility of the programs themselves. They require that individuals with disabilities have equal opportunity to apply for and receive assistance through the programs. Reasonable accommodations must be provided in the application process, and program materials and communications should be made accessible to individuals with disabilities.
- *Grievance procedure*: The regulations stipulate that HCV and public housing programs must have a grievance procedure in place to address complaints of disability discrimination. The procedure should be accessible and allow for prompt and fair resolution of grievances.

According to HUD's 2019 report on Accessibility in Housing, **6 percent of U.S. households, representing 6.9 million households, reported having at least one household person with accessibility difficulties.** Similarly, individuals with disabilities often face various challenges when accessing federal housing assistance programs like HCV and public housing programs such as:

- *Inaccessible housing units*: Housing units may lack the necessary accessibility features such as ramps, wider doorways, or accessible bathrooms, making them unsuitable for individuals with disabilities.
- *Discrimination and stigma*: Individuals with disabilities may encounter discrimination or prejudice when seeking housing, resulting in limited housing options and unequal treatment.

- *Waiting lists and long wait times:* The demand for affordable and accessible housing often exceeds the supply, leading to lengthy waiting lists and extended wait times for individuals with disabilities.
- *Communication barriers:* Inadequate accessibility of program materials and communication can hinder individuals with disabilities from understanding and navigating the application process and their rights under the programs.

Additionally, the lack of sufficient federal funding has posed significant challenges to the development of accessible units in several ways.

1. *Cost of construction and retrofitting:* Building or retrofitting units to meet accessibility standards can involve additional expenses. This includes installing features like ramps, wider doorways, accessible bathrooms, and other accommodations. At a time when industry experts estimate that the backlog of public housing maintenance far exceeds \$100 billion, insufficient Public Housing Capital Funds limit the ability of PHAs to invest in these modifications, making it difficult to create an adequate supply of accessible units.
2. *Competing priorities:* When federal funding for housing programs is limited, PHAs may face the challenge of allocating finite funds among various needs. This can lead to a prioritization of basic housing needs over the development of accessible units, further exacerbating the shortage of accessible housing options.
3. *Maintenance and upkeep costs:* Accessible units require ongoing maintenance and repairs to ensure that accessibility features remain functional and in compliance with applicable standards. Insufficient funding can impede the ability to adequately maintain and address accessibility-related issues, leading to deterioration or reduced functionality of accessibility features over time.
4. *Decreased voucher utilization:* The lack of federal funding for accessible units can also affect rental assistance programs like the HCV and Mainstream Voucher (MS) programs that help people with disabilities afford safe and decent housing. HUD has been closely monitoring budget utilization of these programs and has made improving voucher utilization a priority. Without an adequate supply of accessible units, however, individuals with disabilities face difficulties in finding suitable housing options that meet their needs, limiting their ability to fully utilize rental assistance benefits. Specifically, budget utilization for the MS program, which exclusively serves disabled households, continues to underperform at 75.02% as of July 2023.

RECOMMENDATIONS

We applaud HUD's continued commitment to fair housing for individuals with disabilities embodied in the Proposed Rule. We further acknowledge and applaud HUD's determination to clarify and update obligations for recipients of federal assistance under Section 504 that have developed since the regulations were originally published in 1988.

We have concerns, however, regarding the scope and limits of HUD's Section 504 regulations and broader compliance and enforcement activities by the Office of Fair Housing and Equal Opportunity (FHEO). We therefore urge HUD to deploy the following strategies to assist PHAs in complying with its Section 504 regulations.

Clarify Section 504 Regulations to Align with FHEO Requirements

FHEO has increased investigative and enforcement actions against PHAs, private owners, and property managers alike regarding purported fair housing, physical accessibility, and reasonable accommodation violations. Typically, the initial complaint that triggers an investigation is limited to a particular set of facts or a specific program. However, FHEO has become inclined to expand the scope of such investigations to include the full program or even the entire housing portfolio of the provider. In other words, FHEO will use an individual complaint to trigger a broader compliance review of the provider, regardless of the specific facts of the complaint.

