

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

July 24, 2023

***Submitted via regulations.gov***

Regulations Division  
Office of General Counsel  
U.S. Department of Housing and Urban Development  
451 7th Street SW, Room 10276  
Washington, D.C. 20410-0500

**RE: Docket No. FR-6257-A-01; Nondiscrimination on the Basis of Disability: Updates to HUD's Section 504 Regulations (RIN 2529-AB03)**

Justice in Aging appreciates the opportunity to provide comments on the advance notice of proposed rulemaking (ANPRM) on updates to HUD's Section 504 regulations. Justice in Aging is a national legal advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable housing, health care, economic security, and the courts for older adults with limited resources. We focus on the needs of low-income populations who have traditionally lacked legal protections, such as women, people of color, LGBTQI+ individuals, and people with limited English proficiency.

We strongly support HUD's efforts to strengthen and modernize its Section 504 regulations. Older adult renters have high rates of disability – about 60% of older adult renter households include at least one member with a disability affecting the ability to complete household tasks, 45% have a mobility disability, and 30% have a self-care disability. These rates also rise with age.<sup>1</sup> Section 504 is thus critical to ensuring that low-income older adults can access deeply affordable, accessible, and integrated housing that allows them to age in place with the supports they need. We offer the following comments in response to the questions posed in the ANPRM, and we provide recommendations for steps HUD can take to improve access to federally-assisted and HUD-conducted programs for seniors with disabilities.

**Question 1: Definitions**

We support revising the definition of "individuals with disabilities" to be consistent with the ADA Amendments Act of 2008 and DOJ's Title II ADA regulations. Doing so will also eliminate the discrepancy between how the Fair Housing Act (FHA) and Section 504 treat people with substance use disorder who are engaging in current alcohol use. The FHA does not exclude people currently using alcohol from its definition of people with disabilities, while the current Section 504 regulations do. HUD should ensure that these individuals can still be considered as "individuals with disabilities" under Section 504.

HUD should also clarify its definition of "qualified individual with a disability," including its description of "essential eligibility requirements" under subpart c. The current definition notes that a qualified person with a disability must meet essential eligibility requirements, such as being "capable of

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<sup>1</sup> Joint Center for Housing Studies of Harvard University, "Projections & Implications for Housing a Growing Population: Older Households 2015-2035" (2016), available at [https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard\\_jchs\\_housing\\_growing\\_population\\_2016\\_1.pdf](https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_housing_growing_population_2016_1.pdf).



complying with all obligations of occupancy with or without supportive services provided by persons other than the recipient.” This description makes no mention of the rights of people with disabilities to have reasonable accommodations (RAs) that may help them meet occupancy or other program requirements. The present definition is confusing and suggests that a person with a disability may only be qualified for programs if they can meet all requirements without any RAs. HUD should clarify that a person with a disability who can meet essential eligibility requirements with RAs is also a “qualified individual with a disability.”

Further, this section includes a problematic example of a “chronically mentally ill person” who may not be a qualified person with a disability because their condition poses a significant risk to health and safety absent supportive services. This example perpetuates harmful stereotypes about violent or dangerous behavior among people with mental health conditions. As the Substance Abuse and Mental Health Services Administration (SAMHSA) notes, people with mental health conditions are no more likely to be violent than any other individuals.<sup>2</sup> HUD should therefore remove this example.

## **Question 2: Transitioning from Institutions and Risk of Institutionalization**

Older adults in particular face challenges transitioning from institutions due to the lack of affordable, accessible, and integrated housing that meets their needs. Results from the Money Follows the Person (MFP) program illustrate these challenges. MFP is a Medicaid program that helps adults of all ages with disabilities move out of nursing facilities and other institutions and into the community. However, data shows that individuals over age 65 are transitioned out of facilities at lower rates than individuals under age 65. Older adults constitute 64% of people receiving Medicaid in institutions, but they are only 36% of Money Follows the Person program participants.<sup>3</sup> In one study of MFP participants, older adults were the least likely to transition out of all groups studied, with housing posing a barrier for 72% of older adults. Further, older adults were the only group for which housing challenges significantly predicted a failure to transition (as opposed to a longer transitioning period).<sup>4</sup>

