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February 8, 2011

Becky Kanis, Director
100,000 Homes Campaign
Common Ground National Programs
2901 Angus Street
Los Angeles, California 90039

RE: Use of Vulnerability Index in Programs Supported by
Federal Housing Resources

Dear Ms. Kanis:

You have engaged Relman, Dane & Colfax, PLLC (the “Firm”) to provide a legal opinion about whether Common Ground and its affiliates can, consistent with the federal Fair Housing Act (“FHA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), use a “Vulnerability Index” to prioritize the assignment of housing and supportive services for people with a high mortality risk associated with being homeless.

Our opinion is based on two documents you provided—a General Survey (attached as Exhibit No. 1) and a Scoring Methodology (attached as Exhibit No. 2)—and on our legal research with respect to the FHA and Section 504. This opinion also reflects the author’s experience with relevant regulations and guidance promulgated by the U.S. Department of Housing and Urban Development (“HUD”), and his knowledge of relevant judicial decisions concerning the FHA and Section 504.

For the reasons set out below, it is our opinion that use of the Vulnerability Index (as described in Exhibit No. 1) would not violate the FHA or Section 504. We express no opinion regarding other matters except as specifically set forth in this letter. Specifically, we express no opinion concerning the optional, supplemental questions that may be employed as part of the General Survey by any local organization because we have not reviewed those questions. We are available to consider such questions as part of another opinion letter.

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Background Concerning the Vulnerability Index

Common Ground describes the Vulnerability Index as:

[A] tool for identifying and prioritizing the street homeless population for housing according to the fragility of their health. It is a practical application of research into the causes of death of homeless individuals living on the street conducted by Boston's Healthcare for the Homeless organization, led by Dr. Jim O'Connell. The Boston research identified the specific health conditions that cause homeless individuals to be most at risk for dying on the street.

Common Ground, "Vulnerability Index," available at http://www.commonground.org/?page_id=789 (last visited Dec. 4, 2010). Common Ground has worked with local partners to employ the Vulnerability Index in Los Angeles, California; Santa Monica, California; New Orleans, Louisiana; Washington, D.C.; Portland, Oregon; and Nashville, Tennessee. *Id.* You have further advised us that:

The Vulnerability Index is administered in a form of a survey, which captures a homeless individual's health and social status. It identifies the most vulnerable through a ranking system which takes into account risk factors and the duration of homelessness. This ranking allows those with the most severe health risks to be identified and prioritized for housing and other support.

Becky Kanis, "Vulnerability Index: Prioritizing the Street Homeless Population by Mortality Risk," Conference Materials for National Alliance to End Homelessness National Conference to End Homelessness, July 29, 2008, available at www.endhomelessness.org/files/2061_file_Kanis_handout_vi101.pdf (last visited Dec. 4, 2010).

Nondiscrimination Requirements in Federal Programs for Homeless People

This opinion assumes that the Vulnerability Index would be employed in connection with the federal Continuum of Care and other federal funding programs¹

¹ The Continuum of Care "is a set of three competitively-awarded programs created to address the problems of homelessness in a comprehensive manner with other federal agencies." U.S. Department of Housing and Urban Development, available at <http://www.hud.gov/offices/cpd/homeless/programs/coc/> (last visited Dec. 4, 2010). These include the Supportive Housing Program, the Shelter + Care Program, and the Single Room Occupancy Program. *Id.* HUD also operates a number of other entitlement grant programs to States and municipalities—including the Emergency Shelter Grant Program, Community Development Block Grant Program and HOME Investment Partnership Program—under which funds can be used to address the needs of homeless people. This

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intended to provide housing and services for people who are homeless. Recipients of such funds must comply with the explicit statutory and regulatory requirements of those programs, and must also comply with the civil rights requirements embodied in the FHA and Section 504. Those most relevant to Common Ground's mission and programs deal with prohibitions on disability discrimination. As outlined in greater detail below, it is our opinion that these authorities either affirmatively support the use of the Vulnerability Index or, at the very least, would permit its use.