If FHEO investigations result in findings of fair housing, physical accessibility, or reasonable accommodation violations, FHEO has leveraged the potential that HUD grant funds and FHEO approvals of development transactions will be withheld to pressure PHAs to sign voluntary compliance agreements ("VCAs") to resolve such violations. PHAs are therefore caught in a double bind by being compelled to agree to a VCA or face a loss of HUD grant funds and future development opportunities. Compounding PHA frustration is FHEO's insistence that the PHA is responsible for accessibility issues in units financed with low-income housing tax credits ("LIHTC") or market-rate units, regardless of whether there is a third-party owner or property manager. FHEO ignores the lack of contractual privity between the PHA and third-party owners or managers, and simply imposes liability upon the PHA with no basis in law or regulation.

The detrimental effect of such action cannot be overstated. PHAs not only face the loss of HUD funds, but also risk the loss of funding from state housing finance agencies and tax credit allocations if a PHA does not comply with FHEO's terms. Ultimately, those who suffer are the unhoused and under-housed individuals in our communities.

This increased enforcement and compliance activity is pursued despite the lack of guidance or clarity regarding what "compliance" actually means.

On February 7, 2022, HUD's Office of Inspector General ("OIG") published an Audit Report finding that HUD did not have adequate policies and procedures in place for ensuring that PHAs properly addressed resident requests for reasonable accommodations. The Report found that HUD's guidance to PHAs was fragmented through various notices, some no longer active, and guidebook chapters, and that such opaque guidance has resulted in inconsistent oversight by PIH field offices. OIG's survey of PIH field offices found that nearly half of PIH field offices operated under a mistaken understanding of PHAs' obligations to track reasonable accommodations. These findings perfectly illustrate the need for consistent guidance. At present, PHAs and other regulated

entities are bearing the burden of unclear guidance and erratic enforcement—the results of which, as discussed above, are incredibly costly to PHAs and their residents.

It is imperative that HUD issue guidance that provides greater clarity to allow consistent compliance by PHAs and enforcement by FHEO. Guidance that does not provide set standards essentially imposes strict liability upon PHAs—any deviation from FHEO’s interpretation of current guidance has resulted in punitive action against PHAs and other HUD grantees. HUD’s forthcoming rulemaking must include safe harbors for PHAs, including compliance with otherwise legitimate local, state, or federal law implementation and eligibility or selection policies intended to enhance housing opportunities for specific protected classes or other under-housed persons. Most PHAs are subject to more than one Federal accessibility law and architectural standards in the operations of their housing services, programs, and activities. In addition, State and local laws and building codes apply. Therefore, it is crucial to harmonize, to the extent possible, the various standards and requirements for PHAs to create consistency, transparency, and clarity in compliance.

The lack of such consistency has subjected PHAs to the often divergent interpretations of FHEO. In some cases, FHEO has refused to approve transactions because the proposed development contains “too many” accessible units, providing the rationale that providing too many accessible units unduly concentrates and segregates individuals with disabilities. Despite this lack of basis in law, FHEO has accused PHAs of attempting to “warehouse” individuals with disabilities when a PHA attempts to provide the accessible units required by local law or a housing finance agency and, more importantly, requested by residents. FHEO’s arbitrary actions only serve to delay the provision of accessible affordable housing and create a chilling effect for potential future developments for individuals with disabilities. This directly contradicts HUD’s stated goal of meeting the needs of an increasingly aging population “to enable households to remain in their housing,” in other words, age in place.

In other cases, FHEO has conditioned the approval of proposed transactions upon the execution of a “Memorandum of Assurance” that would require increased accessibility at the property, including accessibility retrofits and additional Uniform Federal Accessibility Standards (UFAS) units. Our non-PHA partners have experienced FHEO requiring full physical accessibility reviews of properties for simple HAP contract transfers or loan refinancing. It appears to be FHEO’s position that Section 504 requires all properties receiving federal funds to be fully accessible, contrary to the current industry understanding based on a plain meaning of the regulations that such Section 504 physical accessibility requirements are only triggered if the development undergoes substantial rehab or includes new construction. The disagreement between the apparent position of FHEO and the plain regulatory language not only creates confusion and additional expenditures of already strained resources, but also delays the development of much-needed housing.