Justice in Aging is also co-counsel in pending *Olmstead* litigation concerning the state of Massachusetts’ failure to help Medicaid-eligible persons with disabilities, including older adults, transition out of nursing facilities. These individuals are capable of living independently with supports, but they are unnecessarily institutionalized in large part because they do not receive assistance with securing affordable, accessible housing in the community. Although the state provides such services for people with intellectual disabilities and acquired brain injuries, it fails to do so for people with other disabilities, including older adults who may have a combination of physical and mental impairments.<sup>5</sup> This case underscores the importance of increasing integrated housing options in communities, as well as ensuring that people across a spectrum of disabilities have meaningful access to these options.

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<sup>2</sup> SAMHSA, Mental Health Myths and Facts (April 2023), available at <https://www.samhsa.gov/mental-health/myths-and-facts>.

<sup>3</sup> Justice in Aging, “An Equity Framework for Evaluating and Improving Medicaid Home and Community-Based Services” (June 2023), available at <https://justiceinaging.org/wp-content/uploads/2023/06/An-Equity-Framework-for-Evaluating-and-Improving-Medicaid-HCBS.pdf>.

<sup>4</sup> Julie Robison, et al., “Challenges to Community Transitions Through Money Follows the Person” (Jan. 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7240761/>.

<sup>5</sup> See WGBH, “A Lawsuit Could Force the State to Help Thousands of People with Disabilities Find Housing” (Jan. 2023), available at <https://www.wgbh.org/news/local-news/2023/01/26/a-lawsuit-could-force-the-state-to-help-thousands-of-people-with-disabilities-find-housing>.

Given that finding housing is such a widespread challenge for institutionalized older adults, HUD should urge Public Housing Authorities (PHAs) to adopt admission preferences for people with disabilities who are transitioning from institutions or at risk of institutionalization. As HUD has noted, a PHA's greatest tool for increasing program access is establishing a preference in its admissions policies.<sup>6</sup> HUD should direct PHAs to collaborate with a range of organizations representing a cross-section of older adults and people with disabilities, such as Area Agencies on Aging, legal aid and Protection & Advocacy (P&A) agencies, and Money Follows the Person programs to establish a system of preferences and referrals based on the local housing needs of people with disabilities.

HUD should also encourage recipients to develop partnerships with service providers. Many older adults who leave institutions or are at risk of institutionalization need supports such as case management, Medicaid home and community-based services (HCBS), and behavioral health services in order to transition into and maintain housing in the community. We recommend that HUD work with the Department of Health and Human Services (HHS) to develop subregulatory guidance on how recipients can coordinate and partner with Medicaid systems and community organizations serving older adults and people with disabilities.

### **Question 3: Accessibility of Websites, Mobile Applications, Etc.**

As more communications and applications move online, HUD must ensure that recipients also provide and collect information through paper and other alternative formats. HUD has observed that disparate access to the internet and digital devices is closely associated with longstanding inequalities in income, race and ethnicity, age, and immigration status.<sup>7</sup> Many older adults, particularly those with low incomes, lack broadband access and do not use the internet or digital devices.<sup>8</sup> And even if they do, their disabilities may prevent them from being able to navigate inaccessible websites and mobile applications. Yet landlords are increasingly requiring rent payments and other transactions for essential landlord-tenant functions to be conducted online through portals and websites that lack accessibility. Some landlords even go so far as to not only charge tenants a monthly fee for paying rent through digital portals, but they also attempt to charge additional fees if tenants pay through means other than a digital portal. HUD should make clear that such practices may violate Section 504.

### **Question 4: Lack of Accessible Units and Strengthening Compliance with Program Accessibility Requirements**

Because HUD's Section 504 regulations were promulgated over 30 years ago, HUD should renew the requirements for recipients to conduct a self-evaluation as outlined in §8.51 and, if necessary, create transition plans as described in §8.21. Many current HUD programs did not exist in 1988 and may have never completed these activities, while other programs may have undergone significant changes that warrant new evaluations. HUD should maintain the requirement for recipients to carry out self-

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<sup>6</sup> HUD, Notice PIH 2023-13, CPD 2023-05 (June 2023), available at <https://hud.gov/sites/dfiles/PIH/documents/pih2023-13.pdf>.