Fair Housing Act: The FHA's prohibition on disability (and other forms of) discrimination applies without regard to the receipt of federal funds. The preamble to HUD's Fair Housing Act regulations specifically states that a housing provider "may lawfully restrict occupancy to persons with handicaps."² In 2006, HUD promulgated the Greene Memorandum (attached as Exhibit No. 3), making clear that the FHA "does not prohibit a housing provider from limiting housing to persons with a specific disability. The Fair Housing Act, while making it unlawful to discriminate against a person because he or she has a disability, does not make it unlawful to deny housing to a person because that person does not have a disability."³

The agency's position is based on a careful review of the legislative history of the FHA and the development of HUD's FHA regulations. Noting that the regulations permit the exclusion of people without disabilities and permit inquiry about disability to ensure that units set aside or prioritized for people with disabilities are actually provided for people who need such units, HUD notes that "[a]dmission decisions formed around the answers to these questions are based on satisfaction of certain eligibility criteria, which creates affirmative housing opportunities, as opposed to segregation, for persons with certain disabilities. *Thus, disability of a particular type can be a basis for admission. In some circumstances, disability-specific housing provides the most effective and comprehensive means of creating an equal housing opportunity, as different disabilities may require different types of services or accommodations. . . . Standing alone, the Fair*

same analysis is applicable to other federal funding programs operated by other agencies, including the U.S. Department of Health and Human Services, the Department of Veterans Affairs and other departments disbursing federal housing resources.

² Implementation of the Fair Housing Amendments Act of 1988; Final Rule, 54 Fed. Reg. 3246 (Jan. 23, 1989) (to be codified at 24 C.F.R. pt. 14).

³ Memorandum from Bryan Greene, Deputy Assistant Secretary for Enforcement and Programs, U.S. Department of Housing and Urban Development, to FHEO Regional Directors, "Guidance on Housing Limited to Persons with Specific Disabilities Under the Fair Housing Act." July 31, 2006 [hereinafter "Greene Memorandum"].

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Housing Act does not bar development of disability-specific housing designed and operated to promote housing opportunities for disabled persons.”⁴

Section 504: Section 504 applies only to recipients of federal funds, and entails additional civil rights protections focused on preventing the segregation of people with disabilities. As a consequence, the Greene Memorandum and other HUD guidance suggest that recipients of federal funds may prioritize housing for people with specific kinds of disabilities only under limited circumstances. Based on our review of the Section 504 statute and regulations and of the Greene Memorandum, it is our opinion that Section 504 does not prohibit the use of the Vulnerability Index (as outlined above and consistent with Exhibit No. 1 and Exhibit No. 2).

Section 504 prohibits discrimination “solely on the basis of handicap.”⁵ The operative HUD regulations spell out a number of additional prohibitions, including one saying that a recipient of federal financial assistance “may not, . . . solely on the basis of handicap; . . . Provide different or separate housing, aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps from that provided to others *unless such action is necessary to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to others.*”⁶ Clearly, then, there are circumstances in which Section 504 recognizes that certain populations may require housing and services tailored to their particular needs and that prioritizing those populations may be necessary in order to meet those needs.

To fully understand the meaning of HUD’s Section 504 regulations, it is necessary to examine three other provisions. The first provides that “. . . housing . . . to be equally effective, [is] not required to produce the identical result or level of achievement for individuals with handicaps and non-handicapped persons, but must afford individuals with handicaps equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.”⁷

A second regulation, requiring recipients of federal funds to “administer programs and activities receiving Federal financial assistance in the most integrated setting

⁴ Greene Memorandum (emphasis supplied).

⁵ 24 C.F.R. § 8.4(a).

⁶ 24 C.F.R. § 8.4(b)(1)(iv).

⁷ 24 C.F.R. § 8.4(b)(2).

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appropriate to the needs of qualified individuals with handicap[s],”⁸ also supports the use of the Vulnerability Index insofar as Common Ground and its partners seek to provide permanent supportive housing in communities that are currently off-limits because of the dearth of appropriate accessible and affordable housing units.

Finally, HUD’s Section 504 regulations permit the exclusion of non-handicapped persons from housing developed with federal financial assistance where “the program is limited by Federal statute or executive order to individuals with handicap[s],” and provides that “[a] specific class of individuals with handicaps may be excluded from a program if the program is limited by Federal statute or Executive order to a different class of individuals.”⁹ Insofar as a number of Continuum of Care and related programs either require or permit a recipient to prioritize applicants with serious physical, mental or substance abuse disabilities, there would appear to be adequate statutory grounds for excluding people who do not have the kinds of disabilities identified and prioritized through the use of the Vulnerability Index. While there is no executive order imposing such a limitation, the use of the Vulnerability Index does not seek to exclude people with disabilities or any subset, but rather to prioritize housing and services—regardless of particular disability—for those at greatest risk of death if not served.