FHEO’s unpredictable positions on unit accessibility sends a clear message to PHAs: providing either too many or too few accessible units subjects housing providers to enforcement action, and only FHEO knows the correct amount. Clear guidance on FHEO’s position on unit accessibility will foster greater compliance and ultimately, encourage and enable PHAs to provide accessible units to individuals with disabilities.

Develop and Fund a Public Housing Ten-Year Sustainability Plan to Recapitalize the Aging Public Housing Portfolio

For the past several decades, Congress has failed to provide adequate funding to the Operating Fund and Capital Fund. The Public Housing Operating Fund continues to be the only major source of federal funds available to housing authorities to support public housing operations, and the Public Housing Capital Fund is the principal source of annual funding available to housing authorities for repair, rehabilitation, and modernization of public housing. Due to historic and chronic underfunding, housing authorities continue to maintain undercapitalized, aging properties that do not meet basic market standards and face the loss of affordable and accessible housing units.

In order to recapitalize the aging public housing portfolio, CLPHA calls for the development and implementation of a Public Housing Ten-Year Sustainability Plan that will utilize current appropriated funding and potentially new funding streams including, but not limited to: expansion of housing tax credits; health and safety investments; climate and infrastructure upgrades; greening and sustainability investments; and increased opportunities to leverage private capital investment. Such funding would enable PHAs to recapitalize their aging portfolios to, among other things, meet the increasing accessibility needs of their communities.

Expand Access to Housing Tax Credits and New Housing Vouchers

CLPHA members have undertaken construction projects specifically focused on creating new accessible units. These units are designed or modified to meet the accessibility needs of individuals with disabilities, including features like wider doorways, accessible bathrooms, and other accommodations. CLPHA members have also retrofitted existing housing units to make them more accessible. This process involves modifying units to include accessibility features such as ramps, grab bars, accessible kitchen and bathroom fixtures, and other necessary adaptations.

For decades, PHAs have successfully developed new housing and improved existing housing through mixed-finance strategies and public-private partnerships that revitalized their aging public housing communities and increased the supply of deeply affordable housing. An expansion of the housing tax credit coupled with an increase in new housing vouchers could have a significant impact on the supply of deeply affordable and special needs housing.

Align Housing and Medicaid

CLPHA members have collaborated with developers and nonprofit organizations specializing in accessible housing to increase the availability of units. These partnerships involve the construction of new accessible units or the acquisition and renovation of existing properties to meet accessibility standards. While members utilize various funding sources to finance housing accessibility improvements, commonly used tactics leverage private financing, access philanthropic grants, or utilize grants and funding opportunities available to nonprofit entities. However, establishing private-public partnerships can present certain challenges for PHAs that may encounter barriers like misalignment of mission and goals. By better aligning housing and Medicaid to provide funds for housing supports, PHAs would have access to additional funding resources to increase the supply of accessible housing units. CLPHA recommends with its 2023 Policy Priorities to expand Medicaid to include housing support and rent coverage and authorize and fund integrated health and housing vouchers. CLPHA also recommends that HUD incentivize PHA/Medicaid partnerships to develop service-connected and permanent supportive housing.

Raise the Cap on the Number of Vouchers PHAs may Project-Base

CLPHA members have utilized project-based vouchers to increase the availability of accessible units. These vouchers are attached to specific housing units, ensuring that individuals with disabilities have access to designated accessible units within a development. PHAs have legal obligations under the Fair Housing Act and Section 504 to provide equal housing opportunities for individuals with disabilities. Allocating funding for PBVs targeted at special needs households ensures compliance with these laws by supporting the development of accessible and supportive housing options. However, PHAs are limited by caps on the number of vouchers that can be project-based, hindering the ability of PHAs to use PBVs. Overall, allocating new funding for PBVs outside these caps to develop service-connected and permanent supportive housing for special needs households aligns with the goal of promoting housing stability, improving outcomes, and creating inclusive communities for individuals with disabilities and other vulnerable populations.

RESPONSES TO QUESTIONS POSED BY HUD

In response to the questions posed by HUD in the Proposed Rule, CLPHA, Reno & Cavanaugh and the MTW Collaborative provide the following answers.