<sup>7</sup> HUD Office of Policy Development and Research (PD&R), "Digital Inequality and Low-Income Households" (Fall 2016), available at <https://www.huduser.gov/portal/periodicals/em/fall16/highlight2.html>.

<sup>8</sup> "The Digital Divide Among Low-Income Homebound Older Adults: Internet Use Patterns, eHealth Literacy, and Attitudes Toward Computer/Internet Use" (May 2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3650931/>.

evaluations and transition planning in consultation with people with disabilities and organizations that represent them.

Additionally, we note the importance of the Low-Income Housing Tax Credit (LIHTC) program in creating accessible, below-market rate housing for older adults with disabilities. According to recent HUD estimates, approximately 32% of LIHTC properties house at least one older adult.<sup>9</sup> We recognize that the Treasury Department, which administers the LIHTC program, does not consider tax credits to be federal financial assistance. However, many LIHTC properties are developed with multiple funding sources – including sources that do qualify as federal financial assistance, such as HOME and Community Development Block Grant (CDBG) funds. These properties are therefore covered by Section 504, yet it can be difficult for tenants and advocates to determine whether Section 504 applies to a LIHTC property because a) many do not realize that LIHTC properties may have received non-LIHTC funding; and b) information about a project’s funding is not always readily available. As a result, noncompliance with Section 504 at LIHTC properties may be underreported and underenforced.

To remedy this issue, HUD should 1) engage these properties in training and technical assistance efforts around Section 504 requirements, including the obligation to pay for RAs/reasonable modifications (RMs);<sup>10</sup> and 2) require states to widely advertise in ways that are accessible all of the federal and state funding sources provided to each LIHTC property, thus allowing easier identification of LIHTC properties that are covered by Section 504. HUD should also issue guidance to Fair Housing Initiatives Program (FHIP) organizations, which investigate and enforce disability discrimination claims under the FHA, about databases and resources that may be used to determine whether (in addition to the FHA) Section 504 applies to a LIHTC property.

#### **Question 5: Challenges With Using Housing Choice Vouchers**

Older adult renters with disabilities often encounter challenges with the Housing Choice Voucher (HCV) program because of problems such as burdensome paperwork to request RAs, the failure by housing providers to grant RAs related to extended absences, and insufficient time to search for new housing before vouchers expire. HUD should revise 24 CFR §8.28 to provide clear guidance on these situations and take other steps to improve the HCV program for people with disabilities.

Many older adults with vouchers have live-in aides and may need an RA in the form of an extra bedroom for a caregiver. However, depending on the PHA, the paperwork involved with requesting an extra bedroom (or any RA) can be burdensome for older adults with disabilities. Some PHAs have lengthy and dense RA packets that solicit more information than necessary and are difficult for people with disabilities to complete. HUD should discourage over-documentation and direct PHAs to simplify paperwork whenever they can. HUD should also amend 24 CFR §8.28 to clarify that PHAs must approve an extra bedroom as a reasonable accommodation.

Another common problem occurs when older adults with disabilities experience medical crises and emergencies that require extended absences from their unit, which can lead to eviction from their

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<sup>9</sup> HUD, “Understanding Whom LIHTC Serves” (Dec. 2019), available at <https://www.huduser.gov/portal/sites/default/files/pdf/LIHTC-TenantReport-2017.pdf>.

