

# Fair Housing Information Sheet # 7

## Using Reasonable Accommodations to Eliminate Financial Barriers In Housing Applications

It is common practice for landlords to use application policies, ostensibly for business purposes, that serve as barriers to housing for many people with disabilities. Often landlords will require applicants to have a monthly income three or four times the required rent. Apartment managers may also have policies that disallow unrelated co-signers or that disallow co-signers altogether. They may also refuse to admit Section 8 housing participants as tenants, asserting the voluntary nature of the Section 8 program as a defense for their failure to reasonably accommodate applicants with disabilities.

As a result, individuals with disabilities may be blocked from an equal opportunity to obtain the housing of their choice. Often, as a result of disability, these individuals are unable to work at a level they might otherwise be capable of, or unable to work at all, and thus cannot meet the income-related application requirements relentlessly imposed by many landlords. Though there is conflicting case law, the Fair Housing Amendments Act may protect applicants for housing who are, because of their disability, unable to meet these economic standards.

### Is there a cause of action under the FHA?

The Fair Housing Amendments Act (FHAA) defines discrimination as including "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3) (B).<sup>1</sup> Such accommodations have been requested most often in the context of zoning ordinances or no-pets policies.<sup>2</sup> Few courts have been faced with a request for waiver of an application-process policy, such as a minimum-income requirement.

The few courts that *have* been faced with such a request have met it with resistance. In *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2nd Cir. 1998), 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*, 998 F.Supp. 784, 786 (E.D.Mich. 1998), the 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.

As a reasonable accommodation, the applicant might request that the landlord look to his previous history of tenancy as an indication of his ability to pay his full rent in a timely fashion, rather than imposing an arbitrary "three times the rent" rule or other income-related requirement. Additionally, the applicant may find a friend, relative or community organization to serve as a co-signer and guarantee his rent for up to one year. If the applicant finds a capable co-signer, he should request that the landlord waive any no-cosigner policy to reasonably accommodate the applicant's disability.

An applicant who is denied housing based on a policy prohibiting Section 8 participants should request that the policy be waived as a reasonable accommodation. Since the majority of the applicant's rent will be guaranteed by the government, any heightened concerns the landlord may have that the tenant will default in payments are unfounded. Though landlords may have reasonable concerns about the bureaucratic involvement that acceptance of Section 8 participants may require, making a reasonable accommodation for one Section 8 participant with a disability should not fundamentally alter the landlord's practices or policies.

Each of these options presumably meets the same goals the financial barriers are aimed at achieving. These alternatives still allow the landlord to have an increased level of certainty that the tenant will pay the rent in its entirety and in a timely fashion. At the same time, these accommodations allow individuals who, because of their disabilities, cannot overcome income-related barriers to housing to enjoy an equal opportunity to the housing of their choice.

### **Economic concessions as reasonable accommodations**

At least one court has implied that the FHAA does not contemplate "financial" or "economic" changes in its reasonable accommodations mandate.<sup>3</sup>

However, such reasoning is misguided and should not dissuade individuals with disabilities from pursuing such accommodations in other jurisdictions. There are a host of cases involving decisions to grant zoning variances or special-use permits as reasonable accommodations that have at their root economic considerations. For example, in *Smith & Lee Associates v. City of Taylor*, the Sixth Circuit held that a zoning variance allowing more than six individuals to reside together in a residential neighborhood was a necessary accommodation. 102 F.3d 781, 795 (6th Cir. 1996). The court reasoned that group homes would not otherwise be possible in residential neighborhoods since 12 residents were needed to make the operation financially viable. *Id.* Thus the court envisioned making accommodations for individuals with disabilities for *financial* reasons rather than for any reason directly related to the individuals' disabilities.

Similarly, in *United States v. California Mobile Home Park Management*, the 9th Circuit contemplated the case of an individual with a disabled child who requested that her landlord make a reasonable accommodation by waiving the fees usually charged for guest parking to allow the child's nurse to park free. 29 F.3d 1413, 1417 (9th Cir. 1994). The court held that the FHAA "may require landlords to assume reasonable financial burdens in accommodating handicapped residents." *Id.*<sup>4</sup> Nothing in the language of the FHAA restricts the reasonable accommodations provision to changes that address the physical impairments caused by an individual's disability. Nor does the FHAA limit the scope of accommodations to those that are non-economic in nature. Courts have recognized that the reasonable accommodation inquiry is "highly fact-specific, requiring case-by-case determination." *California Mobile Home Park Management*, 29 F.3d at 1418. Thus a *per se* rule stating that financial accommodations are not required under the FHAA is inappropriate. Cases like *California Mobile Home* reflect the expansive interpretation of the FHAA that was intended by Congress. The *Salute* case and its progeny ignore Congressional intent, and have not been widely accepted by other courts.

## **The "necessity" and "reasonableness" of financial accommodations**

For an accommodation to be required under the Act, the change in policy or procedure must be both "necessary" and reasonable."

### **Necessity**

Under the FHA, an accommodation will not be granted unless such accommodation is necessary to afford individuals with disabilities equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604(f)(3)(B). Courts interpreting the necessity prong have differing concepts about what this requirement entails. Some courts take the concept of necessity entirely for granted, assuming that individuals who are genuinely disabled under the FHAA require reasonable accommodations to place them on equal footing with non-disabled housing applicants or residents.<sup>5</sup> It is more likely, however, that the court will expressly discuss the necessity requirement. Among those that specifically address necessity, some courts have found that the accommodation must "affirmatively enhance the disabled plaintiff's quality of life by ameliorating the effects of the disability" in order to be necessary. *Bronk*, 54 F.3d at 429. Others have reasoned that an accommodation will be necessary if "but for" the change, the individual will be denied an equal opportunity to enjoy the housing of his choice. *Smith & Lee Associates*, 102 F.3d at 795. Most conceptions of the necessity requirement seem to envision a connection between the effects of the disability involved and the accommodation requested.

However, the Second Circuit has gone beyond these interpretations of the necessity requirement by mandating that it must be the *actual handicap* that is accommodated rather than *disadvantages correlated with having handicaps*. *Salute*, 136 F.3d at 301. Few courts have expressly required such a direct connection between the disability and the accommodation as is stated in *Salute*. In fact some have expressly rejected *any* requirement of connection between the disability and the accommodation. *See, e.g., United States v. City of Philadelphia*, 838 F.Supp. 223, 229 (E.D.Pa. 1993), *affd* 30 F.3d

1488 (3rd Cir. 1994) (holding that the plaintiff need not show a "causal nexus" between the challenged provision and the handicaps of the prospective residents). If an individual is able to show that his economic situation is an effect of his disability, that applicant should be able to properly request the waiver of a minimum income requirement or no co-signer policy as a reasonable accommodation. Such a showing satisfies the interpretation of necessity advocated by most courts that merely requires some connection between the effects of the disability and the accommodation requested.

## **Reasonableness**

Once an individual has established that an accommodation is necessary to allow him an equal opportunity to enjoy the housing of his choice, the accommodation must prove to be reasonable as well. This requirement limits accommodations to those that do not impose an "undue hardship" by causing excessive financial burdens or by fundamentally altering the nature of the program. *Salute*, 136 F.3d at 300. Courts generally engage in a case-by-case balancing test that weighs the interests of the applicant in achieving the accommodation with those of the landlord in maintaining his normal practices and policies.

If a landlord has made an exception to the income-related barrier for someone else in the past, it arguably would not impose an "undue burden" to ask the landlord to make another exception in the case of an individual unable to work because of his disability. For example, if a landlord has in the past allowed students not meeting the minimum income requirements to have parents co-sign for their rent, it would not be too burdensome to require that landlord to allow a non-relative co-sign for an individual with a disability. *But see, Schanz*, 998 F.Supp. at 789 (finding that a landlord might have several valid reasons for allowing blood-relative co-signers, while refusing to allow a guaranty from a corporation). Similarly, if the landlord has allowed a tenant already in an apartment to continue leasing that apartment once he becomes a Section 8 housing participant, it should not be too burdensome to require that landlord to accept as a tenant a Section 8 housing participant who cannot work because of his disability. *But see, Salute*, 136 F.3d at 300 (holding that requiring landlords to accept a Section 8 participant as a new tenant would impose an undue hardship).

However, even if a landlord has never made exceptions to his policies in the past, it may still be reasonable to request an accommodation for an individual with a disability. When an individual requests an accommodation in the application process, that individual is not asking that the landlord charge him less rent or allow him to delay his payments of rent. The applicant is merely asking the landlord to look at proxies for financial stability other than income so that the applicant can have access to the housing opportunity desired. If the landlord looks at the applicant's past tenancy history or the financial stability of the person offering to co-sign, rather than at the actual income of the applicant, the landlord will still be able to assure to a similar degree of certainty that rent will be paid in full and on time. Thus the landlord will be able to keep intact its policies and goals without fundamentally altering its business practices. Moreover, the landlord will be affording the

applicant an opportunity equal to that enjoyed by non-disabled applicants to obtain the housing of his choice.

## **Burden of proof**

Where a court places the burden of proving the necessity and reasonableness of an accommodation may make a difference in the outcome of cases in which a financial concession is requested. The Third Circuit places the burden of showing that an accommodation is not reasonable upon the defendant. *See, e.g., Hovsons*, 89 F.3d at 1104 (3rd Cir. 1996). When this is the case, it seems more likely that the court might assume the necessity of the accommodation and merely require a showing of its unreasonableness. This would improve the chances of obtaining an exception to an income-related barrier to housing. However, other courts, including the Second, Fourth, Fifth, and Sixth Circuits, place the burden on the plaintiff to show the reasonableness and/or necessity of an accommodation. In these jurisdictions, it may be more difficult for a housing applicant to obtain an exemption from normal application procedures. *See, e.g., Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 604 (4th Cir. 1997).

## **IV. Conclusion**

Neither the *Salute* nor the *Schantz* courts considered financial concessions to be appropriate accommodations under the FHAA. Both courts failed to perform the required case-by-case analysis to determine whether the economic status of the housing applicants was a result of their disability. Both courts merely assumed that the applicants were poor individuals who happened to be disabled, rather than individuals who were poor because they were disabled. Thus it seems unlikely that a claim for a financial accommodation would be successful in these jurisdictions. However, claims brought elsewhere could prevail if the applicant is able to show (i) that his disability contributed to his economic situation and (ii) that the accommodation requested would not fundamentally alter the nature of the landlord's normal procedures.

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## **Notes**

1. *See, e.g., United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) (holding that the FHAA "may require landlords to assume reasonable financial burdens in accommodating handicapped residents" and thus may require the landlord to waive guest parking fees for a child's full-time nurse). [Return to text](#).

2. See, e.g., *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996) (holding that a zoning variance was required as a reasonable accommodation to allow the construction of a nursing facility in a residential area, rather than a hospital zone, to reasonably accommodate the disabilities of the residents and allow them an equal opportunity to the housing of their choice); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (finding that a deaf individual's need for an accommodation in the no-pets policy for his hearing dog was per se reasonable).[Return to text.](#)

3. *Salute*, 136 F.3d at 301 ("We think it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages."); see also, *Schanz*, 998 F.Supp. at 792 (distinguishing itself from cases in which accommodations had been made because those accommodations were not "economic" in nature).[Return to text.](#)

4. See also, *Hubbard v. Samson Management Corporation*, 994 F.Supp. 187, 192 (S.D.N.Y. 1998) (holding that if reserving a space for the tenant is "the only way to assure her the same access to her apartment that other tenants take for granted," then the landlord would be required to waive the parking fee usually charged for reserved spaces).[Return to text.](#)

5. See, e.g., *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996).[Return to text.](#)