Challenges and Discrimination Faced by Individuals with Disabilities

Over 41 million people in America have disabilities. Renters with disabilities are more likely to be burdened by rents that consume 50% or more of their income. Roughly 25% of the homeless population in shelters on any given day have a disability.¹ Securing safe, affordable, and accessible housing is critical to assist disabled individuals to live independently.

Yet, HUD's Worst Case Needs Report to Congress in 2021 summarizes that households with the worst-case needs were most commonly among people younger than 62 who have disabilities in 2019. As households recover from the devastating impacts of the COVID-19 pandemic amidst soaring inflation costs, it is unsurprising that individuals with disabilities face the greatest risk of housing instability. According to the report, 2.89 million very low-income (VLI) renter households have people younger than 62 reporting at least one of the six measures of disability. In 2019, 1.04 million (36.1 percent) of these households experienced worst case needs, a modest decrease from 1.30 million (39.8 percent) in 2017.

In addition to higher housing costs, CLPHA members report that individuals with disabilities often require the assistance of a live-in aide to live independently. Some rental properties may not be designed or modified to be accessible for individuals with disabilities, which can further limit housing options for these families. Lack of accessible features like ramps, wider doorways, or adapted bathrooms can make it challenging for individuals with disabilities to comfortably live in those properties, even with a live-in aide.

Auxiliary Aids and Supportive Services Needed

A 2022 University of California, San Francisco report on mobility devices found that slightly more than 6.8 million Americans with physical disabilities use assistive devices to help them become more independent and perform daily tasks they may have had trouble with before. This group comprises 1.7 million wheelchair or scooter riders and 6.1 million users of other mobility devices,

¹ [Advancing Economic Justice for People with Disabilities | National Disability Institute](#)

such as canes, crutches, and walkers. CLPHA members report that most requested auxiliary aids to make a unit accessible are:

- *Grab bars and handrails*: Installing grab bars and handrails in bathrooms, near toilets, and in shower areas can help individuals with mobility challenges maintain balance and prevent falls.
- *Wheelchair ramps*: For individuals who use wheelchairs or have mobility impairments, ramps are essential to provide access to entrances and other areas with stairs.
- *Accessible entryways*: Widening doorways to accommodate wheelchairs and other mobility aids is crucial to ensure easy entry and exit from rooms.
- *Lever handles*: Lever-style door handles and faucet handles are easier to operate for individuals with limited hand strength or dexterity compared to traditional round doorknobs and handles.
- *Accessible bathrooms*: Ensuring bathrooms are designed with adequate space for wheelchair maneuverability and have accessible sinks, toilets, and showers/bathtubs with roll-in options.
- *Lowered countertops and appliances*: Lowering countertops, kitchen sinks, and kitchen appliances can make them more accessible for individuals using wheelchairs or with limited reach.
- *Accessible light switches and outlets*: Lowering light switches and placing electrical outlets at an accessible height can be helpful for individuals with mobility impairments.
- *Visual and auditory alarms*: Visual and auditory alarms, such as flashing lights and loud sound alerts, can alert individuals with hearing or visual impairments to visitors and emergencies.
- *Accessible parking spaces*: Designating accessible parking spaces close to the building entrance with sufficient space for wheelchair accessibility.

Additionally, CLPHA members report simplifying and streamlining the application processes can help individuals with disabilities navigate through their programs more efficiently. This can include helping with completing applications and ensuring reasonable accommodations are available.

Lack of Accessible Units

The lack of accessible units in assisted housing can discourage applications from eligible persons with disabilities significantly. When accessible units are scarce, individuals with disabilities may face limited housing options, and the fear of not finding suitable accommodations can deter them from even applying to housing assistance programs. This can lead to decreased participation and hinder access to affordable and suitable housing for those who need it the most.

Challenges households face in finding available and accessible affordable housing in their communities include:

- *Supply and demand imbalance*: There is often an insufficient supply of accessible units compared to the demand, leading to long waiting lists and limited housing choices.
- *Lack of universal design*: Many housing units are not designed with universal accessibility in mind, making it difficult for individuals with disabilities to find suitable accommodations.
- *Affordability*: Accessible housing may come with higher rental costs due to the modifications and features, making it challenging for households with limited financial resources.
- *Geographical location*: In some areas, the availability of accessible housing can be more limited, especially in rural or low-income communities.
- *Awareness and enforcement*: Some landlords may not be aware of their obligations to provide accessible housing or may be hesitant to make necessary modifications, resulting in a lack of accessible options.