<sup>10</sup> Because HUD’s Section 504 regulations use the term “reasonable accommodations” to refer to both reasonable accommodations and modifications, this comment will also generally use this term when discussing structural modifications.

homes and termination of their vouchers. We have seen cases where older adults with disabilities are temporarily admitted into hospitals or skilled nursing facilities for weeks or months, during which they may fall behind on rent and/or forget to notify the landlord or PHA about their situation as they try to recover and manage their health. When these older adults return to their homes, they find themselves facing eviction, as well as termination of their voucher for violating PHA policies on extended absences from their unit (which can vary widely by PHA). Even if they request RAs to try to avoid eviction and preserve their vouchers, many landlords and PHAs still refuse to grant the RAs and continue pursuing eviction and termination. The result can be devastating for low-income older adults, who often end up losing their homes as well as the subsidy that enabled them to afford housing in the community. These seniors then end up at high risk of homelessness and institutionalization in nursing homes. We urge HUD to provide more guidance on this issue to minimize unnecessary evictions/terminations and to include in §8.28 the obligation to grant RAs for disability-related extended absences.

Limited search times before voucher expiration are also a major barrier for older adults with disabilities. As is the case for other households, older adults have a very difficult time finding an affordable unit from a housing provider that is willing to accept vouchers. However, older adults with disabilities often face additional challenges because they may also need an accessible unit and more help with the search process due to factors such as mobility and cognitive impairments. And although they can request that a PHA extend their search time as an RA, some PHAs are reluctant to grant multiple extensions for individuals. We are also aware of at least one PHA that tried to modify their policies to try to discourage and limit people's ability to ask for search time extensions as RAs. Therefore, we recommend that HUD change the minimum voucher search time from 60 to at least 120 days, as well as clarify that PHAs may need to grant multiple extensions of search times as an RA for an individual with a disability. Further, HUD should explore ways to increase the availability of housing navigation services that help people with disabilities locate and secure housing. This type of assistance is critical, widely needed, and often a necessary but missing complement to other services (such as legal assistance) to ensure that people do not lose their vouchers.

#### **Question 8: Accessibility Features, Including Features to Help Individuals Age in Place, and Failure to Maintain Accessible Features**

The failure of recipients to properly maintain accessibility features – notably elevators – in their properties is a prevalent problem that creates safety risks and social isolation for older adults with disabilities. Some subsidized housing complexes have consistent elevator outages or elevators that have simply been out of service for years. The lack of elevators traps older adults with disabilities in their apartments, preventing them from attending doctor's appointments, evacuating a building in an emergency, and seeing family and friends in the community.<sup>11</sup>

A related problem are long delays by recipients in providing RAs and RMs. As older adults age in their homes or move into new ones, they often need recipients to provide accessibility features and make modifications to units by, for example, installing taller toilets or lowering kitchen cabinets. However, many older adults end up waiting an unreasonably long time for recipients to provide these

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<sup>11</sup> See, e.g., Delaware Online, "Wilmington Housing Authority Official Charged After Scuffle With Complaining Senior Tenants" (Oct. 2020), available at <https://www.delawareonline.com/story/news/2020/10/22/wilmington-housing-authority-official-charged-after-clash-tenants/3727326001/>; The Philadelphia Inquirer, "Broken Elevators Terrify Older People and Those With Disabilities in Philly Apartment Buildings" (June 2023), available at <https://www.inquirer.com/news/broken-elevators-seniors-philadelphia-housing-landlord-tenant-20230611.html>.

accessibility features (if they end up providing them at all), with seniors often having to follow up multiple times about their RA/RM requests. Others may be reluctant to confront their landlords about requests and fear potential retaliation.

HUD should keep recipients accountable for maintenance of their properties and (as explained further in our response to question 11), require recipients to develop written policies and procedures on RAs. We also recommend that HUD consult with the Consortium for Constituents with Disabilities (CCD) to propose legislation on the creation of a new federal funding stream for home modifications in federally assisted housing. Given the increasing aging population, the need to adapt units as people become older will only grow.

### **Question 10: Reasonable Accommodations**

Older adults may need many types of RAs in different types of settings, and it is important for recipients to understand the various types of accommodations that may be necessary for older adults with disabilities. In addition, HUD should ensure that all recipients, from homeless service providers to PHAs, know about their duty to provide RAs under Section 504. Most HUD guidance on RAs provide examples of accommodations in the context of permanent housing, but HUD should also include examples of RAs that are relevant for homeless assistance programs and the coordinated entry system. (Please see our response to Question 13 for more discussion about RAs and disability discrimination among homeless service providers.)