In 1983, in promulgating an interim Section 504 regulation, HUD articulated circumstances under which housing for a specific group of people with disabilities may be necessary in order to ensure equal housing opportunity:

Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504, questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.¹⁰

⁸ 24 C.F.R. § 8.4(d).

⁹ 24 C.F.R. § 8.4(c)(1).

¹⁰ Nondiscrimination Based on Handicap in Federally-Assisted Programs and Activities of the Department of Housing and Urban Development, 48 Fed. Reg. 20,638, 20,639 (May 6, 1983).

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Given the dearth of appropriate housing and services for many homeless people with disabilities living on the street, Common Ground and its partners can likely demonstrate that this is an instance in which Section 504 should permit the allocation of funds for housing that will maintain strong selection preferences for people with high scores on the Vulnerability Index. In other words, this is likely a way of ensuring that people with high Vulnerability Index scores are given opportunities that are "as effective as those provided to others."¹¹

Conclusion and Opinion

Based upon the foregoing, it is our opinion that none of HUD's nondiscrimination and equal opportunity regulations bar the use of the Vulnerability Index, as described herein, by Common Ground.

Sincerely,



Michael Allen

Attachments: Exhibit Nos. 1-3

¹¹ 24 C.F.R. §8.4(b)(1)(iv) (HUD § 504 rules); 28 C.F.R. §35.130(b)(1)(iv) (ADA Title II regulations).

EXHIBIT

1

Vulnerability Index Survey Consent Form

Consent for Interview

We are here today to talk to you about your housing and service needs. If you give us permission, we will ask you some questions today for about 10 minutes and take a picture of you so we can identify you at a later date. These questions are about your health and housing and we will also ask for your social security number. By participating in the interview you give permission to Common Ground and (INSERT LEAD AGENCY HERE) to provide your information to authorized agencies for the purpose of furthering services and housing in this community. Some of the questions we ask might make you feel uncomfortable or be upsetting. If you feel uncomfortable or upset during the interview, you may ask the interviewer to take a break or to skip any of the questions. The information that you tell us during the interview will be stored in a secure database and also be shared with outreach workers and case managers who will follow up with you for services. All of your information will be kept secure and individuals who will see it have signed confidentiality waivers and will not share your information. You can skip any questions you do not want to answer, end the interview at any point, or choose to not have your picture taken. At anytime you can request that your information be removed from the database. We will give you a \$5 food card at the end of the interview to thank you for your time. No one will be upset or angry if you decide not to be interviewed today.

SIGN BELOW IF AGREEING TO BE INTERVIEWED

Your signature (or mark) below indicates that you have read (or been read) the information provided above, have gotten answers to your questions, and have freely chosen to be interviewed. By agreeing to be interviewed, you are not giving up any of your legal rights.

Date

Signature (or Mark) of Participant

Printed Name of Participant

Please sign below if you also agree to have your picture taken

Signature (or Mark) of Participant

1. INTERVIEWER'S NAME		2. TEAM #	
		<input type="checkbox"/> STAFF <input type="checkbox"/> VOLUNTEER	
3. DATE	4. TIME	5. LOCATION	
6. In what language do you feel best able to express yourself?			
7. FIRSTNAME		8. LASTNAME	
9. NICKNAME		10. DOB	
11. Social Security Number		12. Has Consented to Participate: <input type="checkbox"/> YES <input type="checkbox"/> NO	

Identifier:

OK, first I'm going to ask you a few questions about your housing history...

13. What is the total length of time you have lived on the streets or shelters?	# of years:
	# of months:
14. In the past three years, how many times have you been homeless and then housed again?	
15. Where do you sleep most frequently? (check one) <input type="checkbox"/> Shelters <input type="checkbox"/> Streets <input type="checkbox"/> Car/Var/RV <input type="checkbox"/> Subway/Bus <input type="checkbox"/> Beach/Riverbed <input type="checkbox"/> Other (specify)	
16. Where did you live prior to becoming homeless? (check one) <input type="checkbox"/> This city <input type="checkbox"/> This region <input type="checkbox"/> Other part of the State <input type="checkbox"/> Somewhere else (specify)	

OK, now I'd like to ask you a few questions about your health...

17. Where do you usually go for healthcare or when you're not feeling well? <input type="checkbox"/> Hospital <input type="checkbox"/> Clinic <input type="checkbox"/> VA <input type="checkbox"/> Other (Specify) <input type="checkbox"/> Does not go for care	
18. How many times have you been to the emergency room in the past three months? _____	
19. How many times have you been hospitalized as an inpatient in the past year? _____	
20. Do you have now, have you ever had, or has a healthcare provider ever told you that you have any of the following medical conditions?	
a. Kidney disease/ End Stage Renal Disease or Dialysis.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
b. History of frostbite, Hypothermia, or Immersion Foot	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
c. History of Heat Stroke/Heat Exhaustion.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
d. Liver disease, Cirrhosis, or End-Stage Liver Disease	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
e. Heart disease, Arrhythmia, or Irregular Heartbeat.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
f. HIV+/AIDS.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
g. Emphysema	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
h. Diabetes	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
i. Asthma	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
j. Cancer.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
k. Hepatitis C.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
l. Tuberculosis.....	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refused
m. DO NOT ASK: Surveyor, do you observe signs or symptoms of serious physical health conditions?.....	<input type="checkbox"/> Yes <input type="checkbox"/> No

Identifier:

n. Have you ever abused drug/alcohol, or been told you do?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
o. Have you consumed alcohol everyday for the past month?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
p. Have you ever used injection drugs or shots?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
q. Have you ever been treated for drug or alcohol abuse?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
r. DO NOT ASK: Surveyor, do you observe signs of symptoms of alcohol or drug abuse?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
s. Are you currently or have you ever received treatment for mental health issues? ..	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
t. Have you ever been taken to the hospital against your will for mental health reasons?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
u. DO NOT ASK: Surveyor, do you detect signs or symptoms of severe, persistent mental illness?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
v. Have you been the victim of a violent attack since you've become homeless?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
w. Do you have a permanent physical disability that limits your mobility? [i.e., wheelchair, amputation, unable to climb stairs]?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
x. Have you had a serious brain injury or head trauma that required hospitalization or surgery?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
21. What kind of health insurance do you have, if any? (check all that apply)			
<input type="checkbox"/> Medicaid <input type="checkbox"/> Medicare <input type="checkbox"/> VA <input type="checkbox"/> Private Insurance <input type="checkbox"/> None <input type="checkbox"/> Other (specify):			

Alright, now I've just got a few more questions...

22. Have you ever served in the US Military?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
23. If yes, which war/war era did you serve in?	<input type="checkbox"/> Korean War (June 1950-January 1955) <input type="checkbox"/> Vietnam Era (August 1964-April 1975) <input type="checkbox"/> Post Vietnam (May 1975-July 1991) <input type="checkbox"/> Persian Gulf Era (August 1991-Present) <input type="checkbox"/> Afghanistan (2001-Present) <input type="checkbox"/> Iraq (2003-Present) <input type="checkbox"/> Other (Specify) <input type="checkbox"/> Refused		
24. If yes, what was the character of your discharge?	<input type="checkbox"/> Honorable <input type="checkbox"/> Other than Honorable <input type="checkbox"/> Bad Conduct <input type="checkbox"/> Dishonorable <input type="checkbox"/> Refused		
25. Have you ever been in jail?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
26. Have you ever been in prison?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused
27. Have you ever been in foster care?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Refused

28. How do you make money? (choose as many as apply)

- | | | |
|--|--------------------------------------|---|
| <input type="checkbox"/> Work, on-the-books | <input type="checkbox"/> Food Stamps | <input type="checkbox"/> Pension/Retirement |
| <input type="checkbox"/> Work, off-the-books | <input type="checkbox"/> Sex Trade | <input type="checkbox"/> None of the Above |
| <input type="checkbox"/> SSI | <input type="checkbox"/> Drug Trade | |
| <input type="checkbox"/> SSDI/SSA | <input type="checkbox"/> Recycling | |
| <input type="checkbox"/> VA | <input type="checkbox"/> Panhandling | |
| <input type="checkbox"/> Public Assistance | <input type="checkbox"/> No Income | |

29. What is your gender?

-
- Male
-
- Female
-
- Transgender
-
- Other
-
- Decline to State

30. What is your ethnicity? (choose as many as apply)

- | | |
|--|-------------------------------------|
| <input type="checkbox"/> African American/ Black | <input type="checkbox"/> Mixed Race |
| <input type="checkbox"/> Asian | <input type="checkbox"/> Other |
| <input type="checkbox"/> Native Hawaiian or Other Pacific Islander | |
| <input type="checkbox"/> Latino/a | |
| <input type="checkbox"/> Native American | |
| <input type="checkbox"/> White | |
| <input type="checkbox"/> Decline to State | |
| <input type="checkbox"/> Unknown | |

31. What is your citizenship status?

-
- Citizen
-
- Legal Resident
-
- Undocumented

32. What is the highest grade in school you completed?

- | | | | | |
|---|---|---|--------------------------------|---------------------------------------|
| <input type="checkbox"/> K-8 | <input type="checkbox"/> Some high school | <input type="checkbox"/> High School Graduate | <input type="checkbox"/> GED | <input type="checkbox"/> Some College |
| <input type="checkbox"/> College Graduate | <input type="checkbox"/> Post Graduate | <input type="checkbox"/> Decline to State | <input type="checkbox"/> Other | |

OK, now I'm going to ask you some questions about your community**33. Is there a person/outreach worker that you trust more than others?**

-
- Yes
-
- No
-
- Refused

34. If yes, do you know what agency they work for?**OK, now I'd like to take your picture. May I do so?**

Specialize the Vulnerability Index survey for your community!

By clicking on the link below you will have the opportunity to specialize the questionnaire for your region. You will also have the chance to add up to five additional questions for your community. If your community needs access to the Vulnerability Index Database you can sign up for it through this link as well. For questions regarding specializing the Vulnerability Index or on the Vulnerability Index Database, please contact [Kara A Mergl](#), Director for Research and Evaluation.

<https://commonground.wufoo.com/forms/100000-homes-campaignvi-survey-access/>

EXHIBIT

2

At Risk Qualifiers:

More than six months on the streets and at least one of the following:

- Tri-morbidity (a combination of at least one from each category below) (+1)
- More than 3 hospitalizations or ER visits over a year (+1) - Question 18 + Question 19
- More than 3 Emergency Room visits in the past three months (+1) - Question 18
- 60 years or more of age (+1) - Question 10
- HIV+/AIDS (+1) - Question 20/F
- Kidney Disease / ESRD or Dialysis (+1) - Question 20/A
- Liver Disease / HEP C / Cirrhosis / End stage liver disease (+1) - Question 20/D
- Cold weather injuries (frostbite, immersion foot, hypothermia) (+1) - Question 20/B

Tri- Morbidity

- **Mental Health + Serious Medical Condition + Substance Abuse**
- **Client must have at least one condition in each of the following areas to qualify for tri-morbidity**

Mental Health Qualifiers:

- Being treated / receiving counseling for mental health issues - Question 20/S
- Taken to the hospital against your will for mental health reasons - Question 20/T
- Observed signs or symptoms of Mental Illness - Question 20/U

Serious Medical Condition Qualifiers:

- Kidney Disease / ESRD or Dialysis - Question 20/A
- Liver Disease / HEP C / Cirrhosis / End stage liver disease - Question 20/D
- Heart Disease/ arrhythmia/ irregular heartbeat - Question 20/E
- HIV+ / AIDS - Question 20/F
- Emphysema - Question 20/G
- Diabetes - Question 20/H
- Asthma - Question 20/I
- Cancer - Question 20/J
- Hepatitis C - Question 20/K
- Tested Positive for TB - Question 20/L
- Observed signs or symptoms of serious physical health condition - Question 20/M

Substance Abuse Qualifiers:

- Ever abused alcohol or drugs, or told you do - Question 20/N
- History of injection drugs - Question 20/P
- Has been treated for alcohol or drug abuse - Question 20/Q
- Consumed alcohol everyday for the last 30 days - Question 20/O
- Observed signs or symptoms of alcohol or substance abuse - Question 20/R

Time Considerations:

- Length of time homeless
 - Vulnerability is triggered at 6 or more month homeless
 - Database should be able to conduct real-time assessments of vulnerability as someone's length of time homeless increases.
- Age
 - Age over 60 is a determinant for vulnerability
 - Database should be able to conduct real-time assessments of vulnerability as someone's age increases

EXHIBIT

3

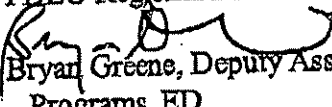


U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

July 31, 2006

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

MEMORANDUM FOR: FHEO Regional Directors

FROM: 
Bryan Greene, Deputy Assistant Secretary for Enforcement and
Programs, ED

SUBJECT: Guidance on Housing Limited to Persons with Specific Disabilities
Under the Fair Housing Act

The Department has received questions asking whether it is a violation of the Fair Housing Act (the Act) to limit housing to members of a specific population of persons with disabilities. Specifically, state housing agencies have asked whether recipients of federal low-income housing tax credits or other developers of multifamily housing may provide housing for persons with a certain type of disability (e.g., developmental disabilities, mental illness), and limit occupancy to such persons, without violating the Act. The question arises because the housing, while providing a benefit to some persons with disabilities, would deny housing opportunities to persons with other types of disabilities. The following analysis explains why this type of limitation does not violate the Act's prohibition against disability discrimination, but may violate Section 504 of the Rehabilitation Act of 1973 if federal financial assistance is involved.

The Fair Housing Act does not prohibit a housing provider from limiting housing to persons with a specific disability. The Fair Housing Act, while making it unlawful to discriminate against a person because he or she has a disability, does not make it unlawful to deny housing to a person because that person does not have a disability. A person must have a disability in order to state a claim of disability discrimination under the Act¹. In the housing at issue, the basis for the denial of housing is not that person's disability, but the absence of the particular disability that uniquely qualifies a person for the housing.

The Fair Housing Act's regulations further support housing providers' ability to designate housing for persons with a specific disability and permit an inquiry "into an applicant's ability to meet the requirements of ownership or tenancy" and "whether an applicant is qualified for a

¹The Fair Housing Act defines "handicap" with respect to a person as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 24 USC 1302(h). The Act also prohibits discrimination against a person associated with a person with a disability.

dwelling available only to persons with handicaps or to persons with a particular disability.” 24 CFR § 100.202 (c)(1) and (2) (2005).

The preamble to the Fair Housing Act’s regulations also addresses this issue, concluding that the Act does not prohibit the exclusion of non-disabled persons from dwellings, and that “[a] privately owned unsubsidized housing facility may lawfully restrict occupancy to persons with handicaps. The owner or operator of such a housing facility must therefore be permitted to inquire of applicants to determine whether they have a handicap for the purpose of determining eligibility.” 54 Fed. Reg. 3232, 3246 (January 23, 1989). In order for a housing provider to lawfully make these inquiries the “dwelling must either be available only to persons with handicaps or to persons with a particular type of handicap, or the dwelling must genuinely be available on a priority basis to persons with a handicap or to persons with a particular type of handicap.” 54 Fed. Reg. 3232, 3246 (January 23, 1989) (emphasis added).

This language would be superfluous without the possibility of the existence of disability-specific housing. Questions such as those set forth above ensure that the people who would benefit from its features utilize the housing in question. Admission decisions formed around the answers to these questions are based on satisfaction of certain eligibility criteria, which creates affirmative housing opportunities, as opposed to segregation, for persons with certain disabilities. Thus, disability of a particular type can be a basis for admission.

In some circumstances, disability-specific housing provides the most effective and comprehensive means of creating an equal housing opportunity, as different disabilities may require different types of services or accommodations. Disability-specific housing has been sponsored to provide housing for recovering alcoholics and drug addicts and persons with mental and developmental disabilities. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (Fair Housing Act case where an organization providing disability-specific housing (for recovering alcoholics and addicts) was the aggrieved person); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002) (Fair Housing Act and ADA case where an organization providing disability-specific housing (for persons with developmental disabilities and/or brain injuries was an aggrieved person).

Standing alone, the Fair Housing Act does not bar development of disability-specific housing designed and operated to promote housing opportunities for disabled persons. But, if federal financial assistance is provided in whole or in part, Section 504 of the Rehabilitation Act of 1973, which prohibits disability-specific housing funded with federal financial assistance, would be applicable. See 24 C.F.R. § 8.4(a). Since low-income housing tax credits (LIHTC) are not considered federal financial assistance, they would not, on their own, trigger coverage of Section 504. But, if LIHTC properties are funded, in whole or in part, with federal financial assistance, Section 504 may prohibit the development of disability-specific housing. Accordingly, developers must look to all the sources of funding and applicable civil rights statutes to assess whether any prohibitions to establishing disability-specific housing exist.