To determine the level of need for accessible housing, HUD should consider various sources of data, such as:

- *Census data*: Demographic data on disability prevalence and housing needs can be obtained from national and local census reports.
- *HUD housing market analyses*: Conducting housing market analyses can identify gaps in accessible housing supply and demand.
- *Fair housing testing*: Fair housing testing can help identify potential discriminatory practices related to accessibility.
- *HUD Section 811 PRA program data*: The Section 811 Project Rental Assistance program that serves persons with disabilities can provide data on demand and use of accessible housing.

Enhance Outreach and Education

Despite limited funding, CLPHA members promote programs and initiatives to make housing accessibility improvements and increase private market rental housing options for persons with disabilities. In addition to building and retrofitting units to meet accessibility standards, some members offer assistance and financial resources for accessibility modifications. HUD could augment these efforts by providing funding, training, and technical assistance for PHA staff and landlords to increase awareness about disability rights, reasonable accommodations, and fair housing practices, fostering a more including housing environment. Making program information and application materials accessible to persons with disabilities is essential to ensure equal access and participation in public programs. HUD could also promote collaboration with disability service providers to identify housing needs, provide support, and develop targeted strategies to address the unique challenges faced by persons with disabilities.

Challenges using Tenant-Based Assistance to Secure Accessible Units

CLPHA members report that persons with disabilities sometimes face reluctance of landlords when using tenant-based assistance to secure a housing unit. Landlords who are hesitant to rent to families with individuals with disabilities due to misconceptions, biases, or perceived maintenance costs associated with accommodations.

Finding accessible units that meet all the specific needs of the individual can also be a daunting task, requiring extensive searching and understanding of local rental markets. When individuals with disabilities must relocate to find accessible units, they may also face disruptions to their support systems, healthcare providers, and social networks.

Providing funding for housing mobility search assistance can be a valuable resource for persons with disabilities, as it helps them navigate the housing market and find suitable and accessible housing options. This type of assistance aims to address the challenges and barriers that families with disabilities may face in securing housing that meets their specific needs.

Public and Common Use Areas

Non-housing facilities surrounding HUD-assisted properties also create barriers for residents with disabilities. Federal funding can play a crucial role in removing barriers to public and common use areas in HUD-assisted properties, making them more accessible and inclusive for individuals with disabilities.

For the past several decades, Congress has failed to provide adequate funding to the Operating Fund and Capital Fund federal funding. As detailed above, failure to adequately fund these programs makes it difficult for PHAs to maintain undercapitalized, aging properties that do not meet basic market standards, including their public and common-use areas. To improve the accessibility of non-housing facilities surrounding HUD-assisted properties, additional federal funding should be made available to:

- Repair sidewalks and upgrade sidewalk ramps;
- Update signage in public areas, making it accessible through the use of Braille, large print, or tactile elements;
- Apply universal design principles to public and common areas;
- Bring HUD-assisted properties into compliance with ADA requirements for public and common-use areas; and
- Conduct accessibility audits and assessments of HUD-assisted properties.

CONCLUSION

PHA input is key in developing guidance on Section 504, as PHAs have encountered fragmented enforcement from HUD's Fair Housing and Equal Opportunity (FHEO) office, with different FHEO offices and regions offering contradictory guidance, novel and inconsistent interpretations of federal law, and excessively punitive enforcement of fair housing policy. Greater clarity on how PHAs may meet their obligations is necessary prior to any compliance and enforcement liability being attached to PHAs. We strongly recommend that HUD consider our comments and those from other interested parties, release a Proposed Rule, and allow for subsequent rounds of comments before issuing a final rule.

CLPHA, Reno & Cavanaugh, and the MTW Collaborative appreciate the opportunity to provide comments in advance of proposed rulemaking. We look forward to working with HUD on future rulemaking.

Sincerely,



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