Some examples of situations in which older adults may need RAs include the following:

- Elder Financial Abuse and Representative Payees: Older adults who have cognitive disabilities may have another individual or organization handling their financial affairs, and these seniors may need RAs if they become victims of financial abuse. For example, an older adult may have a family member who acts as a representative payee and handles the older adult's Social Security or Supplemental Security Income (SSI) payments. However, rep payees sometimes misuse funds and neglect to pay rent on behalf of an older adult, which can lead to the older adult facing eviction. When recipients have older adult tenants in these situations, recipients should grant RAs in the form of withdrawing an eviction notice to allow an older adult time to address the underlying financial abuse and pay rental arrears.
- Need for a Co-Signer: Recipients often fail to provide RAs in the form of waiving administrative policies. Housing providers tend to have more difficulty understanding that they may need to provide RAs to account for the practical impact of a disability (vs. the physical effects of a disability). For example, a recipient may have to grant an RA in the form of a waiver of a no-cosigner policy for an older adult whose disability limits their ability to work and meet minimum income requirements.<sup>12</sup>
- Enforcement of Disabled/Accessible Parking Restrictions: Older adults with disabilities frequently need recipients to provide accessible or other parking that meets their needs. Although landlords usually understand they must provide, for instance, wider or closer parking spaces reserved for people with disabilities as an RA, problems can arise if recipients fail to

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<sup>12</sup> See Giebler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003)(finding that the Fair Housing Act required a landlord to accommodate a disabled housing applicant's request to have his mother serve as a co-signer for a lease).



enforce parking restrictions. Enforcement of parking restrictions is a necessary element of providing reserved parking spaces as an RA. If a reserved space is unavailable for a tenant with a disability due to lack of enforcement, an accommodation has not actually been granted because that tenant remains unable to have an equal opportunity to use and enjoy their dwelling.

- **Hoarding:** Older adults are more likely to have hoarding problems than younger adults, and hoarding disorder is now recognized as a distinct psychiatric condition.<sup>13</sup> Cases involving hoarding behaviors are often complex, and older adults with hoarding disorder may face eviction for issues such as alleged code violations. Recipients should recognize that older adults with hoarding disorder may need RAs, such as extended time for moving out or withdrawal of eviction proceedings, to have the opportunity to secure professional supports (such as mental health and cleaning services) and time to adhere to a service or treatment plan.

Finally, we urge HUD to clarify in its Section 504 regulations that recipients who have notice about a person’s disability and needs may be required to provide an RA even in the absence of an express request. Courts have determined that Section 504 does not place a burden on individuals with disabilities to actively request RAs in all situations where they need accommodations. When recipients have knowledge about an individual’s disability and need for an accommodation, or when the disability and need for accommodation are obvious, recipients may need to proactively provide an RA. See, e.g., *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App’x 287, 296 (5th Cir. 2012)(holding that a disabled person’s failure to expressly “request” an accommodation is not fatal to a Section 504 claim where the defendant had knowledge of the individual’s disability and needs but took no action); see also *McCoy v. Texas Dep’t of Crim. Just.*, No. C.A.C 05 370, 2006 WL 2331055, at \*8 (S.D. Tex. Aug. 9, 2006)(finding that a disabled person was not required to request an accommodation to invoke Section 504 because defendants had notice of the disability and the need for an accommodation was obvious).

### **Question 11: Investigations and Enforcement**

HUD should consider changing the 180-day deadline for filing Section 504 complaints to one year to align with the deadline for filing administrative fair housing complaints. Alternatively, HUD should automatically waive the 180-day filing deadline for good cause when the same complaint includes an FHA claim and is timely under the FHA. The revised regulations should also include a non-exhaustive list of examples showing when good cause may exist for waiving the filing deadline.

We also urge HUD to update its Section 504 regulations in ways that are similar to HHS’ Section 1557 rule, for which HHS issued an NPRM last year. The proposed Section 1557 regulations prohibit discrimination – including on the basis of disability – for health programs receiving federal financial assistance, and they include various provisions designed to prevent potential compliance issues and need for future enforcement actions. These provisions include:

- 1) outlining the responsibilities of coordinators;
- 2) requiring covered entities to develop and implement written policies and procedures to facilitate compliance;
- 3) requiring covered entities to train relevant employees on these policies and procedures;
- 4) requiring each covered entity to provide a notice of nondiscrimination; and

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<sup>13</sup> ScienceDirect, “Hoarding Disorder” (2023), available at <https://www.sciencedirect.com/topics/neuroscience/hoarding-disorder>.

- 5) requiring covered entities to notify the public of the availability of language assistance services and auxiliary aids and services.

Section 504 Coordinators: HUD should clarify the role of Section 504 coordinators by listing their responsibilities in the Section 504 regulations. It is also important for HUD to support Section 504 coordinators with training so that they understand Section 504 and their duty to facilitate compliance. Moreover, we recommend that HUD require all recipients to designate a Section 504 coordinator, regardless of how many people the recipient employs. All covered housing providers should have a staff member who is knowledgeable about Section 504 and promotes compliance.

Written Policies and Procedures: Recipients should have written policies and procedures around grievances, auxiliary aids and services, and RAs. Developing written policies and procedures will help recipients avoid the risk of discriminatory conduct and improve compliance with Section 504. The lack of written policies and procedures increases the risk that recipients will commit Section 504 violations, and it leaves people with disabilities at increased risk of discrimination.

Training on Section 504 and Policies/Procedures: We urge HUD to mandate training on Section 504 and relevant policies and procedures for all of a recipient's relevant employees, which may include staff such as the Section 504 coordinator, people who interact with the public and tenants, and employees with decision-making authority who shape policies and procedures. Training on RAs is especially important because many housing providers do not understand RAs. The concept of RAs is often confusing for many housing providers because it involves a modification of policies, whereas many housing providers believe that nondiscrimination requires them to always apply the same policies to each applicant or tenant. We are aware of cases in which housing providers refused to provide RAs to persons with disabilities under the claim that doing so would violate the alleged requirement to "treat everyone the same" under civil rights laws. Many people with disabilities are unable to secure RAs unless they receive legal assistance or other help from an advocate.

Notice of Nondiscrimination: Recipients should provide members of the public and applicants/tenants with notices of nondiscrimination explaining that the recipient is covered by Section 504 and does not discriminate on the basis of disability. These notices should also note that the recipient provides RAs and auxiliary aids and services, as well as provide other information, such as how to contact Section 504 coordinators and how to file complaints with HUD. To ensure visibility of these notices, HUD should require recipients to post these notices in conspicuous physical locations and online on websites. Further, recipients should provide these notices to tenants on an annual basis. We also recommend that notices use large print and plain language to increase accessibility.

Notice of Availability of Language Assistance Services and Auxiliary Aids and Services: HUD should also require recipients to provide notice of the availability of language assistance services and auxiliary aids and services in the 15 most common languages spoken by people with limited English proficiency (LEP) in the state, and in alternate formats for people with disabilities who request auxiliary aids and services.<sup>14</sup> These notices should be publicly posted and offered to tenants in the ways described above for the notice of nondiscrimination. HUD should also create model notices.

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<sup>14</sup> Although we recognize that language access is considered a Title VI or Fair Housing Act issue, we believe it is important for HUD's Section 504 regulations to recognize that there may be people with disabilities who also have limited English proficiency and need auxiliary aids and services.



### **Question 13: Disability Discrimination and Persons of Color, Older Adults, and Individuals with Limited English Proficiency Who Also Require Auxiliary Aids and Services**

Failure to Provide Language Assistance Services: Many housing providers covered by Section 504 fail to provide language assistance services as required under Title VI.<sup>15</sup> In updating Section 504 regulations, HUD should note the importance of providing auxiliary aids and services in appropriate languages for people with disabilities who also have LEP. HUD should make clear that providing auxiliary aids and services in English only for people with disabilities with LEP may violate Section 504 (as well as Title VI and the Fair Housing Act).

Additionally, Section 504 regulations should require recipients to document an individual's need for language assistance and/or auxiliary aids and services. Recipients should consistently provide communications in requested formats and languages.

Discriminatory Shelter Access: Older adults face challenges not only with accessing housing, but also with accessing shelters and homelessness programs. Older adults are likely the fastest growing group among people experiencing homelessness, and researchers estimate that the number of seniors who are unhoused and 65 and older will triple over the next decade.<sup>16</sup> These older adults are often turned away from shelters due to their disabilities, with shelters claiming they cannot accommodate their needs.<sup>17</sup> Shelters are often not physically accessible for older adults who have mobility impairments and use wheelchairs or walkers, and shelter staff do not always understand how to provide reasonable accommodations. For example, older adults needing help with personal care needs from an outside caregiver may need a reasonable accommodation in the form of a shelter waiving its restrictions on visitors.<sup>18</sup> Older adults experiencing homelessness also frequently have cognitive impairments<sup>19</sup> that may make it difficult for them to follow certain shelter rules, and they may need reasonable accommodations to avoid being evicted from shelters due to alleged rule violations.

Other types of homelessness programs may also discriminate against older adults with disabilities. During the COVID pandemic, Justice in Aging was involved in advocacy on Project Roomkey,

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<sup>15</sup> See The Center for Urban Research and Learning at Loyola University Chicago, "Falling Flat: The Chicago Housing Authority's Inadequate Implementation of Their Language Access Plan" (September 2019), available at <https://www.seniorcaucus.org/language-access-report>; CAAV, et al., "No Access: The Need for Improved Language Assistance Services for Limited English Proficient Asian Tenants of New York City Housing Authority" (2015), available at <https://caaav.org/wp-content/uploads/2015/09/CAAAV-full-housing-report-v11-HIGH-RES.pdf>.

<sup>16</sup> Dennis Culhane et al., AISP, "The Emerging Crisis of Aged Homelessness: Could Housing Solutions be Funded by Avoidance of Excess Shelter, Emergency Room and Nursing Home Costs?" (2019), available at <https://www.aisp.upenn.edu/aginghomelessness/>; AARP, "The Graying of America's Homeless: An Alarming Trend" (December 2022), available at <https://www.aarp.org/home-family/your-home/info-2022/americas-homeless-over-50.html>.

<sup>17</sup> See KFF Health News, "Homelessness Among Older People Is On the Rise, Driven by Inflation and the Housing Crunch" (November 2022), available at <https://kffhealthnews.org/news/article/homelessness-older-people-seniors-inflation-housing-crunch/>; The Washington Post, "Seniors Are Flooding Homeless Shelters That Can't Care for Them" (May 2023), available at <https://www.washingtonpost.com/business/2023/05/22/seniors-homeless-baby-boomers/>.

<sup>18</sup> See The Sacramento Bee, "Dozens of Homeless Have Been kicked Out of Sacramento Hotels Used as Shelters During COVID" (June 2021), available at <https://www.sacbee.com/news/investigations/the-public-eye/article252115548.html>.

<sup>19</sup> Frontiers in Neurology, "Neurocognitive Health of Older Adults Experiencing Homelessness in Oakland, California" (July 2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9353024/>.

a California program administered in part by the Los Angeles Homeless Service Authority (LAHSA) that provided temporary shelter in motel rooms for people experiencing homelessness. LAHSA implemented a policy of denying access to Project Roomkey for people with physical accessibility needs and people needing help with activities of daily living (ADLs), such as getting off toilets and transferring out of beds and chairs. Initially, LAHSA also refused to reasonably modify its policies for people with disabilities by, for example, allowing reasonable modifications of premises or permitting personal care services (such as Medicaid HCBS) to be delivered on-site. As a result, a disproportionate number of older adults – many of whom have disabilities and need assistance with personal care and ADLs such as bathing, dressing, or grooming – were excluded from the program.<sup>20</sup> It was not until advocates intervened that LAHSA revised its policies and practices. As noted in our previous responses, we recommend that HUD develop additional guidance about the obligation to provide reasonable accommodations in the context of shelters and the homeless service system. HUD should also issue guidance with HHS about how homeless service providers can partner with organizations serving people with disabilities, including HCBS providers.

Discriminatory Algorithms and Tenant Screening Practices: We urge HUD to revise its Section 504 regulations to explicitly prohibit discrimination against people with disabilities through the use of algorithms. Housing providers' increasing reliance on algorithms for tenant screening and criminal background checks is raising the risk of discrimination against older adults with disabilities, particularly those who are also people of color. People with disabilities and people of color are overrepresented in the criminal justice system – about 66% of the state and federal prison population are disabled (compared to 27% of adults in the U.S.<sup>21</sup>), and 42% are people of color with disabilities.<sup>22</sup> Older adults in prison are also more likely to have disabilities, with over 50% of those ages 55-64 and around 70% of those 65 and older reporting having a disability.<sup>23</sup> When these older adults re-enter the community, they face steep barriers to securing accessible, affordable housing, in large part due to their criminal records.<sup>24</sup> Housing providers often rely on the recommendations of tenant screening companies using algorithms that flag prospective tenants with criminal records, and landlords frequently do not receive or review the underlying background check reports or do an individualized review of mitigating factors.<sup>25</sup> The results are screening practices that have a disparate impact on people with disabilities and people of color. Moreover, even when these practices have a disparate impact, landlords may mistakenly

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<sup>20</sup> Los Angeles Aging Advocacy Coalition, Letter to Los Angeles Homeless Services Authority Re: Policy of Denying Project Roomkey Services for Homeless Individuals with Disabilities, Including Those Who need Help with ADLs (Activities of Daily Living) (August 2020), available at <https://justiceinaging.org/wp-content/uploads/2020/08/LA-Aging-Advocacy-Coalition-Letter-to-LAHSA-8.4.20.pdf>; see also Los Angeles Times, “Advocates Say Homeless Hotel Program Discriminates Against Disabled People” (August 2020), available at <https://www.latimes.com/homeless-housing/story/2020-08-14/advocates-say-homeless-hotel-program-discriminates-against-disabled-people>.

<sup>21</sup> Centers for Disease Control and Prevention, Disability Impacts All of Us (May 2023), available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

<sup>22</sup> Lauren Bixby et al., “The Links Between Disability, Incarceration, and Social Exclusion” (Oct. 2022), available at <https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495>.

<sup>23</sup> Bureau of Justice Statistics, “Survey of Prison Inmates, 2016: Disabilities Reported by Prisoners” (March 2021), available at <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf>.

<sup>24</sup> Justice in Aging, “Reducing Barriers to Reentry for Older Adults Leaving Incarceration” (May 2022), available at <https://justiceinaging.org/wp-content/uploads/2022/05/Reducing-Barriers-to-Reentry-for-Older-Adults-Leaving-Incarceration.pdf>.

<sup>25</sup> National Consumer Law Center, “Broken Records Redux: How Errors By Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing” (December 2019), available at <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>.

believe that using algorithms – which are often falsely assumed as being objective and without bias – is still a less discriminatory alternative for screening tenants, and they may be wary of deviating from algorithmically-generated results. Therefore, HUD should clarify that recipients may violate Section 504 if they use algorithms to make housing decisions that discriminate against people with disabilities. Doing so will also further HUD’s goals of reducing barriers to HUD programs for people with criminal records.<sup>26</sup> (In addition, it should be noted that HHS included a section prohibiting discrimination through the use of algorithms in its Section 1557 NPRM at §92.210 due to the prevalence of algorithms and potentially discriminatory impacts in clinical decision-making.)

## Conclusion

Thank you for your consideration of Justice in Aging’s comments. We appreciate HUD’s commitment to ensuring equal access to federally-assisted and HUD-conducted programs for older adults and people with disabilities, and we look forward to HUD’s future NPRM on Section 504. If you have any questions about this submission, please contact Jennifer Kye, Senior Attorney, at [jkye@justiceinaging.org](mailto:jkye@justiceinaging.org).

Sincerely,



Tracey Gronniger  
Managing Director, Housing and Economic Security

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<sup>26</sup> HUD, “Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs” (April 2022), available at [https://www.hud.gov/sites/dfiles/Main/documents/Memo\\_on\\_Criminal\\_Records.pdf](https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf).