

Meeting Local Housing Needs:

A Practice Guide for Implementing Selection Preferences and Civil Rights Requirements in Affordable Housing Programs

**Citizens' Housing and Planning Association
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The views expressed in the Practice Guide are those of the author, and are not intended as legal advice. The appropriateness of a particular practice depends on the facts and circumstances of each case. Readers should therefore consult directly with an attorney regarding any legal questions in connection with their own activities.

EXECUTIVE SUMMARY

This Practice Guide is focused on four themes associated with designing and implementing selection preferences, especially selection preferences for local residents, in affordable housing programs, including affordable rental and homeownership programs. Part I discusses general program eligibility requirements. Part II examines program requirements directly associated with selection preferences. Part III introduces essential fair housing principles and civil rights standards in affordable housing programs. Part IV presents the analytical techniques a housing provider might use to understand the civil rights effect of selection preferences that favor local residents, and discusses methods of designing selection preferences in light of civil rights considerations.

Part II, concerning program requirements, and Part III, in its discussion of the obligation to affirmatively further fair housing, emphasize the importance of developing written plans to implement and monitor admission and selection practices. The Executive Summary represents a checklist of items a housing provider should consider when adopting a written tenant selection plan. It applies the principles articulated in the Practice Guide to the decisions providers are likely to face in the choice of admissions preferences, the design of a marketing plan, the development of an outreach and application procedure, the construction of a waiting list, and the screening and admission of individual households.

OUTLINE FOR DESIGNING AND IMPLEMENTING SELECTION PREFERENCES

A. PROJECT FUNDING SOURCES

The sources of funds for a housing development, including loans, grants and rental assistance subsidies, almost always affect selection and admission practices. In developing a plan for designing and implementing selection preferences, it is important to have a clear idea of those sources and the program requirements related to applicant eligibility for occupancy, admissions, and selection preferences. The funding sources discussed in the Practice Guide are described in Figure 1, at the end of Part I.

Funding Sources for the program or development include:

- _____
- _____
- _____

B. ELIGIBILITY CRITERIA BASED ON PROGRAM REQUIREMENTS

Selection preferences must not be inconsistent with the eligibility requirements associated with each of the sources of funding for the program. Income eligibility, targeting and other requirements should be considered in the design of admission and eligibility standards. The key requirements associated with the programs discussed in the Practice Guide are described in Figure 2, also at the end of Part I.

- Income Eligibility Standards:
 - Funding Source 1: _____
 - Funding Source 2: _____
 - Funding Source 3: _____

- Citizenship Requirements:
 - Funding Source 1: _____
 - Funding Source 2: _____
 - Funding Source 3: _____

- Special Family Characteristics (e.g., elders or people with disabilities):
 - Funding Source 1: _____
 - Funding Source 2: _____
 - Funding Source 3: _____

- Income Targeting Requirements:
 - Funding Source 1: _____
 - Funding Source 2: _____
 - Funding Source 3: _____

- Other:
 - Funding Source 1: _____
 - Funding Source 2: _____
 - Funding Source 3: _____

C. MANDATORY SELECTION PREFERENCES

In addition to eligibility standards, some affordable housing programs require owners to offer selection preferences to otherwise eligible households. Providers should also pay particular attention to program requirements that impose priority categories *within* particular mandatory preferences. Mandatory selection preferences for individual programs are described in Part II.

Mandatory income targeting requirements and/or income tier requirements:

Funding Source 1: _____

Funding Source 2: _____

Funding Source 3: _____

Mandatory preferences or priorities based on displacement (e.g., displaced by public action, or by natural disaster):

Funding Source 1: _____

Funding Source 2: _____

Funding Source 3: _____

Mandatory preferences or priorities based Special Family Characteristics (e.g., elders or people with disabilities):

Funding Source 1: _____

Funding Source 2: _____

Funding Source 3: _____

Other mandatory preferences:

Funding Source 1: _____

Funding Source 2: _____

Funding Source 3: _____

D. CIVIL RIGHTS REQUIREMENTS

Virtually all housing in Massachusetts is subject to the requirements of the federal Fair Housing Act and the companion state housing discrimination statute, Chapter 151B. Other civil rights laws apply to housing providers that receive state or federal financial assistance, or to activities of state and local government, or to public accommodations. Some of the particular requirements of these laws are incorporated into other components of the Executive Summary. However, it is useful, if not essential, for housing providers to understand the laws that apply to the programs and housing they operate. A description of those laws and the categories of people protected by the laws can be found in Figure 3, in Part III.

1. Laws that Apply to All Housing.

- The Fair Housing Act of 1968, as amended.
- Chapter 151B of the Massachusetts General Laws

2. Laws that Apply to Recipients of Federal Financial Assistance

- Title VI of the 1964 Civil Rights Act
- Title IX of the Education Amendments of 1972
- Section 504 of the 1973 Rehabilitation Act
- Age Discrimination Act of 1975

3. The Americans with Disabilities Act Applies because:

- The program is an activity of state or local government
- The program includes public accommodations

E. HOUSING NEEDS ASSESSMENT FOR VOLUNTARY PREFERENCES

Where a provider chooses to adopt a local selection preference that is not mandatory, the preference should be based on an assessment of local housing needs. Some programs require written assessments. Most programs require providers to assess civil rights conditions in their communities, regions and programs as part of the housing needs assessment. For civil rights purposes, needs assessments are recommended, even where they are not required. In such circumstances, providers may choose to rely on the mandatory assessments from a companion program, if the information in the assessment is useful for their own program.

Local selection preferences must also make sense in the context of the geographic area in which the housing or the housing program is located. Where a housing provider or a community chooses to implement a selection preference for local residents, it is important to be aware of how the community compares to the larger market area. The most common definition of a market area, and the definition commonly used by the U.S. Department of Housing and Urban

Development (HUD), is the metropolitan statistical area. Providers should determine if program rules define the permissible scope of a market area. In the absence of program definitions, providers may use larger or smaller market areas such as a municipality, the county, the jurisdiction and contiguous communities, or a regional planning district. In general, the market area should not be smaller than the boundaries of the municipality. The most useful assessment will show the number of income qualified residents in the community and the market area, and their relative housing burdens, family, racial and ethnic characteristics.

The data needed to complete a housing needs assessment may be available from a number of sources, including the mandatory assessments for individual programs. Sample data from HUD's on-line Comprehensive Housing Affordability Strategy (CHAS) data tables is depicted in Tables A-1 to A-7, in the Appendix to Part IV.

1. The Housing Market Area Consists of:

- The metropolitan statistical area
- The county
- The municipality
- One or more contiguous municipalities
- Other: _____

2. The Housing Needs Assessment is based on one or more of the following documents:

- Consolidated Plan for the jurisdiction, including the jurisdiction's Analysis of Impediments to Fair Housing Choice
- Public Housing Agency Plan for the jurisdiction, including the PHA's Analysis of Impediments to Fair Housing Choice
- Information developed by the PHA in compliance with Section 8 management assessment (SEMAP) requirements
- Local Affordable Housing Plan developed under the Department of Housing and Community Development (DHCD) Planned Production Regulations.
- Studies and/or recommendations of the local Community Preservation Committee established pursuant to the Community Preservation Act
- The Community Development Plan developed pursuant to Massachusetts Executive Order 418
- Affirmative Fair Housing Marketing Plan, as approved by HUD or DHCD
- Statement of methods provider will use to affirmatively further fair housing in competitive application for HUD funds
- Other accepted data sources: _____

3. The Housing Needs Assessment Identifies the Following Priority Needs in the Community and the Housing Market:

- The following renter or owner households with high rent burdens (e.g., families with children or elderly families paying >30% of income or >50% of income):

- The following renter or owner households with other housing problems (e.g., families with children or elderly families with other housing needs such as poor living conditions):

- The following renter or owner households based on household income (e.g., 30% AMI, 50% AMI, 80% AMI or 100% AMI):

- Renter or owner households with the following characteristics (e.g., elders, people with disabilities, homeless families, victims of domestic violence, families with children, veterans, people who work or live in the area):

- Other needs: _____

4. Racial and Ethnic Characteristics in the Community and the Housing Market

- The characteristics of the households with priority housing needs in the community:
 - White _____ %
 - American Indian or Alaskan Native _____ %
 - Black or African-American _____ %
 - Hispanic or Latino _____ %
 - Native Hawaiian or Pacific Islander _____ %
- The characteristics of the households with priority housing needs in the market area:
 - White _____ %
 - American Indian or Alaskan Native _____ %
 - Black or African-American _____ %
 - Hispanic or Latino _____ %
 - Native Hawaiian or Pacific Islander _____ %

F. CHOOSING THE PREFERENCE

In choosing a selection preference, it is important to identify the characteristics of the households who will benefit from the preference. To implement a preference, a provider must be able to comply with the requirements of the funding source or sources for the housing program, including program eligibility requirements, and any mandatory preferences. For example, in many HUD programs, a selection preference for local residents must also favor applicants who work in the local preference area. In addition, the preference should address one or more of the needs identified in the housing needs assessments used by the community or the provider.

It is equally important to examine actual or anticipated waiting lists and occupancy patterns in light of the preference and the characteristics of the people who live in the community and the market area to determine whether the preference will result in a disproportionate delay, denial or exclusion based on race, ethnic origin, color, religion, family status, gender, disability, age, marital status or other categories of people protected by civil rights laws. If there is a disproportionate effect, a provider should ascertain if there is some less harmful method of meeting the need the preference is intended to address. Methods to evaluate disproportionate impact, such as the so-called "Four-Fifths Rule," are described in Part IV.

1. Defining the Preference:

The selection preference(s) is based on the following characteristics and housing needs:

- Income (specify): _____
- Place of residence (specify preference area): _____
- Place of work (specify preference area): _____
- Type of housing problem (e.g., homeless, high rent burden, other housing problem):

- Household characteristics (e.g., working, elderly or disabled family, displaced):

- Other: _____

2. Based on the Housing Needs Assessment, the Preference is consistent with program requirements for:

- Income Eligibility Standards: _____
- Citizenship Requirements: _____
- Special Family Characteristics (e.g., elders or people with disabilities):

- Mandatory income targeting and preferences: _____
- Other Requirements: _____

3. Program Compliance

- No approval for the selection preference(s) is needed from the source of financing or an administrative agency.
- The marketing plan must be approved by: _____
- The selection preference(s) must be approved by: _____
- The tenant selection plan must be approved by: _____

4. Civil Rights and Fair Housing Compliance

- An examination of the actual waiting list or anticipated waiting list, and an examination of the housing market area indicates the following racial, ethnic or other differences between the waiting list and the housing market: _____
- An examination of the occupancy patterns or anticipated occupancy patterns, and an examination of the housing market area indicates the following racial, ethnic or other differences between the occupancy patterns and the housing market:

- The actual or anticipated rate of participation on the waiting list by minorities compared to the participation rate of non-minorities is at least 80% (the "Four-Fifths Rule"):

- The actual or anticipated rate of selection for admission by minorities compared to the rate of selection for admission by non-minorities is at least 80% (the "Four-Fifths Rule"):

- Is there a delay in minority selection for occupancy compared to non-minority waiting time? Specify: _____
- The selection preference, or other aspects of the housing affirmatively further fair housing in the following ways: _____
- Other methods for meeting the identified housing need that have less of an effect on minority participation include: _____

G. IMPLEMENTING SELECTION PREFERENCES IN AN APPLICANT SELECTION PLAN

Written applicant selection plans are a requirement of many housing programs. It is the document that addresses, among other aspects of operations, project marketing consistent with fair housing requirements, application procedures, procedures for building and maintaining a waiting list, different methods for implementing preferences, and civil rights related concerns. It is also the policy that describes how applicants are selected from waiting lists upon unit turnover, in both rental housing programs, and in homeownership programs that require resale of affordable homes to low-income buyers. From a civil rights perspective, a provider might consider shaping selection practices around the basic requirement to engage in affirmative fair housing marketing. Under that requirement, application procedures must be designed to

encourage application by the households who are the least likely to apply because of race, ethnicity, age, disability or other characteristics protected civil rights law.

Planning for applicant selection and marketing cannot be the end of a provider's evaluation of civil rights and program compliance. Many civil rights laws impose planning standards that mandate an examination of admission and occupancy *outcomes* to assess whether a marketing plan is successful from a civil rights perspective, or whether a selection practice has an unintended negative civil rights effect. In addition, some laws require providers to keep records depicting the characteristics of applicants or occupants in affordable housing. The purpose of this record keeping is to assure compliance with civil rights laws, to monitor the civil rights effect of admission and selection practices, and to provide information to owners that will allow for the adjustment of marketing and selection practices.

1. Application and Waiting List Procedures

The following procedures are in place to assure that the groups of individuals least likely to apply are offered an opportunity to apply:

- Applications may be obtained and returned by (e.g., mail, telephone, facsimile transmission, at the site, at locations in the community, over the internet):

- In addition to the individual applicant, an application may be obtained and submitted on behalf of an applicant by (e.g., community based agencies, service providers):

- Applications can be obtained and submitted at the following locations that are accessible to people with disabilities: _____
- Applications are in the following alternative formats accessible to people with disabilities: _____
- Auxiliary aids such as TTY devices and interpreter services are available to applicants with disabilities.
- Applications are available to individuals who are not proficient in English in the following alternative languages or with the following notices: _____

- Interpreter services are available to applicants who are not proficient in English:

- Applications are available during the following hours to accommodate potential applicants who lack transportation, or who work, or who must travel long distances to apply: _____
- Applications may be obtained and submitted over the following time period to assure broad participation: _____
- The waiting list will be created with the following methods that will reduce the need for applicants to stand in a queue (e.g., lottery): _____

2. Affirmative Fair Housing Marketing

The affirmative fair housing marketing plan encourages applications by the people least likely to apply by:

- Advertising in the following print, radio and other media:

- Establishing relationships with the following organizations that serve the people least likely to apply: _____
- Distributing marketing materials in the following alternative formats accessible to people with disabilities: _____
- Listing accessible units on MassAccess when available for occupancy.
- Distributing marketing materials in the following alternative languages for individuals living in the market area who are not proficient in English:

3. Planning Requirements

The following required or recommended civil rights related assessments and planning are complete:

- The Section 504 and ADA self-evaluation and a plan for making reasonable modifications in application practices, policies and procedures.
- The Section 504 and ADA transition plan for achieving architectural access in existing housing and facilities, including any updates based on periodic needs assessments and self-evaluations.
- The assessment of the needs of qualified individuals with limited proficiency in English, including an assessment of the resources available to assure effective access by individuals with limited proficiency in English, as required by Title VI.
- The Analysis of Impediments to Fair Housing Choice, including the action plan for removing barriers to choice required as part of the PHA plan.
- The Analysis of Impediments to Fair Housing Choice, including the action plan for removing barriers to choice required as part of the Consolidated Plan.
- A plan to affirmatively further fair housing as required by the competitive application for HUD funds.

4. Monitoring and Follow Up for Civil Rights Compliance

- An examination of the actual waiting list and an examination of the occupancy patterns in the development indicates the following racial, ethnic or other disparities among the waiting list, occupancy patterns and the housing market:

- The actual or anticipated number of minorities on the waiting list compared to the number of non-minorities is at least 80% (the “Four-Fifths Rule”):

- The actual or anticipated number of minorities participating in the program or in occupancy compared to the number of non-minorities is at least 80%:

- There is (or is not) a delay in minority selection for occupancy compared to non-minority waiting time:

- The selection preference, or other aspects of the housing succeeded in addressing one or more of the following actions to affirmatively further fair housing in the following ways:

- Based on the foregoing assessment, marketing activities will be adjusted in the following ways: _____
- Based on the foregoing assessment, selection preferences and admission practices will be adjusted in the following ways: _____

INTRODUCTION

LOCAL NEED, SELECTION TO HOUSING PROGRAMS AND EQUAL OPPORTUNITY

Affordable housing programs provide a precious and limited resource. Cities and towns naturally and legitimately want to make sure that those resources meet local needs, most often by the use of admission and selection practices that offer preferences to local residents.

Meeting local need is only one among many goals of affordable housing programs. Often, program rules focus selection criteria on special populations, like elders or people with disabilities. They may mandate that housing providers target some amount of resources at lower income families, or may require a mix of dwelling units that serve low-income, moderate income and higher income households.

Equal opportunity and fair housing are also paramount considerations in all affordable housing programs. Racial segregation, concentrations of poverty, and social and economic isolation remain defining characteristics of large areas of Massachusetts.¹ Consequently, selection practices that limit housing programs to local residents can perpetuate conditions of discrimination. It is the stated objective of the Commonwealth of Massachusetts and the federal government to end housing discrimination. By both executive order and legislative enactment, it is state and federal policy to use public resources, including housing resources, to promote equal choice and housing opportunity, and to reverse the persistent trends of segregation and isolation.²

A GUIDE FOR THINKING ABOUT COMPETING NEEDS

Affordable housing only works when apartments and homes are distributed in a way that can meet local need, program objectives and the goal of equal opportunity. Communities, providers, and developers sometimes focus on one of these goals at the cost of ignoring the others. The unfortunate result is conflict that undermines the desire to provide affordable housing.

In Massachusetts, that conflict has crystallized in litigation where civil rights laws are placed in direct conflict with claims to housing on behalf of residents of particular communities, and even particular neighborhoods. For example, in *Raso v. Lago*³ and *Langlois v. Abington Housing Authority*,⁴ 100% local selection preferences were held unlawful because the preference scheme violated fair housing and civil rights laws. Judicial decisions like these are sometimes perceived as disregarding local housing needs. The perception, however, does not reflect the real outcome of the cases. In both *Raso* and *Langlois*, the courts held that local need could not prevail *entirely* over program and civil rights considerations. The courts did not say that local needs must be completely disregarded.

This Practice Guide explains how to balance civil rights considerations with local housing needs through selection practices used in affordable housing programs. The Guide is organized into the following component parts:

Part I: Identifying the housing program and the people it serves. Eligibility requirements for participation in individual programs affect the extent to which selections to the program can meet local need. Program rules usually address key admissions criteria based on such factors as

income, age, or disability. They establish requirements that certain numbers of dwelling units or admissions be targeted to higher or lower financial tiers of income eligible households.

Part II: Understanding selection preferences as part of the housing program. Selection preferences set priorities for admission among qualified, eligible applicants. Some preferences may be required by program rules, and program rules may permit others. Certain types of selection preferences may be prohibited. These distinctions are critical to any provider choosing to meet local housing need through selection preferences.

Part III: Learning about civil rights considerations and equal opportunity conditions in the program and in the housing market. State and federal law instructs housing providers to be attentive to the categories of people protected by civil rights laws, the requirements of those civil rights laws, and the civil rights conditions affecting protected classes in the market area in which the program operates. Some programs directly incorporate program-related civil rights rules that affect marketing, screening, admissions, and occupancy. Many programs require recipients to engage in affirmative activities to further fair housing and equal opportunity.

Part IV: Implementing selection preferences consistent with civil rights requirements. Providers *are* permitted to meet the housing needs of local residents. However, selection preferences that address local needs must conform to civil rights standards. It is possible to achieve both aims with an assessment that examines three factors: the civil rights effect of the admission practices selected by a provider; whether practices are justified by an identifiable housing need; and whether the practice is the least discriminatory method available to meet the need.

Executive Summary: Making a plan. Selection practices should be implemented through a written plan to assure clarity, fairness and consistency in admission. A good plan examines the characteristics of the local housing market and the local community, and addresses every aspect of the operation of the housing. It tailors program design, marketing, the process of accepting applications for occupancy, waiting list management, screening for eligibility, and selection for participation in a manner that balances local need, program objectives and equal opportunity. And, because communities, housing markets and program participation are all dynamic and change over time, it includes procedures for implementation, monitoring and making adjustments. Planning requirements are discussed in Parts II, III and IV of the Practice Guide. The Executive Summary offers a checklist that can also form a template to a written plan for implementing selection practices in compliance with civil rights laws.

For each of these themes, the Practice Guide summarizes the significant factors that communities, providers and developers ought to consider in shaping selection criteria. Its reference point is the practical operational features of admission and occupancy policies in commonly used state and federal housing programs in Massachusetts. Those programs are listed in Figure 1.⁵ In many cases, program resources may be used for both rental housing and affordable homeownership.⁶ Homeownership and rental programs using the same source of funds are generally subject to the same participant selection requirements. Differences are noted in the Practice Guide where relevant. The Practice Guide is not a detailed description of all the features of the programs; its focus is on admission and occupancy. Readers should refer to program rules and consult with the agencies that administer the programs and their own attorneys for concerns about particular legal obligations.

Figure 1
Affordable Housing Programs

Program	Administering Agency
Federal Programs	
Public Housing	HUD Office of Public and Indian Housing (PIH); local public housing agencies (PHA)
Section 8 Housing Choice Vouchers (including the Section 8 Project Based Housing Choice Voucher Program)	HUD PIH; PHAs
HOME	HUD Office of Community Planning and Development (CPD); local jurisdictions, including municipalities, consortia and the Department of Housing and Community Development (DHCD)
Multi-Family Section 8 Assistance ⁷	HUD Office of Multi-Family Housing; MassHousing
Section 202 Program of Housing and Supportive Services for Elders ⁸	HUD Office of Multi-Family Housing
Section 811 Program of Housing and Supportive Services for People with Disabilities	HUD Office of Multi-Family Housing
Low-income Housing Tax Credits (LIHTC)	Internal Revenue Service (IRS); DHCD, MassHousing (for LIHTC related to tax exempt bonds)
State Programs	
State Public Housing	DHCD
Affordable Housing Trust Fund	DHCD program; MassHousing is administrator
Section 13 A	MassHousing
Local Initiative Program ⁹	DHCD
Facilities Consolidation Fund	DHCD
Affordable Housing Voucher Program, Massachusetts Rental Voucher Program	DHCD
Comprehensive Permit Housing	DHCD
Community Preservation Act	Department of Revenue; municipalities
80/20 Program	MassHousing

ENDNOTES TO INTRODUCTION

¹ See, e.g., Boston Metropatterns: A Regional Agenda for Community Stability in Greater (Metropolitan Area Research Corporation and Citizens Housing and Planning Association, October 2001).

² In 1962, the Kennedy Administration issued Executive Order 11063, which instructed every federal agency to utilize its resources to prevent housing discrimination. See, Executive Order 11063, *Equal Opportunity in Housing*, 27 Fed. Reg. 11527 (November 20, 1962) as amended by Executive Order 12892, *Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing*, 59 Fed. Reg. 2939 (January 20, 1994). The federal Fair Housing Act, enacted in 1968, commands every federal agency to engage in affirmative activities to further fair housing. 42 U.S.C. §3605(e). Massachusetts Executive Orders declaring the Commonwealth's policy to take affirmative steps to reverse conditions of discrimination date back to 1970. See, e.g., Executive Order 74 (July 20, 1970). The principles underlying Executive Order 74 have been reaffirmed in some way by nearly every governor since that time. See, e.g., Executive Order 452, *Governor's Diversity and Equal Opportunity Initiative* (June 17, 2003).

³ *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998).

⁴ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).

⁵ Not all affordable housing programs are discussed in the Practice Guide. For example, the federal Community Development Block Grant (CDBG) program, and the Commonwealth's Housing Stabilization Fund, and Housing Innovation Fund are beyond the scope of the Guide.

⁶ For examples of homeownership programs, see, 24 C.F.R. §92.205(a) (HOME program); 24 Part 906 (federal public housing homeownership); 24 C.F.R. §982.625, *et seq* (Section 8 Housing Choice Voucher program homeownership option); *Local Initiative Program Guidelines* (DHCD, May 1997) ("*LIP Guidelines*"), page 4 (LIP and Comprehensive Permit Housing); M.G.L. ch. 40B, §1 (Community Preservation Act definitions of "community housing" and "real property interest").

⁷ As discussed in the Practice Guide, Multi-Family Section 8 Assistance involves contracts between private multi-family owners and HUD or state housing finance agencies under the Section 8 New Construction, Substantial Rehabilitation and State Housing Agency programs. See *generally*, 24 C.F.R. Parts 880, 881 and 883. Other programs involving project-based Section 8 assistance are beyond the scope of the paper. See, e.g., 24 C.F.R. Part 882 (moderate rehabilitation), Part 884 (rural set-aside) and Part 886 (special allocations).

⁸ From 1959 to 1990, the Section 202 program served both elders and people with disabilities. In 1990, the program was divided into a Program of Housing and Supportive Services for Elders, and a separate Program of Housing and Supportive Services for People with Disabilities. See, P.L. 101-625 (November 28, 1990). In addition, many pre-1990 Section 202 properties receive multi-family project based Section 8 assistance. The differences among the various iterations of the Section 202 program are described in HUD regulations at 24 C.F.R. Part 891, and are noted where relevant in the Practice Guide.

⁹ The Local Initiative Program (LIP) is designed to assist local municipalities in the planning for and development of affordable housing that meets the characteristics of housing included in DHCD's inventory of subsidized housing authorized by regulations implementing the Massachusetts comprehensive permit statute, M.G.L. ch. 40B. See, 760 C.M.R. §45.01; *see also*, M.G.L. ch. 40B, §20.

PART I: ELIGIBILITY AND SELECTION PRACTICES: WHAT IS THE PROGRAM AND WHO DOES IT SERVE?

OVERVIEW OF PART I

Selection preferences establish priorities for the distribution of units or assistance among eligible households. Consequently, a housing provider must be able to define the universe of eligible families before establishing preferences that favor some eligible households over others. This section of the Practice Guide focuses on the characteristics of the people who are eligible to participate. Specifically, it addresses:

- *Eligibility* for housing, based on income and other family characteristics.
- *Income targeting and deconcentration requirements* that influence how eligible households are selected for participation.

Figure 2 summarizes the key eligibility and targeting criteria of the most significant housing programs.

A. ELIGIBILITY FOR HOUSING

Eligibility for affordable housing is generally a function of income and other family characteristics. Although the criteria differ among various programs, every program maintains standards that define how applicants qualify for occupancy. Three of the most common eligibility factors are discussed in this section; income eligibility, citizenship and immigration status and housing for special populations.

1. Income

In virtually all affordable housing programs, program requirements limit eligibility to households with incomes at or below a certain level. Income eligibility is usually expressed in terms such as “low income,” “very low income,” or “low and moderate income.” Although the definitions of these terms vary among the different programs, they are all a measure of “area median income” (AMI); that is, a percentage of the median income for specified metropolitan areas and non-metropolitan counties, adjusted for family size.¹ Most state programs administered by the Department of Housing and Community Development (DHCD) and most federal housing programs funded by the U.S. Department of Housing and Urban Development (HUD), limit eligibility to “low-income families,” defined as families with incomes at or below 80% of AMI.²

Income eligibility limits for the programs discussed in the Practice Guide, including the various terms used to express the income limits, are described in Figure 2.

2. Citizenship and Immigration Status

Federal programs providing certain types of rental assistance subsidies, including the Multi-Family Section 8 Assistance, the Section 8 Housing Choice Voucher Program and public housing, limit eligibility to citizens, non-citizen nationals of the United States, and immigrants with certain types of immigration status. Mixed households comprised of eligible and ineligible members qualify for pro-rated rental assistance.³ Restrictions based on citizenship and immigration status are not a feature of Massachusetts state housing programs.⁴ Providers who are not required to, but choose to restrict admission based on citizenship or immigration status often face significant fair housing challenges. This issue is discussed in greater detail in Part III.

3. Special Populations

Some affordable housing programs restrict eligibility to specially designated categories of people, while others serve special populations through the use of selection preferences. Part I addresses the programs that limit eligibility to special populations. Selection preferences for special populations are discussed in Part II.

Federal public housing is one example of a program that permits restrictions on occupancy in particular developments to designated categories of households. In that program, a PHA may limit admissions to elders and non-elders with disabilities in a “mixed population development... that was reserved for elderly and disabled families at its inception.”⁵ In general, PHAs are required to give equal preference to elders and non-elders with disabilities in admissions to mixed population public housing developments.⁶ However, with HUD approval of a five year, renewable allocation plan, PHAs are permitted to change the eligibility criteria for any federal public housing development, including properties for families with children and mixed population properties. An approved allocation plan may designate a property or part of a property solely for occupancy by people age 62 or more, solely for non-elders with disabilities, or for use by a specific mix of elders and non-elders with disabilities, or a mix of elders and “near-elderly families.” A “near-elderly family” is a family in which the head of household, spouse or sole member is at least 50 years old, but is less than 62. A PHA with an approved plan to serve elders and near-elderly families may offer units to near-elderly families if there are insufficient elders on the PHA’s waiting list to fill available vacancies.⁷

HUD’s post-1990 Section 202 program of housing and supportive services for the elderly is another program that limits occupancy to households of which the head or sole member is a person 62 years of age or older.⁸ Properties assisted through the Section 8 Project Based Housing Choice Voucher Program may limit occupancy solely to elders, or solely to people with disabilities.⁹ The same is true for properties assisted with Multi-Family Section 8 Assistance.¹⁰ PHAs may also limit eligibility to elderly families and disabled families in properties assisted through the state Chapter 667 program.¹¹ Low or moderate senior housing for people age 60 or more is one type of community housing that may be constructed under the Community Preservation Act.¹²

Certain HUD multi-family properties, including developments constructed under the §221(d)(3), §236 and pre-1990 §202 programs, may restrict occupancy to elders-only, or to mixed groups of elders and people with disabilities, based on “the rules, standards and agreements in effect at the time of the development of the housing.” Owners of these so-called “Section 658 properties,” named for the section of the law that permits the restrictions, are permitted to change the eligibility standards for the property with HUD approval, and only under limited circumstances.¹³ HUD maintains an inventory of these Section 658 properties that describes the number of units available to elders, and to people with disabilities. The inventory also lists properties with accessible units, and properties with Multi-Family Section 8 Assistance that implement selection preferences for elders.¹⁴

Some programs serve only people with disabilities. DHCD’s Facilities Consolidation Program limits eligibility to people who are eligible to receive services from the state Departments of Mental Health or Mental Retardation.¹⁵ In the federal Section 811 program of housing and supportive services for people with disabilities, a sponsor may serve one or more of the categories of people eligible for occupancy under the enabling statute, including people with any disability, people with developmental disabilities, people with chronic mental illness, and individuals with AIDS.¹⁶ Other programs do not mandate restrictions, but allow owners to limit occupancy by category of disability. Examples of such programs include the federal LIHTC statute, which relaxes a number of requirements applicable to general occupancy housing for projects that provide supportive services or meet the needs of special populations,¹⁷ and the HOME program, which permits but does not require owners to restrict admissions and occupancy persons with special needs or a particular disability.¹⁸ DHCD uses the flexibility of the Section 8 Housing Choice Voucher program to set aside vouchers in a variety of settings for such groups as veterans, people with AIDS, grandparents raising grandchildren, families at risk of losing custody of children due to lack of affordable housing, people with mental retardation, and people engaged in economic self-sufficiency activities.¹⁹

To prevent unjustified segregation of people with disabilities, HUD regulations implementing Section 504 of the 1973 Rehabilitation Act and Department of Justice regulations for the Americans with Disabilities Act limit the circumstances in which separate housing and services can be provided to people with disabilities, or categories of people with disabilities. These civil rights issues are discussed in Part III.²⁰ Part II discusses how special populations can be served with selection preferences instead of eligibility restrictions. Part III addresses the affect Section 504 and other civil rights laws on eligibility and selection preference.

B. ACHIEVING INCOME MIX: TARGETING AND DECONCENTRATION

The concept of *eligibility* defines the total universe of people or families who are *qualified* to participate in a particular program. Within that universe, program requirements often mandate that housing providers achieve a mix of incomes among eligible occupants. Income mixing is usually designed to serve two goals. On the one hand, it assures that limited housing resources are directed to the most housing needy families. On the other, promoting a mix of incomes prevents the concentration of large numbers of extremely low-income households in the same property. Housing programs use two practices to achieve income mixing; *targeting*, which selects eligible applicants by income tier; and *deconcentration*, which defines a range of

strategies to bring higher income households to lower income neighborhoods or properties and lower income families to higher income areas or developments.

1. Targeting

Figure 2 depicts the targeting requirements in the programs that are the subject of the Practice Guide. Some targeting standards allow providers to reverse occupancy trends that resulted in particular programs serving larger or smaller shares of extremely low income families. For example, HUD's public housing program tends to serve extremely low income families in high poverty neighborhoods. Consequently, under current public housing targeting requirements, a PHA must select families with incomes at or below 30% of AMI for 40% of a PHA's annual admissions. However, the PHA may select higher income applicants, up to the public housing eligibility limit of 80% of AMI for the remaining 60% of its annual admissions.²¹ In contrast, as a tenant-based program that promotes family mobility in the private housing market, the Section 8 Housing Choice Voucher Program targets 75% of annual admissions to extremely low-income households.²²

Often, housing resources are channeled from federal sources to state or local governments that then grant the funds to sub-recipients for use in individual properties. In such circumstances, program rules may impose targeting requirements at both a jurisdictional level and at the project level. For example, in rental projects with 5 or more units assisted with HOME funds, 20% of the units must be available to families at rents that do not exceed 30% of 50% of AMI.²³ In addition, 90% of a *jurisdiction's* HOME funds allocated to tenant-based rental assistance and rental projects must assist households with incomes at or below 60% of AMI.²⁴ All HOME funds allocated to homeownership must serve low-income households.²⁵

The LIHTC program operates in a similar manner. The LIHTC statute requires state Qualified Allocation Plans (QAP) to offer preferential distributions of tax credits to, among other, categories, "projects serving the lowest income tenants."²⁶ DHCD's QAP complies with this requirement by requiring project sponsors to reserve no fewer than 10% of project units for families with incomes at or below 30% AMI.²⁷ Under the federal law, for LIHTC properties with certain forms of HOME financing, 20% of the units in each building in a project must be rented to households with incomes at or below 50% of AMI.²⁸

2. Deconcentration

Many housing programs attempt to control the concentration of extremely low-income and minority households in particular properties or neighborhoods through site and neighborhood standards, and not selection and admissions practices. For example, most HUD programs rely on site and neighborhood standards that limit construction of federally-assisted housing in areas of "minority concentration" and high poverty areas.²⁹ In contrast, DHCD's awards rating points to projects located in communities with limited inventories of affordable housing. Income mix is addressed in the QAP by awarding rating points to projects that include a mix of low-income and market rate units.³⁰

Other programs use methods that directly affect participant selection. Federal family public housing developments are subject to the most extensive deconcentration requirements affecting admissions. Under federal rules, PHAs must develop strategies to bring higher income families into low-income developments and lower income families into higher-income developments. While some strategies may include self-sufficiency incentives for the occupants of the lower-income developments, or capital investment programs to improve the living environment, PHAs may also utilize selection preferences for the admission of working families to low-income properties and other selection strategies to achieve a mix of income.³¹ For properties receiving assistance from MassHousing under the Section 13A program, deconcentration is achieved by establishing a mix of basic, below-market and market rents based upon “the need for low and moderate income housing in the development’s market area, and the fiscal needs of the project.”³² The MassHousing 80/20 program aims for a mix of 20% low-income and 80% market rate rentals. The Local Housing Program initiative of the LIP program requires that no less than 25% of available rental or homeowner units be sold or rented at prices affordable to low and moderate income buyers in order for the development to qualify as affordable housing under Chapter 40B.³³

In proposing its rules for deconcentration of public housing, HUD drew an explicit connection between high concentrations of poverty and patterns of discrimination in admission and selection practices.³⁴ Consequently, even though other housing programs are not subject to federal public housing deconcentration requirements, providers may want to borrow strategies from the federal public housing environment in considering their own civil rights obligations. These strategies are discussed in greater detail in Part III.

FIGURE 2				
ELIGIBILITY AND TARGETING CRITERIA				
Program and Income Definitions	Income Limits	Citizenship Requirements	Special Populations	Targeting
FEDERAL PROGRAMS				
Public Housing Low-Income: 80% AMI Very Low-Income: 50% AMI Extremely Low-Income: 30% AMI	Low-Income	Citizens, documented immigrants, non-citizen nationals.	Elders, non-elders with disabilities.	40% of annual admissions must serve Extremely Low-Income Families.
Section 8 Housing Choice Vouchers Low-Income: 80% AMI Very Low-Income: 50% AMI Extremely Low-Income: 30% AMI	Low-Income	Citizens, documented immigrants, non-citizen nationals.	By selection preference only. No eligibility limitations for special populations.	75% of annual admissions must serve Extremely Low-Income Families.
Project Based Section 8 Housing Choice Vouchers Low-Income: 80% AMI Very Low-Income: 50% AMI Extremely Low-Income: 30% AMI	Low-Income	Citizens, documented immigrants, non-citizen nationals.	Elders, non-elders with disabilities, families receiving supportive services.	75% of annual admissions must serve Extremely Low-Income Families.
HOME Low-Income: 80% AMI Very Low-Income: 50% AMI	Low-Income	None.	Development may serve persons with special needs; persons with particular disabilities.	For assisted projects with more than 5 units, 20% of the units must be rented to Very Low-Income; jurisdiction must target 90% of assistance to families at 60% AMI.

FIGURE 2				
ELIGIBILITY AND TARGETING CRITERIA				
Program and Income Definitions	Income Limits	Citizenship Requirements	Special Populations	Targeting
FEDERAL PROGRAMS (continued)				
Multi-Family Section 8 Assistance Low-Income: 80% AMI Very Low-Income: 50% AMI Extremely Low-Income: 30% AMI	Low-Income	Citizens, documented immigrants, non-citizen nationals.	By selection preference only. No eligibility limitations for special populations.	40% of annual admissions must serve Extremely Low-Income Families. Limited admissions for families between Very Low and Low-Income.
Section 202 Program for Elders Low-Income: 80% AMI Very Low-Income: 50% AMI	Low-Income before 1990, Very Low-Income after 1990.	Citizens, documented immigrants, non-citizen nationals, for projects with Multi-Family Section 8 Assistance.	Elders only for properties developed after 1990; elders and categories of people with disabilities before 1990.	For Section 8 properties, 40% of annual admissions must serve Extremely Low-Income Families; limited admissions for families between Very Low and Low-Income.
Section 811 Program for People with Disabilities Very Low-Income: 50% AMI	Very Low-Income	None.	Categories of people with disabilities.	None.
Low-income Housing Tax Credits See definition of “qualified low-income housing project” ³⁵	40% of units at 60% AMI or 20% of units at 50% AMI	None	May be developed for special populations.	For buildings with certain HOME loans, 40% of the units must be rented to Very Low-Income families.

FIGURE 2				
ELIGIBILITY AND TARGETING CRITERIA				
Program and Income Definitions	Income Limits	Citizenship Requirements	Special Populations	Targeting
STATE PROGRAMS				
State Public Housing Low-Income: 80% AMI	Low-Income	None	Elders, non-elders with disabilities.	None.
Affordable Housing Trust Fund	110% AMI	None	Transitional housing and housing for the homeless permitted.	None.
Section 13 A Low-Income: 80% AMI	Low-Income	None	None.	None.
Local Initiative Program Low and Moderate Income: 80% AMI	Low and Moderate Income	None	None.	None.
Facilities Consolidation Fund	None	None	Only clients of Department of Mental Health or Mental Retardation	None.
Community Preservation Act Low-Income: 80% AMI Moderate Income: 100% AMI	Low and Moderate Income for Seniors; Low-Income for all others.	None	Senior housing permitted for persons age 60 or more	None
80/20 Program	For low income units, 50% AMI	None	None.	20% of project units must be rented to families at or below 50% AMI.

ENDNOTES TO PART I

¹ A detailed explanation of the methodology for computing area median income measures is in *FY 2004 HUD Income Limits Briefing Material* (HUD Office of Policy Development and Research, January 30, 2004), posted on the internet at:

<http://www.huduser.org/intercept.asp?loc=/Datasets/IL/IL04/BRIEFING-MATERIALs.pdf>

² *See, e.g.*, 42 U.S.C. §1437a(b)(2) (definitions of “low income,” “very low income,” and “extremely low income” for federal public housing, Section 8 Housing Choice Vouchers and Multi-Family Section 8 Assistance) and 760 C.M.R. §5.06(1) (eligibility for state public housing and AHVP is limited to “low income” households as defined by HUD).

³ 24 C.F.R. Part 5, Subpart E.

⁴ The state public housing statute, M.G.L. ch. 121B, §32, limits occupancy in state funded public housing to citizens, and non-citizen veterans and elders. This portion of Section 32 was declared unconstitutional in 1977. *See, Weeks v. Waltham Housing Authority*, C.A. No. 76-402-F (D. Mass., July 27, 1977) (consent judgment). In 1996, new federal laws were enacted that significantly limited access to state benefits and services for certain categories of non-citizen immigrants. However, the new statute also permitted individual states to adopt legislation that would permit the provision of benefits to immigrants otherwise ineligible under federal law. *See generally*, 8 U.S.C. §1621. After the enactment of the federal law, the Massachusetts legislature adopted laws that broadly authorize the provision of state funded public benefits to non-citizen immigrants. *See*, M.G.L. ch. 6A, §16C.

⁵ 24 C.F.R. §960.102(b).

⁶ 24 C.F.R. §960.407(a).

⁷ *See generally*, 42 U.S.C. §1437e. *See also*, HUD Notice PIH 97-12 (HA) (March 12, 1997).

⁸ *See*, 12 U.S.C. §1701q(i)(1) (only “elderly persons” qualify for selection) and (k)(1) (definition of “elderly person”).

⁹ 42 U.S.C. §1437f(o)(13)(D)(ii).

¹⁰ 42 U.S.C. §13611 to §13617.

¹¹ M.G.L. ch. 121B, §39.

¹² *See*, M.G.L. ch. 44B, §1 (definitions of “community housing” and “low or moderate income senior housing”) and §5 (adoption of open space and community housing plan).

¹³ *See*, P.L. 102-550, §658 (October 21, 1992), codified at 42 U.S.C. §13618. *See also*, HUD Handbook No. 4350.3 REV-1, *Occupancy Requirements of Subsidized Multi-Family Housing Programs* (June 12, 2003) (the “Multi-Family Occupancy Handbook”), Chapters 3 and 4.

¹⁴ The Multi-Family Inventory is posted on the internet at the following HUD web site:

<http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>

¹⁵ 760 C.M.R. §19.03.

¹⁶ *See*, 42 U.S.C. §8013(k)(2) and 24 C.F.R. §891.305 (definition of “person with disabilities”). A sponsor may limit occupancy in a Section 811 property to a subcategory of eligible people with disabilities only with the approval of HUD. For example, with HUD approval, it is permissible to serve only people with autism, which is a subcategory

of developmental disability. Even with HUD permission, a sponsor must permit occupancy by any qualified person with a disability “who could benefit from the housing and/or services provided regardless of the person’s disability.” 24 C.F.R. §891.410(c)(2)(ii). *See also*, H-2003-16, *Fiscal Year 2003 Policy for Capital Advance Authority Assignments, Instructions and Program Requirements for the Section 202 and Section 811 Capital Advance Programs* (HUD Office of Multi-Family Housing, July 17, 2003) at par. 4(SS)(8)(b).

¹⁷ *See, e.g.*, 26 U.S.C. §42(g)(2)(iii) (government payments made to owners for supportive services not included in “gross rent”); 26 U.S.C. §42(i)(3)(A)(i) and (iii) (transitional housing funded with federal homelessness funds is not “transient housing” and units qualify as rent restricted units); 26 U.S.C. §42(i)(3)(B)(iv) (month-to-month tenancies permitted for single room occupancy housing); 26 U.S.C. §42(m)(1)(C)(v) (QAPs must give preferential treatment to projects serving tenants with special needs).

¹⁸For tenant-based assistance in the HOME program, *see*, 24 C.F.R. §92.209(c). HUD guidance also permits such restrictions where HOME funds are used for construction. *See, HOMEfires*, Vol. 1, No. 4 (HUD, October 30, 1997), available at:

<http://www.hud.gov/offices/cpd/affordablehousing/library/homefires/volumes/vol1no4.cfm>.

¹⁹ *DHCD Administrative Plan for Tenant Based Rental Assistance under the Section 8 Housing Choice Voucher Program*, §18 to 30 (as amended through March 1, 2004) (“*DHCD Section 8 Administrative Plan*”).

²⁰ 24 C.F.R. §8.4(b)(1)(iv) and (c)(1) (Section 504); 28 C.F.R. §35.130(c) (ADA, Title II); 28 C.F.R. §36.202(c) and (d) (ADA, Title III).

²¹24 C.F.R. §960.202(b). HUD data from 1998 indicates that the median income of residents in federal public housing is 25% of AMI, and that the average public housing development is located in a census tract with a poverty rate of 36%. *See, A Picture of Subsidized Households- 1998, U.S. Summary Data* (HUD Office of Policy Development and Research, 1998), posted on the internet at:

<http://www.huduser.org/datasets/assthsq/statedata98/HUD4US3.TXT>

²² 24 C.F.R. §982.201(b)(2).

²³ 92 C.F.R. §92.252(b)(1).

²⁴ 92 C.F.R. §92.216(a)(1).

²⁵ 24 C.F.R. 92.217.

²⁶ 26 U.S.C. §42(m)(1)(B)(ii)(I).

²⁷ *2004 QAP*, page 30.

²⁸ 26 U.S.C. §42(i)(2)(D).

²⁹ *See, e.g.*, 24 C.F.R. §891.125 (c) (§202 program); 24 C.F.R. §941.202 (c) and (d) (federal public housing development). These rules attempt to balance the sometimes competing interests of promoting desegregation and neighborhood revitalization by allowing construction in segregated neighborhoods when necessary to achieve an “overriding housing need.”

³⁰ *2004 QAP* at pages 34 and 39.

³¹ 24 C.F.R. Part 903, Subpart A.

³² *Section 13A Interest Subsidy Handbook* (Massachusetts Housing Finance Agency, August 12, 1997), available on line at: <http://www.mhfa.com>.

³³ 760 C.M.R. §45.04(6).

³⁴ *See*, 65 Fed. Reg. 20686 (April 17, 2000) (preamble to deconcentration rule).

³⁵ 26 U.S.C. §42(g).

PART II: SELECTION PREFERENCES

OVERVIEW

While *eligibility requirements* determine the universe of families who qualify for a housing program, *selection preferences* choose from among eligible applicants in order to achieve the particular goals of the program, the community, or the housing provider. Preferences may be mandatory, that is, required by program rules. In other cases, program rules may permit owners to design property or program-specific admissions preferences in order to address locally identified needs. This part of the Practice Guide discusses four topics related to selection preferences: preferences that are mandated by program requirements; general considerations that providers should take into account when evaluating whether to elect voluntary preferences permitted, but not required in various housing programs; preferences that favor local residents; and permitted preferences for special groups specifically identified in program regulations.

A. MANDATORY SELECTION PREFERENCES

Until 1996, federal rental housing programs imposed mandatory selection preferences that targeted housing resources at displaced and homeless families and households facing substantial rent burdens. Congress suspended those preferences in 1996, and then repealed them in 1998.¹ Consequently, for purposes of the housing programs discussed in the Practice Guide, mandatory selection preferences are a feature solely of state housing programs.

1. State Public Housing, MRVP and AHVP

Under DHCD regulations, admissions to state public housing developments, and the MRVP and AHVP programs are based on seven descending, mandatory priority categories. The first three categories favor homeless households displaced by natural forces or by public action. The fourth priority category is based on an emergency case plan “reflective of the needs of persons who are homeless, in abusive situations, or encountering severe medical emergencies.” Other priority categories include AHVP participants living in temporary transitional housing, transfers of overhoused households of families requesting a transfer for medical reasons, and standard applicants without a priority.² Within each of the priorities, local housing authorities must select by preference categories based upon affirmative action goals for minority households, and two others for veterans and local residents.³

2. Chapter 667 Housing for Elders and Non-Elders with Disabilities

Admission to developments for elders and non-elders with disabilities under the Chapter 667 state public housing program is regulated to maintain a relative occupancy mix of 13.5% non-elders with disabilities and 86.5% elders. If occupancy by non-elders with disabilities in a PHA’s Chapter 667 units is less than 13.5%, then the PHA must admit one non-elder for each elder admitted to occupancy. Once occupancy by non-elders with disabilities is at the target level, only elders are admitted to vacant units. If occupancy by non-elders with disabilities is at 13.5%, and there are no elders on the PHA’s waiting list, the PHA must offer first preference non-elders with disabilities between the ages of 50 and 60, and then to the next qualified non-elder with

disabilities.⁴ Selections to Chapter 667 developments are otherwise subject to DHCD's mandatory selection preferences.

3. DHCD Section 8 Housing Choice Voucher Program

DHCD's Section 8 Administrative Plan requires regional administrators of the state-wide Section 8 Housing Choice Voucher program to use selection preferences intended to direct voucher resources to particular housing needy families. Examples of favored households include residents of certain transitional housing programs for homeless and disabled families, households eligible for assistance under DHCD's victim-witness program, homeless families residing in state-funded shelters, homeless households and households residing in substandard housing, persons displaced by disaster, government action, domestic violence or the actions of a landlord, victims of hate crimes, and other similar households identified in the plan. Selection preferences are also offered to residents of the region in which the administrator is located.⁵

4. MassHousing Programs

MassHousing's Section 13A and 80/20 programs impose selection preferences only when there are no mandatory preferences required by other subsidy programs assisting the property. In the absence of other mandatory preferences, preference must be offered to households displaced by natural forces, or by public action, and to families with children displaced by domestic violence. Under a Memorandum of Understanding involving the state Departments of Mental Health (DMH) and Mental Retardation (DMR), many MassHousing properties must set aside at least 3% of low-income and moderate income units for individuals receiving state funded mental health and mental retardation services. The set-aside is enforced through closing documents for project financing.⁶

B. PERMITTED LOCAL PROVIDER SELECTION PREFERENCES: BASIC PRINCIPLES

Mandatory selection preferences are imposed to assure that housing resources are directed to households determined by policy makers to have overriding state or national housing needs. Within this framework, housing laws also permit local housing agencies and providers to adopt preferences intended to meet local needs.⁷

In housing markets characterized by patterns of residential segregation or other barriers to housing opportunity for people protected by civil rights laws, local selection preferences can run afoul of program requirements and civil rights laws. Four essential principles for choosing local selection preferences can help providers stay clear of disputes.

1. Consistency with local housing need. Most programs require providers to design local selection preferences within the context of specifically identified local housing needs. In the federal public housing and Section 8 Housing Choice Voucher programs, for example, PHAs are free to establish local preferences "based on local housing needs and priorities, as determined by... using accepted data sources."⁸ Providers with Multi-Family Section 8 Assistance seeking permission to implement local selection preferences in the program must justify local priorities under similar standards.⁹ Federal public housing, the Section 8 Housing Choice Voucher

program, the Multi-Family Section 8 Assistance and the HOME program all require providers to establish preferences based on the housing needs analysis adopted by the local jurisdiction for purposes of federal Consolidated Planning requirements.¹⁰ Local preferences in federal public housing and the Section 8 Housing Choice Voucher program and programs subject to Consolidated Planning must also reflect public comment received by the PHA or the jurisdiction in the public housing planning process, or the Consolidated Planning process.¹¹

Local selection preferences utilized for units developed under the LIP program must also address “critical local housing needs.”¹² Developers of rental and homeownership units constructed without state or federal subsidies that count as “affordable units” for purposes of a municipality’s affordable housing inventory under Chapter 40B are also permitted to adopt local selection preferences for up to 70% of the affordable units, if the preferences are consistent with local housing needs.¹³

2. Consistency with program requirements. Virtually all programs that permit local selection preferences require local preferences to be administered in a manner that is consistent with and subordinate to underlying program requirements. This principle is codified in rules for the federal public housing program,¹⁴ HUD’s multi-family housing programs,¹⁵ and the housing programs administered by MassHousing.¹⁶

3. Civil rights compliance. Local selection practices must conform to state and federal fair housing and civil rights laws, and must not “have the purpose or effect of delaying or otherwise denying admission” to housing programs based on such protected characteristics as race, color, ethnic origin, gender, religion, disability or age.¹⁷ Civil rights issues as they affect selection preferences are discussed in greater detail in Part III of the Practice Guide.

4. Written plans. Written plans that clearly describe eligibility criteria, screening procedures, and the preferences used in admission are important to promote selection practices that are consistently applied to all applicants on a fair basis. Written plans are required in nearly all programs, including rental housing and homeownership programs. Often, they must be approved by the administering agency. For example, written emergency case plans approved by DHCD are required for fourth priority admission to the state public housing, MRVP and AHVP programs,¹⁸ and MassHousing requires each participating owner to prepare a tenant selection plan which is subject to agency review and approval.¹⁹ Owners of properties with Multi-Family Section 8 Assistance and other forms of federally assisted multi-family housing must develop written, publicly available tenant selection plans.²⁰ HUD does not review or approve the plans, although the plans may be subject to monitoring by the agency’s Office of Fair Housing and Equal Opportunity (FHEO).²¹ Written admission standards are also a required feature of the rental component of the HOME program, as well as both the rental and homeownership components of the Section 8 Housing Choice Voucher program and the federal public housing program.²² Tenant selection plans are not an explicit requirement of the LIHTC program. However, federal law requires project sponsors to submit a comprehensive market study at the time of an application for tax credits identifying the housing needs of the low-income households to be served by the proposed project.²³

Planning requirements are also a feature of the state comprehensive permit process under Chapter 40B and the Community Preservation Act. For example, if a decision by a zoning board to approve or deny a comprehensive permit is consistent with a local affordable housing plan approved by DHCD, the board's action is presumed to be valid by the Housing Appeals Committee.²⁴ The local affordable housing plan must be based on a "comprehensive needs analysis that examines community demographics," and other factors bearing on local housing need.²⁵ The recommendations made by community preservation committees for the development of affordable housing under the CPA must be based on a study of the "needs, possibilities and resources of the city or town regarding community preservation."²⁶

C. RESIDENCY PREFERENCES: SELECTING LOCAL RESIDENTS FIRST

By definition, selection preferences for local residents offer favorable admission opportunities to families that live or work within the boundaries of a particular geographic area, or "residency preference area." In evaluating the legality of such preferences, it bears repeating that affordable housing resources are scarce and that communities hold a legitimate interest in directing those limited resources to housing-needy local citizens living within their municipal boundaries. Of equal import is the recognition that racially segregated living patterns dominate large areas of Massachusetts. Local selection preferences *are* permitted. Discrimination that is the result of selections from a segregated housing market *is not* permitted. This section of the Practice Guide focuses on the ways in which housing programs permit and regulate selection practices that favor local residents. Part III of the Practice Guide addresses how to avoid negative civil rights consequences in the implementation of local residency preferences.

Almost all programs permit selection preferences that favor local residents. To assure consistency with program and civil rights requirements, program rules typically regulate the manner in which preferences may be implemented, and the rules share common features.

1. Residency Requirements are Prohibited

While most programs allow *preferences* that favor the selection of local residents from among eligible applicants, requirements that limit *eligibility* to local residents are prohibited. Prohibitions on residency requirements are explicitly articulated in most federal housing programs, including federal public housing, the Section 8 Housing Choice Voucher program, and HUD's multi-family housing programs. Those prohibitions forbid durational residency requirements; that is, the use of restrictions on eligibility based on the length of time a family has lived or worked in the municipality or jurisdiction.²⁷ Rules for Massachusetts state programs do not address residency requirements. However, the courts have consistently ruled that durational residency requirements are unconstitutional, and it is unlikely that such requirements can be legally imposed in state housing programs.²⁸

2. Local Preference Areas May Not Be Smaller Than the Municipal Boundaries

To assure that segregated living patterns within communities are not perpetuated with subsidized housing resources, federal program rules forbid residency preference areas that are smaller than the municipality or county in which the housing is located.²⁹

3. Local Preferences Must Avoid Discriminatory Effects

Federal program rules also forbid the use of local selection preferences when they have the purpose or the “effect of delaying or otherwise denying admission to a [program,] project or unit based on” individual characteristics covered by civil rights laws, including “the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family.”³⁰ Similar standards apply to state public housing, the LIP program, and the housing programs supervised by MassHousing.³¹ The federal standard closely follows the standard generally applicable to all housing providers under the federal Fair Housing Act.³² Consequently, even in the absence of specific program regulations, it is likely that local selection standards having a discriminatory effect will violate the Fair Housing Act. Distinctions between intentional discrimination and actions with a discriminatory effect, as well as judicial criteria used to determine the discriminatory impact of selection policies, are discussed in greater detail in Parts III and IV.

4. Defining Households That Work in or Receive Education or Training in the Preference Area as Local Residents

For the federal public housing, multi-family and Section 8 programs, families with a household member hired to work in the residency preference area must be treated like local residents, entitled to a local residency preference. Under these federal programs, a housing provider *may* also choose to offer a local residency preference to graduates of education and training programs located in the jurisdiction, if the program is designed to prepare participants for the job market.³³ DHCD Chapter 40B guidelines for programs receiving affordable housing financing from non-governmental sources encourage communities to use local selection preferences that favor municipal employees, relatives of current residents, and employees of local businesses.³⁴

5. Local Preferences May Be Numerically Limited

Numerical limits on the use of preferences can sometimes neutralize potentially discriminatory effects of local residency preferences. Numerical limits are an explicit feature of DHCD’s Chapter 40B and LIP Guidelines, permitting local selection preferences for up to 70% of the low and moderate income units to be distributed in particular projects, so long as the preferences “do not have a discriminatory or unlawful effect.”³⁵ HUD imposes no such limits, leaving providers to rely on their own assessment of the local housing market.³⁶ However, HUD has encouraged PHAs seeking new allocations of Section 8 Housing Choice Vouchers to limit local residency preferences in the rating factors the agency uses to evaluate applications for competitive funding.³⁷ Communities or providers that consider adopting the 70% local selection preference permitted by the Chapter 40B and LIP Guidelines should assess the effect of the preference on

civil rights considerations. The methods for conducting such an evaluation are discussed in Part IV of the Practice Guide.

6. Local Selection Preferences May Require Approval and Monitoring

Most programs require some form of approval or agency oversight in the use of local residency preferences. LIP guidelines require prior DHCD approval of residency preferences as part of the agency's review and approval of LIP marketing plans.³⁸ Local preferences used by PHAs in the federal public housing and Section 8 Housing Choice Voucher programs must be described in the annual and five year PHA Plans submitted to HUD for review and approval.³⁹ FHEO monitors PHA implementation of local residency preferences, and may prohibit use of residency preferences if their use is inconsistent with HUD's obligation to affirmatively further fair housing.⁴⁰

Owners of federally assisted multi-family properties must secure permission from HUD to use residency preferences as part of the Affirmative Fair Housing Marketing Plan every owner is required to submit prior to initial leasing of units.⁴¹ HUD review at initial leasing includes a mandatory pre-occupancy conference with FHEO.⁴² Subsequent to initial lease-up, owners may adopt residency preferences only with HUD approval, or without HUD approval if the PHA in the jurisdiction where the housing is located is utilizing a local residency preference.⁴³ Like the public housing programs, local residency preferences used in federal multi-family housing are subject to ongoing monitoring by FHEO.⁴⁴

D. PREFERENCES BASED ON HOUSING NEED

Serving local residents first through residency preferences is only one way of meeting local housing needs. Housing providers retain wide latitude to adopt selection preferences that benefit particular groups or categories of families, based not on where they live, but on the particular housing needs of the group.⁴⁵ Many of these types of preferences originate in federal housing programs, where the underlying statutes encourage owners to favor certain groups, either because they are viewed by policy makers as especially housing needy, or because favorable selection practices for a particular category achieves a policy goal such as an improved mix of incomes in the housing program. As with other preferences, selection of these households must assure that eligible families are admitted in a manner consistent with program and civil rights requirements. This section of the Practice Guide outlines the issues that arise in this context.

1. Working Families

Federal public housing rules, the regulations for the Section 8 Housing Choice Voucher program, and federal multi-family housing programs permit housing providers to adopt selection preferences for households in which the head of household or the co-head of household is employed. While it is customary for providers in these programs to define eligibility for a working preference based on a number of weekly hours of work, program rules forbid PHAs and owners from giving preference to higher income families over lower income families. To avoid the potential for discrimination based on age or disability, an owner or PHA adopting a working preference must extend the benefit of the preference to elderly and disabled households.⁴⁶

2. Victims of Domestic Violence

HUD regulations instruct PHAs and multi-family owners that they “should” consider adopting selection preferences for victims of domestic violence. PHAs and owners are free to adopt or reject a preference for victims of domestic violence, at their discretion.⁴⁷

3. Elders

Part I of the Practice Guide described programs like the federal Section 202 program in which only elderly families are eligible for occupancy. It is also common for providers to adopt preferences that select people above specified ages from among eligible applicants. Such preferences can be complicated by the rules of the specific program, or by state or federal civil rights laws that forbid age discrimination, or laws that protect families with children and people with disabilities. This section of the Practice Guide discusses program standards that address selection preferences for elders. Part III of the paper will address how civil rights laws affect the use of selection preferences based on age.

(i) Federal Public Housing and Section 8 Housing Choice Vouchers. PHAs are permitted to adopt selection preferences to their *general occupancy* public housing for single elders.⁴⁸ Such selection preferences must be distinguished from admissions to the *mixed population* developments discussed in Part I, where eligibility for admission is limited to elders and non-elderly people with disabilities.⁴⁹ HUD rules require PHAs to give equal preference to elders and non-elders with disabilities in admissions to mixed population public housing developments, unless the PHA is operating under an approved public housing allocation plan that restricts eligibility for all or part of the development elders only or only non-elders with disabilities.⁵⁰ As an alternative, PHAs can choose to implement allocation plans with the use of selection preferences instead of eligibility restrictions that preclude admission by elders or non-elders with disabilities.⁵¹

PHAs are also permitted to adopt selection preferences to their Section 8 Housing Choice Voucher program for single elders.⁵²

(ii) Multi-Family Section 8 Assistance. Under a federal law adopted in 1992, owners of federally-assisted properties that receive project-based Section 8 assistance may choose to adopt a selection preference for elders in mixed population properties that were originally designed for occupancy by both elders and non-elders with disabilities. Such developments are known as “Section 651 properties,” named for the section of the public law that permits the preferences.⁵³ An owner adopting an elderly selection preference must still reserve a percentage of units for occupancy by non-elders with disabilities. The minimum number of units to be reserved for people with disabilities must be based on the lesser of 10% of total units, or the number of non-elders with disabilities in occupancy when the law was adopted. The owner can reserve more than the minimum number of units for non-elders with disabilities, and is also permitted to adopt a secondary selection preference for near-elders, if the property admits at least the required quota of non-elders with disabilities.⁵⁴ Multi-family owners are also permitted to adopt selection preferences to their general occupancy properties for single elders.⁵⁵

Section 651 properties are to be distinguished from the Section 658 multi-family properties described in Part I, where occupancy is limited by program eligibility rules solely to elders.⁵⁶

(iii) HOME Program. HUD regulations permit selection preferences for “persons with a special need or particular disability” when HOME funds are used for tenant based rental assistance.⁵⁷ HOME regulations do not say whether elders without disabilities are “persons with special needs” for purposes of HOME tenant-based rental assistance. HUD regulations are also silent on whether selection preferences for elders are acceptable in rental properties constructed with HOME funds. However, HUD guidance allows the use of HOME funds to create preferential housing for elders in the tenant based rental assistance component of the program and in the rental housing construction element of the program.⁵⁸

(iv) DHCD Programs. Part I explained that the Chapter 667 state public housing program for elders and people with disabilities limits occupancy to specified quotas of elders and non-elders with disabilities. There are no other provisions in state public housing, in the MRVP, AHVP or LIP programs for selection preferences for elders among other eligible applicants.

(v) MassHousing Multi-Family Programs. In 1996, MassHousing devised an elderly preference scheme for its state-financed multi-family programs that is similar to the standards applicable to the federal Section 651 properties. The policy applies to owners who can document that the property was designed primarily for occupancy by people age 55 or more, and who can show that 80% of the units have been continuously occupied by at least one person age 55 or more since September 13, 1988. Properties meeting these conditions may adopt a selection preference that favors elders over eligible non-elder households, including non-elderly people with disabilities. Owners must continue to rent accessible units to non-elders with disabilities on the waiting list who need the features of the unit, unless there is a tenant already in occupancy who also needs the unit. Providers must also continue to comply with the set-aside requirements applicable to the building under the DMH and DMR set-aside programs. Owners lose the option to elect the elder selection preference if the population of elders in the property falls below 80%.⁵⁹

(vi) Community Preservation Act. The CPA permits communities to develop low or moderate income senior housing for people age 60 or more.⁶⁰

4. People with Disabilities

Most program rules that address selection preferences for people with disabilities are similar to the kinds of preferences providers may implement in favor of elders. And, in the same way that age discrimination laws affect preferences for elders, disability rights laws can limit the kinds of preferences a housing provider may implement for people with disabilities. Program related standards permitting selection preferences for people with disabilities are described in this part of the Practice Guide. Civil rights considerations are addressed in Part III.

(i) Federal Public Housing, Section 8 Housing Choice Vouchers and Multi-Family Section 8 Assistance. PHAs operating federal public housing and the Section 8 Housing Choice Voucher program, and housing providers receiving Multi-Family Section 8 Assistance are permitted to adopt selection preferences to their general occupancy housing programs for single non-elderly disabled families. They may also implement selection preferences for families that include a person with disabilities.⁶¹ However, program rules forbid the use of selection preferences for people with specific disabilities.⁶² With HUD approval, a PHA may designate a part of a public housing development solely for non-elderly people with disabilities. Such an allocation plan can be implemented with selection preferences that favor people with disabilities over other eligible applicants.⁶³ Where a PHA enters into contracts to project base Section 8 Housing Choice Vouchers, properties may be developed that serve only tenants with disabilities.⁶⁴

(ii) HOME Program. Selection preferences for people with disabilities, including “persons with a special need or particular disability” are permitted when HOME funds are used for tenant based rental assistance.⁶⁵ HUD guidance supports the use of HOME funds to create preferential housing for people with disabilities in both the tenant based rental assistance component of the program and in the rental housing construction element of the program.⁶⁶

(iii) DHCD Programs. DHCD’s Chapter 667 state public housing program for elders and people with disabilities limits eligibility based on age and disability, and the AHVP serves only people with disabilities.⁶⁷ The agency’s Section 8 Administrative Plan provides for number of set-aside programs and preferences for the benefit of people with disabilities, including people with AIDS, and people with mental retardation.⁶⁸ There are no provisions in state public housing, in the MRVP, or LIP programs for selection preferences for people with disabilities among other eligible applicants.

(iv) MassHousing. MassHousing requires some multi-family owners to participate in the DMR and DMH set-aside program and also requires all multi-family owners to offer first preference for accessible units to families with individuals who need the features of the units. However, there are no other provisions applicable to MassHousing programs that explicitly permit selection preferences for people with disabilities.

(v) Accessible Units for People with Disabilities. State and federal laws impose a variety of standards to assure that dwelling units are architecturally usable by people with disabilities.⁶⁹ Under the Massachusetts Housing Bill of Rights, public and private landlords must offer vacant accessible units to individuals who notified the owner during the previous twelve months that they need the features of the unit. Landlords are also required to provide fifteen days notice of the availability of an accessible unit to Mass Access, a central, statewide registry of accessible apartments.⁷⁰ Owners of housing receiving federal financial assistance, including federal public housing, HOME funds, Section 202 and Section 811 assistance, Multi-Family Section 8 Assistance and Project Based Section 8 Vouchers, are required to offer accessible units first to families in occupancy who need an accessible unit, and then to the first household on the waiting list needing the features of the unit. Where there are no families either in occupancy or on the waiting list that require accessibility features, an owner may lease the unit to a household that does not need an accessible unit. In that situation, a landlord is also permitted to use a lease

provision requiring the family to move to another available unit in the event a household applies that needs an accessible apartment.⁷¹

5. Homeless Families

Some programs permit housing providers to adopt selection preferences for homeless families. For example, in federal public housing and in the Section 8 Housing Choice Voucher program, PHAs may adopt selection preferences for single, homeless individuals.⁷² Under the HOME program, a housing provider may elect preferences for homeless families as “persons with special needs.”⁷³ DHCD’s Section 8 Administrative Plan creates selection preferences for several categories of applicants residing in transitional housing programs, including programs that serve homeless families.⁷⁴ Emergency case plans developed by PHAs for purposes of state public housing, MRVP and AHVP must offer emergency case status and selection preferences to homeless applicants.⁷⁵

E. WAITING LISTS AND IMPLEMENTATION OF SELECTION PREFERENCES

1. Basic Principles for Waiting Lists

A housing provider’s implementation of selection preferences must be consistent with program standards related to waiting list management, whether the preferences are based on program requirements, or on the permissive preferences specifically identified in program rules, or on preferences adopted by the provider based solely on local need, or on a combination of these approaches. Various housing programs permit or require different kinds of waiting list practices. In state public housing and in MassHousing programs, for example, owners must establish waiting lists by date and time of application.⁷⁶ DHCD’s Chapter 40B and LIP guidelines mandate “a fair and equitable process such as a lottery” to create and order waiting lists.⁷⁷ Federal programs tend to be more flexible, allowing providers to select lottery techniques, other random ordering methods, date and time of application, or other fair procedures.⁷⁸ Virtually all programs allow owners to create sub-lists that match particular applicant characteristics to particular categories of units to assure that households are assigned to units of appropriate size, or with appropriate amenities such as accessibility features.⁷⁹

Within the context of these waiting list standards, providers are generally permitted to choose the way in which preference schemes are administered, including situations where a provider utilizes multiple preferences.⁸⁰ Examples of different selection preference strategies include:

1. Ranking preferences for selection, where the households characterized by the priority need are selected before other applicants. For example, families displaced by public action may be selected first before other applicants with preferences, followed by homeless families, followed by individuals who are victims of domestic violence.
2. Establishing priorities within preferences. For example, a homeless family that includes an elderly member may be selected before other homeless families.⁸¹

3. Weighting preferences by awarding points for individual preferences, and selecting applicants with the greatest number of aggregate points. A homeless family with no other preference characteristics might receive one preference point, and be selected after a homeless household including a veteran, which might receive two preference points.

4. Establishing preferences as a percentage of admissions. For example, where necessary to address racial imbalances in public housing occupancy patterns, DHCD affirmative action standards require PHAs to select a minority household in one of every three admissions in order to meet DHCD affirmative action requirements.⁸²

2. Waiting List Management, Turnover and Homeownership Programs

The basic principles for making selections from waiting lists based on preferences apply to both the selection of initial participants in a program, and the distribution of units upon turnover. However, local housing needs, program needs, and the characteristics of program participants and applicants can change over time. It is therefore important for providers to analyze, update and manage waiting lists to ensure that waiting list practices remain consistent with the objectives of the housing program. Waiting list analysis and updating should focus on individual applicants, including continued eligibility, household composition, and continued need for the housing. It should also take into account the number of families on the waiting list, the rate of turnover, the expected time when a household can reasonably expect to be offered a unit, and whether or not the waiting list should remain open or closed. Particularly with respect to selection preferences, it is also useful to determine if there is a sufficient number and variety of applicants to assure full utilization of the housing program's resources, whether the waiting list is adequately representative of the racial, ethnic, social and economic characteristics of potential applicants in the housing market, whether program requirements for income targeting can be achieved with current waiting list, and whether or not the existing waiting list will meet the provider's priorities for offering housing opportunities to the geographic area served by the program.⁸³

The same principles apply to homeownership programs. Some homeownership programs, like the Local Initiative Program, restrict resale of affordable homes to eligible low-income purchasers.⁸⁴ Others, such as the HOME program, and the Community Preservation Act, allow but do not require providers to impose resale restrictions.⁸⁵ The period before unit turnover may be longer for homeownership than for rental units, both because of the nature of homeownership, and the lesser number of units subject to restrictions upon turnover. Where resale provisions are in effect, the community or the provider should therefore consider whether homes should be resold from a waiting list, or whether it is more appropriate for resale to be conducted through new marketing and a lottery. In making the decision, the provider should also consider which approach will achieve the objectives of the homeownership program.

ENDNOTES TO PART II

¹ See, P.L. 104-330 (October 26, 1996), §402(d)(1) (suspending mandatory federal selection preferences), and P.L. 105-276, §514 (October 21, 1998) (repealing preferences). For rental units in the HOME program, see, 67 Fed. Reg. 61756 (October 1, 2002).

² 760 C.M.R. §5.09(1). See also, 760 C.M.R. §5.03 (definition of “transfer for good cause”). While fourth priority selections from emergency case plans are mandatory, a PHA has some discretion with respect to the content of the emergency case plan, subject to the approval of DHCD. See, 760 C.M.R. §5.11 (state public housing); 760 C.M.R. §49.04 (MRVP); 760 C.M.R. §53.04 (AHVP).

³ 760 C.M.R. §5.09.

⁴ 760 C.M.R. §5.10(2).

⁵ DHCD Section 8 Administrative Plan, §3.

⁶ Tenant Selection Regulations of the Massachusetts Housing Finance Agency (May 1, 2003) (“MassHousing Tenant Selection Regulations”).

⁷ See, e.g., 42 U.S.C. §1437d(c)(4) (federal public housing); 42 U.S.C. §1437f(o)(6)(A)(ii) (Section 8 Housing Choice Voucher Program).

⁸ Id.

⁹ See, HUD Handbook No. 8025.1 REV-2, *Implementing Affirmative Fair Housing Marketing Plan Requirements* (Office of Fair Housing and Equal Opportunity, April 1993) (“Affirmative Fair Housing Marketing Handbook”) at par. 2-12(A).

¹⁰ 42 U.S.C. §1437d(c)(4)(A) (public housing); 42 U.S.C. §1437f(o)(6)(A)(ii) (Section 8 Housing Choice Vouchers); *Affirmative Fair Housing Marketing Handbook* at par. 2-12(A) (Multi-Family Section 8 Assistance); Notice CPD 96-07. *Guidance on Tenant Based Rental Assistance Under the HOME Program* (Office of Community Planning and Development, November 1, 1996). HUD’s Consolidated Planning regulations govern the use of HOME funds, Community Development Block Grants, Emergency Shelter Grants, and funds for HUD’s program of Housing Opportunity for People with AIDS. The rules require participating jurisdictions to complete comprehensive housing needs and housing market assessments, taking into account housing need based on income, status as renter or owner, age, disability, and other demographic characteristics. 24 C.F.R. §91.205

¹¹ 42 U.S.C. §1437c-1 (public housing agency plans); §1437d(c)(4)(A) (public housing); 42 U.S.C. §1437f(o)(6)(A)(ii) (Section 8 Housing Choice Vouchers); 24 C.F.R. Part 91, Subpart B (consolidated plans).

¹² LIP Guidelines, page 14.

¹³ *Guidelines for Housing Programs In Which Funding is Provided Through a Non-Governmental Entity* (DHCD, undated) (“40B NEF Guidelines”).

¹⁴ 24 C.F.R. §960.206(a).

¹⁵ See, *Multi-Family Occupancy Handbook*, par. 4-6(C) at page 4-12.

¹⁶ *MassHousing Tenant Selection Regulations*, Section III(E).

¹⁷ For the federal housing programs, see, 24 C.F.R. §5.105(a) (general HUD non-discrimination standards); 24 C.F.R. §5.655(c)(1)(iv) and *Multi-Family Occupancy Handbook*, par. 4-6(C) at page 4-12 (federal multi-family

housing programs); 24 C.F.R. §92.350 (HOME program); 24 C.F.R. §960.206(b)(i) and (iii) (federal public housing); 24 C.F.R. §982.207(b) (Section 8 Housing Choice Voucher program). In tax credit projects, units do not qualify as low-income units unless they are available “for use by the general public.” Internal Revenue Services rules interpret this requirement to mean that providers must comply with federal non-discrimination laws, including HUD civil rights regulations. 26 C.F.R. §1.42-9. For state programs, *see*, M.G.L. ch. 121B, §32 (“For all purposes of this chapter no person shall, because of race, color, creed, religion, blindness or physical handicap be subjected to any discrimination or segregation.”); *LIP Guidelines*, page 14; *MassHousing Tenant Selection Regulations*, Section III(E); 760 C.M.R. §47.08 (affirmative action and non-discrimination requirements applicable to local housing agencies) and §47.09 (to same affect, other applicants for state housing funds). DHCD’s affirmative action regulations also incorporate by reference now repealed civil rights rules applicable to local housing agencies. Under the repealed rules, local housing agencies must “engage in and promote fair housing and tenant selection practices so as to prevent discrimination and segregation and to remedy the effects of past discrimination.” 760 C.M.R. §33.06(1), effective pursuant to the savings clause at 760 C.M.R. §47.08.

¹⁸ 760 C.M.R. §5.11.

¹⁹ *Section 13A Interest Subsidy Handbook*, page 14; *MassHousing Tenant Selection Regulations*, Section III(E).

²⁰ 24 C.F.R. §5.655(b)(2); *Multi-Family Occupancy Handbook*, par. 4-4(A) at page 4-3.

²¹ *Affirmative Fair Housing Marketing Handbook*, par. 6-7(B)(7)(b).

²² 24 C.F.R. §92.253(d) (HOME rental units); 24 C.F.R. §982.54(d)(1) and (16) (Section 8 Housing Choice Vouchers); 24 C.F.R. §960.202(a)(1) (federal public housing rentals); 24 C.F.R. §903.7(k) (public housing agency plan requirements for public housing homeownership).

²³ 26 U.S.C. §42(m)(1)(A)(iii); *see also*, 2004 QAP at page 34.

²⁴ 760 C.M.R. §31.07(1)(i).

²⁵ *See*, *Chapter 40B Guidelines for Planned Production Regulation* (DHCD) (“*Planned Production Regulation*”).

²⁶ M.G.L. ch. 44B, §5(b).

²⁷ *See*, 24 C.F.R. §5.655(c)(1)(i) and (v) and the *Multi-Family Occupancy Handbook*, par. 4-6(C)(1)(a) and (g) (multi-family programs); 24 C.F.R. §960.206(b)(1)(ii) (public housing); 24 C.F.R. §982.207(b)(1)(ii) (Section 8 Housing Choice Vouchers).

²⁸ Durational residency requirements were most recently struck down in *Saenz v. Roe*, 119 S. Ct. 1518 (1999). For a comparable Massachusetts case, *see*, *Strong v. Collatos*, 593 F.2d 420 (1 Cir. 1979) (veterans benefits residency requirement). The *Saenz* court observed that residency requirements that interfere with the right to move from one place to another are subject to the strictest level of judicial scrutiny and are not valid unless justified by compelling governmental interests. Residency requirements that focus on other activities may be subject to lesser levels of review. *See, e.g., Doe v. Com’r. of Transitional Assistance*, 437 Mass. 521 (2002). In *Doe*, a six month residency requirement imposed on undocumented immigrants as a condition of eligibility for public assistance was upheld because it was based in part on the legitimate exercise of state authority under a federal law regulating immigration. Residency requirements in housing programs affect the right to travel protected by the highest level of judicial review in *Saenz* and *Strong*. It is worth noting that the constitutional principles at work in those cases do not prohibit local selection preferences among otherwise eligible residents and non-residents. *See, Fayerweather v. Narragansett Housing Authority*, 848 F. Supp. 19 (D. RI 1994).

²⁹ 24 C.F.R. §5.655(c)(1)(iv) (multi-family housing); 24 C.F.R. §960.206(b)(1)(i) and (iv) (public housing); 24 C.F.R. §982.207(b)(1)(i) and (iv) (Section 8 Housing Choice Vouchers). In *Raso v. Lago*, the court endorsed a limited neighborhood-based selection preference. However, the preference was designed to offer housing opportunities to households previously displaced by urban renewal activities in the same area where the new

housing was constructed, as part of a state statutory framework aimed at offering preferences for displaced households, consistent with federal requirements, including federal fair housing requirements. *See, Raso v. Lago*, 135 F.3d 11 (1 Cir. 1998).

³⁰ 24 C.F.R. §5.655(c)(1)(iv) and *Multi-Family Occupancy Handbook*, par. 4-6(C)(1)(b) (multi-family programs); 24 C.F.R. §960.206(b)(1)(iii) (federal public housing); 24 C.F.R. §982.207(b)(1)(iii) (Section 8 Housing Choice Vouchers).

³¹ 760 C.M.R. §47.07 and §47.08 (state public housing, AHVP and MRVP); *LIP Program Guidelines*, p. 14; *MassHousing Tenant Selection Regulations*, Section III(B).

³² *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2000)

³³ 24 C.F.R. §5.655(c)(1)(vi) and *Multi-Family Occupancy Handbook*, par. 4-6(C)(1)(d) (multi-family programs); 24 C.F.R. §960.206(b)(1)(v) (federal public housing); 24 C.F.R. §982.207(b)(1)(v) (Section 8 Housing Choice Vouchers).

³⁴ *See, 40B NEF Guidelines*.

³⁵ *40B NEF Guidelines* at section 22; *LIP Guidelines* at p. 14.

³⁶ *Affirmative Fair Housing Marketing Handbook* at par. 2-12(A).

³⁷ *Compare, e.g.*, 65 Fed. Reg. 31584, 31585 (May 18, 2000) (fiscal year 2000 Section 8 Fair Share Notice of Funding availability; rating points for local selection preferences that do not exceed 15% of admissions); 65 Fed. Reg. 78039, 78043 (December 13, 2000) (fiscal year 2001 notice, rating points for selection preferences that do not exceed 50% of admissions); 67 Fed. Reg. 8427 (February 22, 2002) (fiscal year 2002 notice, no limits on selection preferences).

³⁸ *LIP Guidelines* at p. 13.

³⁹ 24 C.F.R. §903.7(b); *see also*, 24 C.F.R. §960.206(a)(1) (federal public housing) and 24 C.F.R. §982.207(a)(2) (Section 8 Housing Choice Vouchers).

⁴⁰ HUD Handbook No 8004.1, *Consolidated Civil Rights Monitoring Requirements, Public Housing Agency, Section 8 Existing and Lower Income Public Housing Programs* (December 1989) (“*Civil Rights Monitoring Handbook*”) at par. 4-12(A)(3)(b)(1)(E).

⁴¹ *Affirmative Fair Housing Marketing Handbook* at par. 2-12(A). *See also*, 24 C.F.R. §200.625 (affirmative fair housing marketing regulations).

⁴² 24 C.F.R. §108.15.

⁴³ 24 C.F.R. §5.655(c)(1)(iii); *Multi-Family Occupancy Handbook*, par. 4-6(C)(1)(c).

⁴⁴ *Affirmative Fair Housing Marketing Handbook* at par. 5-4(A)(1).

⁴⁵ *See*, notes 8 to 14 and accompanying text.

⁴⁶ *See*, 24 C.F.R. §5.655(c)(2) and *Multi-Family Occupancy Handbook*, par. 4-6(C)(3) (multi-family housing); 24 C.F.R. §960.206(b)(2) (federal public housing) and 24 C.F.R. §982.207(b)(2) (Section 8 Housing Choice Vouchers). The federal public housing rule forbidding preferences based on level of income is not applicable to HUD’s HOPE VI program of public housing revitalization. Because of the mixed-finance nature of the HOPE VI program, public housing policy permits tenant selection by income tier. *See, Mixed Finance Policy Alert: Site-Based Waiting Lists* (Office of Public and Indian Housing, January 2, 2002).

⁴⁷ 24 C.F.R. §5. 655(c)(4) and *Multi-Family Occupancy Handbook*, par. 4-6(C)(4) (multi-family housing); 24 C.F.R. §960.206(b)(4) (public housing) and 24 C.F.R. §982.207(b)(4) (Section 8). *See also*, 42 U.S.C. §1437f(o)(6)(A)(i) (Section 8 Tenant Based Voucher preference for victims of violent crime).

⁴⁸ 24 C.F.R. §960.206(b)(5).

⁴⁹ 24 C.F.R. §960.102(b).

⁵⁰ 24 C.F.R. §960.407(a).

⁵¹ *Designated Public Housing Handbook* (Abt Associates, August 1998), page 26.

⁵² 24 C.F.R. §982.207(b)(5).

⁵³ *See*, P.L. 102-550, §651, *et seq* (October 21, 1992), codified at 42 U.S.C. §13611 to §13617.

⁵⁴ *See, e.g.*, 24 C.F.R. §880.612a; *see also*, *Multi-Family Occupancy Handbook*, par. 3-17(A).

⁵⁵ 24 C.F.R. §5.655(c)(5).

⁵⁶ *See*, Part I, note 12 and accompanying text.

⁵⁷ 24 C.F.R. §92.209(c)(2).

⁵⁸ *See*, *HOMEfires*, Vol. 1, No. 4 (HUD, October 30, 1997), available at <http://www.hud.gov:80/offices/cpd/affordablehousing/library/homefires/volumes/vol1no4.cfm>.

⁵⁹ *MassHousing Tenant Selection Regulations* at Section III(E), Section III(H)(1) and Exhibit 1 (*Advisory: MHFA's Policy on Mixed Populations in Agency-Financed State-Assisted Developments*, October 23, 1996). The reference in MassHousing policy to September 13, 1988 apparently relates to the date of the enactment of the Fair Housing Amendments Act of 1988, P.L. 100-430, which imposed prohibitions on discrimination based on familial status, but provided for exemptions for certain "55 and over housing." The relevant provisions of the Fair Housing Act were amended by the Housing for Older Persons Act of 1995, P.L. 104-76 (December 28, 1995), and HUD published implementing regulations in 1999. *See*, 63 Fed. Reg. 16323 (April 2, 1999). MassHousing's policy did not change in response to the new federal rules, and it is unclear precisely how the agency drew the connection between the family status provisions in the Fair Housing Act and the ability of owners to exclude occupancy by non-elders with disabilities.

⁶⁰ *See*, M.G.L. ch. 44B, §1 (definitions of "community housing" and "low or moderate income senior housing").

⁶¹ 24 C.F.R. §5.655(c)(3) and (5); (Multi-Family Section 8 Assistance); 24 C.F.R. §960.206(b)(3) and (5) (public housing); 24 C.F.R. §982.207(b)(3) and (5) (Housing Choice Vouchers).

⁶² 24 C.F.R. §5.655(c)(3) (Multi-Family Section 8 Assistance); 24 C.F.R. §960.206(b)(3) (public housing); 24 C.F.R. §982.207(b)(3) (Section 8 Housing Choice Vouchers).

⁶³ 42 U.S.C. §1437e. *See also*, HUD Notice PIH 97-12 (HA) (March 12, 1997).

⁶⁴ 42 U.S.C. §1437f(o)(13).

⁶⁵ 24 C.F.R. §92.209(c)(2).

⁶⁶ See, *HOMEfires*, Vol. 1, No. 4 (HUD, October 30, 1997), available at:

<http://www.hud.gov:80/offices/cpd/affordablehousing/library/homefires/volumes/vol1no4.cfm>.

⁶⁷ See, M.G.L. ch. 121B, §39 (Chapter 667 public housing); 760 C.M.R. §53.03(1) (AHVP).

⁶⁸ *DHCD Section 8 Administrative Plan*, §3.

⁶⁹ See, e.g., M.G.L. ch. 22, §13A and Title 521 of the Code of Massachusetts Regulations (Massachusetts Architectural Access Board; publicly financed buildings); M.G.L. ch. 151B, §4(6) (Massachusetts Housing Bill of Rights; all public and private dwellings with 3 or more units constructed for first occupancy after March 1991); 42 U.S.C §3604(f) (federal Fair Housing Act; design standards for dwellings with 4 or more units constructed for first occupancy after March 1991); 24 C.F.R. §8.22, *et seq* (Section 504 requirements for housing assisted with HUD funds); 28 C.F.R. Part 35, Subpart D (ADA requirements for state governmental and local programs).

⁷⁰ M.G.L. ch. 151B, §4(7A). For MHFA programs, *see also*, *MassHousing Tenant Selection Regulations* at Section III(H)(1). For state public housing programs, *see*, 760 C.M.R. §5.10(b). For units developed under M.G.L. ch. 40B utilizing Affordable Housing Program funds through the New England Fund of the Federal Home Loan Bank of Boston, *see*, *40B NEF Guidelines*. For LIP units, *see*, *LIP Guidelines*, page 14. Mass Access, the Massachusetts Accessible Housing Registry, is created through the Massachusetts Rehabilitation Commission, and is maintained at CHAPA. *See*, M.G.L. ch. 6, §79. *See also*, the on-line Mass Access data base at:

<http://www.massaccesshousingregistry.org>

⁷¹ 24 C.F.R. §8.27.

⁷² 24 C.F.R. §960.206(b)(5) (federal public housing); 24 C.F.R. §982.207(b)(5) (Section 8 Housing Choice Vouchers).

⁷³ *HOMEfires*, Vol. 1, No. 4 (HUD, October 30, 1997).

⁷⁴ *DHCD Annual Plan*, page 20.

⁷⁵ 760 C.M.R. §5.11.

⁷⁶ 760 C.M.R. §5.05(2) (state public housing); *Section 13A Interest Subsidy Handbook*, page 14 and *MassHousing Tenant Selection Regulations*, Section III(F) (MassHousing).

⁷⁷ *40B NEF Guidelines* at section 20; *LIP Guidelines* at p. 14.

⁷⁸ See, e.g., 24 C.F.R. §92.253(d)(3) (HOME); 24 C.F.R. §960.206(e) (public housing); 24 C.F.R. §982.207(c) (Section 8 Housing Choice Vouchers); *Multi-Family Occupancy Handbook*, par. 4-6(D) (multi-family housing programs).

⁷⁹ See, e.g., 24 C.F.R. §960.206(c) (federal public housing).

⁸⁰ Various strategies for implementing selection preferences can be found in the *Multi-Family Occupancy Handbook*, par. 4-6(D), the *Public Housing Occupancy Guidebook* (HUD, June 2003), page 34, and in the *MassHousing Tenant Selection Regulations*, Section III(E).

⁸¹ Priorities within preferences as also a feature of DHCD's mandatory selection scheme. *See*, 760 C.M.R. §5.09.

⁸² 760 C.M.R. §5.10(3).

⁸³ See, Chapter 4, §3 of the *Multi-Family Occupancy Handbook*, Chapter 3 of the *Public Housing Occupancy Guidebook*, and in HUD Guidebook 7420.10G, *Housing Choice Voucher Program Guidebook* (HUD, April 2001), Chapter 4.

⁸⁴ *LIP Guidelines*, pages 4 and 7. See also, *NEF Guidelines*, par. 13.

⁸⁵ 24 C.F.R. §92.254(a)(5)(i) (HOME); M.G.L. ch. 44B, §2 (definition of “real property interest”). Still other homeownership programs provide for recapture of assistance over defined affordability periods, but do not impose resale restrictions. See, e.g., 24 C.F.R. §906.27 (public housing homeownership). HOME program rules allow participating jurisdictions to choose between resale restrictions and recapture of assistance. See, 24 C.F.R. §92.254(a)(5)(i) (resale) and (a)(5)(ii) (recapture). The homeownership option of HUD’s Section 8 Housing Choice Voucher Program permits neither resale restrictions or recapture of assistance. See, 24 C.F.R. §982.625(h).

PART III: CIVIL RIGHTS CONSIDERATIONS IN SELECTION PREFERENCES

OVERVIEW OF PART III

Every housing program requires affordable housing providers to comply with civil rights standards in each aspect of development and operations.¹ One way of understanding civil rights standards is to group them into three categories. One category consists of civil rights laws of general applicability, like the federal Fair Housing Act, Section 504 of the 1973 Rehabilitation Act, or Title VI of the Civil Rights Act of 1964. Second, the rules for particular housing programs may also impose specific civil rights related program requirements. Finally, federal executive orders, the Fair Housing Act and Massachusetts Executive Orders also impose an obligation on state and federal agencies to affirmatively further civil rights and fair housing.² These three civil rights mandates; the general obligation not to discriminate, the responsibility to comply with civil rights related program requirements, and the obligation to further fair housing all have an impact on selections and admissions to affordable housing.

A. CIVIL RIGHTS LAWS

Civil rights laws in the United States developed over time and in response to widely different social and political conditions. An examination of all these laws is beyond the scope of the Practice Guide.³ The concept of “civil rights” used in the Practice Guide is focused on the specific laws commonly encountered by housing providers on a day-to-day basis, such as the Fair Housing Act, and the Americans with Disabilities Act. They are implemented through executive orders, substantive and procedural regulations and guidance issued by federal, state, or local agencies. For housing providers, the key to understanding these laws is to know the source of the law, the agency responsible for implementing or enforcing the law, the types of housing and programs that are subject to the law, the categories of people protected by the law, and the conduct prohibited or regulated by the law. Legal authorities, enforcement agencies and covered housing and programs are summarized in Figure 3.

1. Covered Housing and Programs

(i) Laws that apply to buildings. Some civil rights laws are generally applicable to all housing. These laws generally regulate owners based on the size of the property or the characteristics of the units. For example, the federal Fair Housing Act (also known as Title VIII of the Civil Rights Act of 1968)⁴ applies to the rental and sale of “dwellings,” including temporary and permanent places of residence such as apartments, single family homes, single room occupancy units, group homes, homeless shelters and residential treatment facilities.⁵ Only single family homes sold by the owner without the assistance of a broker, and without discriminatory advertising, and owner-occupied properties of four units or less are exempt from the broad coverage of the law.⁶ The comparable Massachusetts fair housing law, Chapter 151B, provides for similar coverage, exempting only owner-occupied properties of less than three units, and home sales of ten units or less sold without brokerage or advertising.⁷

(ii) Laws that apply based on source of financing. The source of the funds for the housing program may trigger other laws. Title VI of the 1964 Civil Rights Act,⁸ Title IX of the of the Education Amendments of 1972,⁹ Section 504 of the 1973 Rehabilitation Act,¹⁰ and the Age Discrimination Act of 1975¹¹ all apply to programs that receive federal financial assistance. “Federal financial assistance” means federal grants and loans, advances of federal funds, a donation or sale of federal property, in-kind contributions of federal support, and federal contracts, but not contracts of insurance or loan guaranties like HUD’s Section 221(d)(4) program of mortgage insurance.¹² Covered programs include all forms of Section 8 assistance, the HOME program, and the Section 202 and 811 programs.

These laws apply to *all* the activities of the entity receiving the funds, even if the funds are extended to only one part of the entity, or even if the funds support limited or specific activities. For example, the activities of an *entire* entity are governed by these federal statutes if the recipient is an instrumentality of government, like a housing authority, or if assistance is extended to a corporation or partnership as a whole, or if the funds are extended to a particular division of a corporation, partnership or other business entity whose sole purpose is the provision of housing or health or social services.¹³ In addition to recipients, sub-recipients must comply with the non-discrimination requirements.¹⁴

Other sources of funding trigger somewhat different schemes. For example, Title II of the ADA outlaws disability discrimination in services, programs and activities provide or made available by public entities like state and local governments, without regard to federal funding.¹⁵ All the activities of a public entity are covered by Title II, even where they are provided by non-governmental contractors.¹⁶ To qualify for tax credits in the LIHTC program, a unit must be available for “use by the general public.” Under Internal Revenue Service rules, a unit meets this standard if it is rented “in a manner consistent with housing policy governing non-discrimination, as evidenced by the rules and regulations of” HUD, and the standards set out in HUD’s *Multi-Family Occupancy Handbook*.¹⁷ At the very least, this means that a tax credit owner must comply with the Fair Housing Act.¹⁸

(iii) Public Accommodations Under the ADA. Title III of the ADA outlaws discrimination based on disability in places of public accommodation. The ADA definition of a “public accommodation” applies to non-housing facilities such as retail establishments. It also includes transient lodging facilities like homeless shelters and social services establishments, and therefore regulates transitional housing, community residences and group homes, and housing programs linked to supportive services like the Section 202 or Section 811 programs.¹⁹ Such facilities may also be covered by Title VIII, resulting in overlapping coverage.²⁰

**FIGURE 3
CIVIL RIGHTS LAWS**

Law	Legal Authorities	Responsible Agency	Covered Housing or Programs	Protected Classes
Fair Housing Act (Title VIII)	42 U.S.C. §3601, <i>et seq.</i> ; 24 C.F.R. Part 100.	HUD	All rentals and sales	Race, color, religion, national origin, gender, familial status, disability.
Chapter 151B	M.G.L. ch. 151B	Massachusetts Commission Against Discrimination	All rentals and sales	Race, color, religion, creed, national origin, gender, familial status, disability, age, marital status, sexual orientation, receipt of public assistance, including rental assistance.
Title VI	42 U.S.C. §2000d, <i>et seq.</i> ; 24 C.F.R. Part 1	HUD	Programs and activities with federal financial assistance.	Race, color and national origin.
Title IX	20 U.S.C. §1681, <i>et seq.</i> ; 24 C.F.R. Part 3	HUD	Educational programs and activities with federal financial assistance.	Gender
Section 504	29 U.S.C. §794; 24 C.F.R. Part 8	HUD	Programs and activities with federal financial assistance.	Disability
Age Discrimination Act of 1975	42 U.S.C. §6101, <i>et seq.</i> ; 24 C.F.R. Part 146	HUD	Programs and activities with federal financial assistance.	Age
Americans with Disabilities Act, Title II	42 U.S.C. §12202; 28 C.F.R. Part 35	Department of Justice; HUD for housing programs	State and local governmental services	Disability
Americans with Disabilities Act, Title III	42 U.S.C. §12202; 28 C.F.R. Part 35	Department of Justice	Public Accommodations	Disability

(iv) Architectural Access. Laws that require owners to construct or maintain accessible units apply based on the characteristics of the buildings or projects, or on the source of the funding, or on a combination of these factors. Under the Fair Housing Act, “covered multi-family dwellings” constructed for first occupancy after March 13, 1991 must comply with HUD’s Fair Housing Act Accessibility Guidelines (FHAAG). “Covered multi-family dwellings” are all the units in an elevator building with four or more dwelling units, or all the ground floor units in a non-elevator building with four or more dwelling units.²¹ Multi-level, non-elevator townhouse construction is not covered because the units occupy more than one floor. Buildings that were constructed for first occupancy before March 13, 1991 and renovated after that date are also not covered by the Fair Housing Act.²²

Requirements imposed under Massachusetts law by Chapter 151B are similar. Under that law, covered dwellings are all the units in an elevator building with three or more dwelling units or all the first floor units in a non-elevator building with three or more dwelling units where the building was constructed for first occupancy after March 13, 1991.²³ The scope of Chapter 151B’s architectural access standards are broader than those of Title VIII in several other respects. Where the Fair Housing Act only requires an owner to permit a tenant to make reasonable physical modifications to a unit for buildings constructed before 1991, under Chapter 151B, reasonable modifications are at the landlord’s expense for “publicly assisted housing accommodations, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units...”²⁴

In contrast to the manner in which Chapter 151B and Title VIII regulate *buildings*, other laws impose architectural access requirements on *programs, activities, or projects*. For example, the new construction standards of Section 504 apply to multi-family housing projects consisting of five or more dwelling covered by a single contract for federal financial assistance, whether or not they are located on a common site.²⁵ Under Title II of the ADA, the “benefits of the programs, services or activities” of state and local public services must be accessible.²⁶ The Massachusetts architectural access law regulates public buildings constructed with public funds, and privately constructed “multiple dwellings.”²⁷

State and federal agencies responsible for administering and enforcing architectural access laws publish technical standards that describe the elements of dwelling units that must be accessible and the measures that make those elements accessible. A discussion of those standards is beyond the scope of the Practice Guide. They are depicted in Figure 4.

2. Protected Classes

The basic civil rights laws housing providers encounter on a daily basis are designed to end discrimination based on particular human characteristics. Figure 3 depicts the categories of people protected by various civil rights laws. While prohibitions on discrimination against some classes of people are self-evident, such as skin color, other categories bear some greater explanation.

(i) Race

Civil rights laws outlaw all discrimination when based on racial prejudice of any kind. For purposes of implementing program requirements for civil rights monitoring and compliance, and for affirmative action selection preferences in state housing programs, state and federal agencies provide specific definitions of racial categories. Minimum statistical requirements for compliance with federal civil rights laws set out five categories of race for these purposes: White, American Indian or Alaskan Native, Black or African-American, Hispanic or Latino, and Native Hawaiian or Other Pacific Islander.²⁸ DHCD rules use somewhat different standards, setting out categories of race for Native Americans or Alaskan Natives, Asian or Pacific Islanders, Blacks, Hispanics, and Cape Verdeans.²⁹

(ii) National Origin

In housing with some forms of federal assistance, such as Multi-Family Section 8 Assistance and federal public housing, owners are required to screen for eligible citizenship and immigration status.³⁰ Other federal laws restrict access to public benefits to non-citizens, including undocumented immigrants and immigrants without an acceptable immigration status.³¹ The Fair Housing Act permits the kinds of inquiries necessary to apply these eligibility criteria, and also permits general inquiries in non-subsidized housing about citizenship and immigration status in screening applicants for admission, as long as the screening criteria are applied evenly to all applicants and do not constitute a pretext for discrimination based on national origin.³² However, federal policy instructs *assisted* housing providers to apply immigration restrictions on eligibility for *assisted* housing only when required by law.³³ In Massachusetts, state law provides a broad authorization for the provision of state-funded public benefits to non-citizen immigrants.³⁴

(iii) Family Status

The Fair Housing Act and Chapter 151B both protect families with children. Both statutes outlaw discrimination based on “familial status;” that is, the presence in the household of a child under the age of eighteen.³⁵ Protected families include a parent or another person with legal custody of a child, the designee of a parent or legal custodian, pregnant women, and households in the process of obtaining legal custody of a child, such as foster families.³⁶

Some forms of housing are not covered by the familial status provisions of Title VIII and Chapter 151B. Exempt housing under Title VIII includes housing provided under a state or federal program that HUD “determines is specifically designed and operated to assist elderly persons...”³⁷ Similar exemptions apply under state law.³⁸ The fact that a state or federal housing program serves elders does not always permit an owner to exclude a qualifying elderly family with children. In such programs as federal public housing, the Section 8 Housing Choice Voucher program, properties receiving Multi-Family Section 8 Assistance, and the Section 202 program, the definition of a qualifying “elderly family” consists of a family whose sole member, spouse, or head of household is age 62 or more.³⁹ A similar definition of elderly household applies in state public housing programs.⁴⁰ For the federal programs using such a definition,

HUD policy makes it clear that providers may not exclude an otherwise eligible elderly family with children from elderly housing, such as an elder caring for a grandchild.⁴¹

Other types of housing exempt from the family status provisions of Title VIII include housing that is solely for individuals age 62 or more, and housing intended for occupancy by, and operated as housing for people age 55 and older.⁴² Under federal law, properties operated as housing for people age 55 and older must comply with record keeping standards documenting that at least 80% of the units in the development are occupied by households where at least one member is over the age of 55. Properties claiming the exemption must also maintain written policies that evidence the intention to operate as over-55 housing, including marketing materials, lease provisions, and written rules.⁴³

Under Chapter 151B, LIHTC properties intended for use as housing for persons 55 years of age, or over or for people 62 years of age or over are exempt from the prohibition on discrimination based on family status. Other housing developments for individuals over 55 or over 62 are exempt only if located on one parcel of land or contiguous parcels of land consisting of five acres or more.⁴⁴ Additional exemptions from the family status provisions of Chapter 151B include buildings with three or fewer apartments, where one unit is occupied by an individual age 65 or more and the presence of children would impose a hardship on the elder, the temporary leasing or sub-leasing of a single unit by an owner or lessee, and the rental of a single unit in a two-family owner occupied building.⁴⁵

(iv) Gender

Title VIII, Title IX and Chapter 151B all forbid the exclusion of applicants from housing based on gender. In most cases, these laws prohibit single-sex housing programs. HUD policy indicates that some housing may be exempted on a limited case-by-case basis but only for compelling reasons of privacy and security.⁴⁶ For example, in some cases where bathrooms are shared, such as single room occupancy housing, it may be permissible to limit occupancy on separate floors of a facility, to either men or women.⁴⁷

(v) Age

HUD rules implementing the Age Discrimination Act forbid *any* distinctions based on age, unless age is “a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity.”⁴⁸ Consequently, age based distinctions are permitted when adopted by an elected legislative body such as Congress, a state legislature or a city council, for programs that provide benefits or services, or establish eligibility for participation based on age.⁴⁹ For example, age is an eligibility factor for many housing programs in which occupancy is limited by statute to individuals or families of particular age groups, and it is entirely lawful to consider age in those contexts.⁵⁰ Age Discrimination Act rules also permit providers to offer preferences and other special benefits to elders or to children in programs where eligibility is not based on age.⁵¹ Finally, in the absence of statutory limitations on eligibility, age may be a permissible “factor necessary to the normal operation” of a program under a four-factor test set out in HUD rules; that is, where (1) age is a measure of a particular characteristic; (2) the characteristic must be measured for the purposes of normal program operation or to achieve an

objective of the program; (3) age is a reasonable standard for measuring the eligibility characteristic; and (4) other measures are impractical.⁵² HUD guidelines urge recipients to apply age distinctions in a flexible manner, permitting “a person, upon a proper showing of the necessary characteristics, to participate in the activity or program, even though he or she would otherwise be barred by the age distinction.”⁵³ One example of a permissible age-based distinction is a requirement that applicants for housing show the legal capacity to enter into a lease by proving that they are age eighteen or older.⁵⁴

(vi) Disability

“Disability” is a term that has a different meanings depending on the context. Affordable housing providers use a definition of “disability” for purposes of determining eligibility for occupancy or for selection preferences that is focused on an applicant’s functional impairments. Civil rights laws use a different definition designed to address bias against people who have functional impairments, as well as individuals subjected to prejudice because of unfounded assumptions about disability. While there are common features to each definition, there are also significant differences.

(a) Eligibility Definitions of Disability for State Funded Housing. In DHCD’s Chapter 667 program of public housing for elders and people with disabilities, and in the AHVP program, an individual with disabilities qualifies for admission when the person has a physical, mental or emotional impairment which is expected to be of long continued and indefinite duration, substantially impedes the ability to live independently in conventional housing, and is of such a nature that the ability to live independently can be improved by more suitable housing conditions.⁵⁵ Under this standard, an individual with disabilities qualifies for state housing programs if a physician certifies that the disability is expected to last more than six months, or if special architectural design features or low-rent housing are not available in the private market, and the applicant is faced with living in an institution or in substandard housing or with paying excessive rents.⁵⁶

(b) Eligibility Definitions of Disability in Federal Housing. Most federal programs operate under the same definition of “disability” for purposes of determining eligibility for admission, or for selection preferences. Under that definition, an individual qualifies as a person with disabilities under one of three standards: (1) the person has a disability that meets the standards for receipt of Social Security disability benefits; or (2) is determined to have a physical, mental, or emotional impairment that is expected to be of long continued and indefinite duration, substantially impedes the individual’s ability to live independently, and could be improved by more suitable housing conditions; or (3) has a developmental disability. The definition includes people with AIDS.⁵⁷

Certain federal programs, like the Section 811 program, permit sponsors to serve people with certain classes of disabilities, like chronic mental illness, or developmental disabilities.⁵⁸ With HUD permission, a Section 811 sponsor may limit occupancy to people with similar disabilities who require similar supportive services, such as people with autism. Even with HUD approval, the Section 811 owner must admit any qualified person with a disability, if the person can benefit from the housing or services offered at the property.⁵⁹ Other programs, including federal public

housing, the Section 8 Housing Choice Voucher program, and the HOME program permit selection preferences for people with disabilities, but forbid selection preferences for people with specific disabilities.⁶⁰

(c) Civil Rights Definitions of Disability. Section 504 of the Rehabilitation Act, the Fair Housing Act, the ADA, and Chapter 151B all define "disability" in the same way. A person with disabilities for civil rights purposes is an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.⁶¹ A physical or mental impairment can include practically any condition, disease, illness, disfigurement, or disorder (e.g., alcoholism, AIDS or HIV infection, emotional disorder, mental retardation, cerebral palsy, cancer, deafness) so long as the impairment substantially limits one or more major life activity. "Major life activity" includes caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.⁶²

(d) Substance Abuse. Abuse of alcohol and illegal drugs is an area singled out for special treatment in both housing eligibility standards and civil rights laws. The eligibility definition of "disability" excludes from federal housing programs those individuals whose sole disability is drug or alcohol dependence.⁶³ Federal law also requires PHAs administering public housing and Section 8 Housing Choice Vouchers, and owners of properties receiving Multi-Family Section 8 Assistance to deny admission and terminate assistance to any person who is a current user of illegal drugs, and to any person whose use of drugs or alcohol interferes with the health, safety or peaceful enjoyment of other residents. Before denying admission, or terminating assistance, a federal housing provider may consider whether the individual is successfully participating in or has successfully completed a supervised rehabilitation program, is otherwise rehabilitated, and is no longer abusing drugs or alcohol.⁶⁴

Under state law, a person whose sole impairment consists of drug or alcohol abuse does not qualify for admission to state housing programs as a person with disabilities.⁶⁵ Housing authorities are barred from admitting applicants who are current users of illegal drugs. Illegal use of drugs during the twelve months preceding an application for housing creates a presumption that the individual is a current user. The presumption may be overcome by a convincing showing that the person has permanently stopped the illegal use of drugs.⁶⁶

Section 504 of the Rehabilitation Act, the ADA, and the Fair Housing Act explicitly exclude from civil rights protection individuals who currently use illegal drugs or are addicted to a controlled substance. Chapter 151B also contains such exclusions. The federal laws distinguish between individuals who currently use illegal drugs and individuals who are not currently using illegal drugs but have a history of illegal drug use. In general, under federal civil rights laws, an individual is entitled to protection as a person with disabilities if he or she is not using illegal drugs and has successfully completed a rehabilitation program, has otherwise been rehabilitated successfully, or is participating in a treatment program.⁶⁷

From a civil rights perspective, abuse of alcohol is different from illegal use of drugs. Alcoholism is a disability recognized by civil rights laws.⁶⁸ HUD's Section 504 regulations do not protect an individual whose current use of alcohol prevents the individual from complying

with the provisions of a lease or otherwise participating in the program or activity in question, or whose participation, by reason of current alcohol abuse, would constitute a direct threat to the property or safety of others.⁶⁹ The Justice Department, for purposes of the ADA, and HUD with respect to the Fair Housing Act, intend for their regulations to be interpreted in a manner consistent with Section 504.⁷⁰ Consequently, Section 504's exception for alcoholics who cannot qualify is likely to apply to decisions under Title VIII and the ADA.

(vii) Participation in Rental Assistance Programs

Chapter 151B makes it an act of discrimination to refuse to rent to a family because the household participates in a rental assistance or housing subsidy program like MRVP, AHVP or the Section 8 Housing Choice Voucher program.⁷¹ The LIHTC statute contains a similar prohibition.⁷² Certain other federal housing programs, like the HOME program, also forbid a refusal to rent to Section 8 Housing Choice Voucher participants.⁷³

(viii) Other Protected Classes Under Chapter 151B

In addition to the special protections offered to participants in housing subsidy programs under Massachusetts law, Chapter 151B extends the prohibition against discrimination to categories of individuals not protected by federal law, including within the scope of the statute marital status, ancestry and sexual orientation. The text of Chapter 151B prohibiting discrimination against gay and lesbian people explicitly denies the protection of the law to people of any sexual orientation whose sexual interest includes minor children, when the landlord denies housing on that basis.⁷⁴

3. Definitions of Discrimination

The term “discrimination” is a single word that encompasses multiple behaviors defined in detail in state and federal civil rights laws. It includes overt acts of prejudice, differential treatment motivated by bias, and acts that while apparently neutral with respect to protected persons, nonetheless have a discriminatory effect. This section of the Practice Guide outlines the meaning civil rights provisions give to the concept of discrimination.⁷⁵

(i) Refusal to Rent or Sell

Every civil rights law makes it unlawful to withhold, make unavailable, or refuse to rent, lease, or sell a dwelling, or deny participation because of a protected characteristic of an applicant, tenant or buyer. While Chapter 151B and Title VIII are nearly identical in the statutory prohibition against a refusal to rent or sell, regulations promulgated under the Fair Housing Act offer a more detailed description of unlawful conduct. The rules forbid untruthful representations that dwellings are unavailable; statements that discourage rentals or purchases; a refusal to negotiate for sale or rental; refusing to accept a *bona fide* offer to rent or sell; imposing different sales prices or rents; and using different qualifications, application procedures, screening and selection standards, or application fees.

(ii) Different Treatment, Unequal Treatment, and Affirmative Steps to Promote Access

Anti-discrimination statutes forbid different treatment in terms, conditions, and privileges based on protected characteristics. The law also forbids unequal treatment, such as different services or benefits, or restrictions in eligibility criteria not imposed on others. Differential treatment includes use of different leases or lease terms, rental agreements, sales contracts, or down payment or closing requirements. Title VIII regulations also define “differential treatment” to include a delay in maintenance or repairs because the prospective occupant or current occupant is a person with a protected characteristic.⁷⁶

Although people with disabilities are protected by the ban on differential treatment, civil rights law recognizes that the concept of “disability” is highly individualized; that is, the nature, scope and extent of possible impairments affects the individual ability of a person with disabilities to participate in a housing program in a uniquely personal manner. Consequently, disability discrimination law permits a housing provider to treat a person with disabilities differently in limited circumstances when “such action is necessary to provide...housing, aid, benefits or services that are as effective as those provided to others.”⁷⁷ One example of permitted differential treatment is the concept of “reasonable accommodation” under which a landlord must make reasonable modifications in policies, practices, and procedures to offer a person with disabilities an equal opportunity to use and enjoy a dwelling.⁷⁸

Under Title VI regulations, a housing provider must take affirmative steps to assure equal access for populations of people with limited proficiency in English.⁷⁹ Executive Order 13166 instructs federal agencies to provide guidance to grantees to clarify that obligation.⁸⁰ Preliminary HUD guidance suggests that grantees can comply with Title VI requirements by assessing the number or proportion of non-English speaking individuals that require language assistance to establish eligibility for a federally funded program, the frequency with which such individuals are in contact with a grantee’s program, the nature and importance of the particular program or activity, and resources available to remove language-based barriers.⁸¹ Among the strategies grantees may use to improve access in light of the assessment are hiring bilingual staff or interpreters, using telephone interpreter services or community volunteers, and translating key documents.⁸²

(iii) Segregation

It is unlawful to engage in any form of segregation involving any class protected by civil rights laws. Federal rules provide only two limited exceptions to this standard. First, in the context of gender discrimination, where there are compelling reasons of privacy or security that are based on the particular nature of a program and the particular configuration of the housing, HUD may permit an agency to provide single-gender housing.⁸³ Second, for purposes of disability discrimination, Section 504 and ADA rules also permit providers to provide separate benefits or services to people with disabilities when needed to provide services that are “as effective as those provided to others.”⁸⁴ The most common justification for separate programs for people with disabilities is the need to link housing with supportive services.

Section 504 and the ADA regulations use somewhat different approaches to address the issue of supportive services in segregated settings for people with disabilities. Under the ADA,

supportive services may be provided in segregated settings solely for people with disabilities or for categories of people with disabilities, in limited situations where segregated programming will provide opportunities *beyond* those required by the ADA.⁸⁵ For example, it may be permissible under the ADA for a state to provide a separate program of supportive housing for people with cognitive impairments who can benefit from the particular services offered in connection with the housing, when the services are needed to assure that participants will succeed in community based living situations outside of institutional settings. The Massachusetts Facilities Consolidation Fund is one such program.⁸⁶

HUD Section 504 regulations include two rules that apply to segregated housing for people with disabilities. The first is similar to the ADA rule. It permits separate housing for people with disabilities, or any class of people with disabilities, “when necessary to provide qualified” people with disabilities with housing that is as effective “as provided to others.”⁸⁷ Under the second rule, people without disabilities may be excluded from particular programs, and eligibility may be limited to a class of people with disabilities only where specifically authorized by executive order or statute, such as in the HUD Section 811 program.⁸⁸

Even where separate programs are permitted by the ADA and Section 504, housing providers are required to provide benefits and services in the most integrated setting appropriate to the needs of each individual.⁸⁹ Equally important, a provider may not exclude a person with disabilities from standard housing programs because of the existence of otherwise permissible separate housing programs.⁹⁰

(iv) Illegal Inquiries and Record Keeping

Under Fair Housing Act rules, a landlord or a seller may not make inquiries regarding the protected characteristics of an applicant or tenant, and may not keep records, waiting lists, codes or other devices that are intended to make distinctions based on race, color, religion, gender, ethnic origin, disability, or family status.⁹¹ The rules do not forbid such inquiries or records when maintained for a legitimate, non-discriminatory purpose. For example, despite the prohibition on discrimination based on family status, it is lawful to maintain waiting lists that identify the number of household members, and the gender, marital status and ages of household members for purposes of assigning an appropriate size unit.⁹² It is also appropriate to ask all applicants about the existence of a disability to determine whether an applicant qualifies for admission to housing for people with disabilities, or for a selection preference to a housing program that benefits people with disabilities, or to determine if an individual qualifies for assignment to a unit with special accessibility features, or to determine whether the individual is currently using illegal drugs. Documentation of disability may be requested when an individual seeks a reasonable modification in rules, policies and procedures as an accommodation for a disability. When such inquiries are necessary, the housing provider should request only the information needed to determine whether the individual qualifies for the housing or benefit at issue.⁹³

(v) Marketing and Advertising

Chapter 151B and the Fair Housing Act prohibit the use of marketing practices or advertising that indicates discriminatory preferences.⁹⁴ At one time, Title VIII regulations included comprehensive guidance on advertising and marketing practices in 24 C.F.R. Part 109. Part 109 was repealed in 1996 as part of a larger initiative to streamline agency regulations. HUD continues to rely on Part 109 as guidance.⁹⁵ Under that guidance, advertising and marketing practices that are related to legitimate eligibility and screening activities do not violate Title VIII.⁹⁶

(vi) Harassment

Chapter 151B, Title VIII, and the ADA outlaw any behavior that coerces, intimidates, threatens, or interferes with the enjoyment of any right secured by those laws. Judicial decisions interpreting the Fair Housing Act make it clear that a landlord may not harass a tenant or an applicant based on a protected characteristic. A landlord's failure to address tenant-on-tenant harassment motivated by gender, race, or disability is also a violation of law.⁹⁷

(vii) Non-discrimination in Resident and Public Participation

Many programs include various provisions for resident or public participation in project development and operations.⁹⁸ Civil rights rules forbid discrimination based on race, color, national origin, religion, gender, and disability in resident and public participation initiatives.⁹⁹

4. Disparate Impact and Discriminatory Effect

Civil rights laws forbid deliberate acts of discrimination where there is evidence of intent and purpose to exclude a person due to some protected characteristic such as race.¹⁰⁰ Most federal appeals courts also hold that facially neutral policies with discriminatory effect violate Title VIII.¹⁰¹ HUD's Office of Fair Housing and Equal Opportunity adopted the same policy for purposes of its enforcement obligations under Title VIII.¹⁰² Federal rules implementing Title VI, Section 504, the ADA, and the Age Discrimination Act also state the same principle: it is unlawful "to utilize criteria or methods of administration which have the effect of subjecting persons to discrimination..."¹⁰³ The term commonly used to describe these sorts of unlawful activities is "disparate impact."¹⁰⁴

The courts recognize two types of disparate impact violations. In some cases, neutral policies like zoning laws may be unlawful if they perpetuate patterns of residential segregation.¹⁰⁵ For housing providers, a more common claim is that some admissions or screening policy has the effect of excluding or denying or delaying participation by a protected group of people. For example, a selection preference for local residents that does not state a racial preference may still be illegal if it effectively precludes or if it substantially delays participation by qualified racial minorities.¹⁰⁶

HUD regulations incorporate this second standard into program rules permitting local selection preferences. Under the rules, local selection preferences are lawful so long as the preference

does not have the purpose or the effect of denying or delaying admission to a project, program, or dwelling unit based on a protected characteristic.¹⁰⁷ The court decision in the *Langlois* case that struck down 100% local resident selection preferences was based, in part, on the Fair Housing Act prohibition against policies with disparate effect.¹⁰⁸ Similar standards apply in the state public housing, MRVP and AHVP programs where DHCD rules require local housing authorities to correct practices that have a negative effect on applications by minorities.¹⁰⁹

Not all policies that affect participation by protected classes of people, including selection preferences for local residents, will have an unlawful disparate impact. For example, selection preferences are often motivated by important governmental interests such as meeting local housing needs, and may be justified so long as there is no other less discriminatory method to meet that important need. In *Langlois*, the First Circuit Court of Appeals noted that selection preferences based on local housing need were explicitly permitted by statute in the Section 8 Housing Choice Voucher program.¹¹⁰ In a later decision, the *Langlois* trial court ruled that the selection preferences at issue in the case were unlawful because the PHAs could not “offer a record of local conditions and needs that suggests why the residency preferences are necessary.”¹¹¹

It is possible to measure or estimate the effect of a policy and tailor it to avoid a discriminatory effect. Strategies for determining local need and tailoring selection preferences are discussed in Part IV.

B. CIVIL RIGHTS RELATED PROGRAM REQUIREMENTS

In addition to the general prohibitions against discrimination imposed by Title VI, Title VIII, Section 504 and other legal authorities, agency rules often require recipients of housing assistance to comply with civil rights related operational standards that affect nearly every aspect of each program. HUD calls these mandates Civil Rights-Related Program Requirements.¹¹²

1. Siting

Most programs impose siting requirements that are intended to avoid segregation and improve housing choice. For example, under Title VI and HOME regulations, recipients may not use discriminatory site selections or siting practices that have the effect or intent of defeating the purposes of civil rights laws.¹¹³ Standards for the Section 202 and Section 811 programs, federal public housing development and for new construction in the project-based component of the Section 8 Housing Choice Voucher program rules say that developments must not be located in areas of minority concentration, in mixed-race neighborhoods that are susceptible to segregation, or in high poverty areas, except in situations where there are “overriding housing needs.” Under these rules, an overriding housing need might include a development constructed as part of a neighborhood redevelopment strategy, or in a revitalizing area.¹¹⁴

Federal requirements in the LIHTC do not regulate siting criteria from a civil rights standpoint. The statute does provide for enhanced tax credits in “qualified census tracts,” which are high poverty areas, and “difficult to develop areas,” which often involve areas away from urban centers where high land and development costs are barriers to development of affordable

housing.¹¹⁵ Section 42 also requires state qualified allocation plans to give preference to projects “the development of which contributes to a concerted community revitalization plan.”¹¹⁶

2. Design.

In addition to the architectural access requirements of the Fair Housing Act, Section 504, the ADA, Chapter 151B and the Massachusetts Architectural Access Act, some programs incorporate rules about design features that have civil rights implications. Federal public housing development rules, for example, include general standards that require low-density design features and features suitable for “the people they are intended to serve.”¹¹⁷ Under Internal Revenue Service rules, a tax credit unit is available for “use by the general public” if, among other things, it is constructed in accordance with the Fair Housing Act Access Guidelines.¹¹⁸

3. Affirmative Fair Housing Marketing and Outreach.

HUD rules applicable to properties with Multi-Family Section 8 Assistance require owners to develop fair housing marketing plans that attract applicants of all racial and ethnic groups.¹¹⁹ Under marketing rules for rental units constructed with HOME funds, grantees must adopt “[a]ffirmative marketing steps [that] consist of actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status or disability.”¹²⁰

State funded programs operate under similar rules. For example, MassHousing tenant selection regulations require non-discriminatory marketing practices and forbid “segregation of units,” except “when such segregation is manifestly related to the objective of the program in place.”¹²¹

Programs funded by DHCD must develop Affirmative Fair Marketing Plans through which the PHA identifies the percentages of significant groups of minorities in the municipality and in the surrounding metropolitan statistical area, corrects practices that have “a negative effect” on applications and admission of minorities, and describes special activities designed to attract applicants from under-represented groups. Affirmative Fair Marketing Plans are distinguished from DHCD’s affirmative action regulations primarily in that the affirmative action rules are implemented through selection preferences, while the marketing rules are implemented primarily through vigorous recruitment.¹²² Similar standards govern LIP and Chapter 40B related programs.¹²³

4. Waiting Lists.

Title VI rules require sequential, community-wide, priority and preference-based waiting lists in public housing programs.¹²⁴ However, under changes resulting from the Quality Housing and Work Responsibility Act of 1998, PHAs may now use site-based waiting lists in public housing.¹²⁵ Implementing rules require PHAs to engage in comprehensive monitoring activities to ensure that site-based waiting lists do not result in discrimination.¹²⁶ Section 8 Housing Choice Voucher rules require PHAs to use a single waiting list for the tenant-based portion of the

program. However, a housing authority that serves a large geographic area is permitted to use different waiting lists for separate municipalities or counties.¹²⁷

State public housing, LIP and Chapter 40B NEF guidelines use race-conscious procedures to reverse conditions of exclusion, or to avoid the potential discriminatory effects of selection preferences for local residents. Under state public housing rules, for example, PHAs must offer Affirmative Action Preferences to minority households whenever a PHA occupancy profile indicates that minority occupancy is less than highest percentage of minority residents in the municipality, the regional housing market, an area comprised of the municipality plus contiguous cities and towns, or some other area approved by DHCD. In such circumstances, minorities must be selected for occupancy on a ratio that may not exceed one in every three admissions, or be lower than one in every five admissions.¹²⁸

In the LIP and Chapter 40B NEF programs, a local preference may not exceed 70%. Under DHCD requirements, the developer must create a pool of applicants from among local residents, and a separate “open pool” of applicants from the surrounding HUD-defined metropolitan statistical area. Applicants in each pool are assigned a position on a list based on a lottery. Where there is a difference between the percentage of minority households in the local preference pool and the open pool, minorities from the open pool are placed in the local resident pool, until the percentage of minorities in the local pool equals the percentage of minorities in metropolitan statistical area. Selections are then made on a random basis from the local pool, up to the local preference percentage, and the remaining selections are made from the open pool.¹²⁹

5. Records.

Title VIII standards generally forbid record keeping practices that identify applicants or occupants based on protected characteristics when those practices are intended to discriminate or result in discrimination. However, in many programs, grantees are required to maintain records indicating the extent of program participation by race, color, ethnicity, religion, age, gender, and disability to ensure compliance with program related civil rights requirements. Records in federal programs must be made available for review by HUD and by the public.¹³⁰ In housing with Multi-Family Section 8 Assistance, providers are urged to maintain civil rights related information separate from waiting list information in order to insulate owners from claims of discrimination.¹³¹ DHCD periodically reviews records maintained by PHAs to monitor compliance with the affirmative action requirements applicable to state public housing, AHVP and MRVP.¹³²

6. Fair Housing Counseling.

Some HUD programs require grantees to counsel participating families about housing opportunity and fair housing rights. For example, Section 8 Housing Choice Voucher administrative plans must include provisions that encourage participation by landlords outside areas of poverty and segregation and that assist victims of discrimination.¹³³ When a family is selected for admission to the program, the PHA must explain the advantages to moving to low-poverty areas and must provide a list of landlords with suitable apartments to families that need accessible units.¹³⁴

7. Program Modifications for People with Disabilities.

In keeping with the general principle of providing reasonable modifications in programs, policies, and procedures to accommodate the needs of individuals with disabilities, state and federal housing programs also require specific programmatic accommodations to people with disabilities. For example, PHAs administering the Section 8 Housing Choice Voucher program have an obligation to help participating renters with disabilities find accessible housing.¹³⁵ In the federal public housing and voucher program, housing authorities may be required to offer higher utility allowances where needed to accommodate a person with disabilities.¹³⁶ All programs include requirements to take into account “mitigating circumstances,” including disability-related circumstances, before rejecting an applicant for admission.¹³⁷

State and federal housing programs also require public housing authorities and assisted housing providers to modify admissions and occupancy requirements for people with disabilities who hire personal care attendants (PCA). Under program rules, housing providers must assign units with extra bedrooms for PCAs and must disregard the PCA’s income in determining financial eligibility for program participation and calculating tenant rent.¹³⁸

C. CIVIL RIGHTS PLANNING AND THE AFFIRMATIVE OBLIGATION TO FURTHER FAIR HOUSING

Residential segregation remains a defining feature of the Massachusetts housing market. That characteristic was not formed by natural patterns of migration or choice. Instead, Massachusetts followed the same historical patterns that led to segregation throughout the United States. Racial harassment and violence drove non-white residents away from cities, towns and neighborhoods from colonial times, when white townspeople would “warn out” black families, to the present day, where minority residents of public housing still face racial hostility.¹³⁹ Nineteenth century laws allowed Massachusetts cities to remove unwanted newcomers based on skin color.¹⁴⁰ Some Massachusetts towns deliberately refused to provide municipal services to housing developers and the developer’s prospective home buyers for the explicit purpose of preventing people of color from moving to the community.¹⁴¹ Official government policies promoted and enforced segregated living patterns in public and assisted housing.¹⁴² Discrimination persists in mortgage lending, the rental housing market, and in home sales.¹⁴³

Fair housing and civil rights laws require housing providers to take account of this history, these continuing abuses, and the conditions of segregation that persist as a result. The Fair Housing Act requires every federal agency to take affirmative steps to further fair housing.¹⁴⁴ State and federal executive orders require the same.¹⁴⁵ In turn, state and federal agencies devolve the responsibility to further fair housing on providers of assisted housing. Under Title VI, for example, grantees are obliged to take “affirmative action to overcome the effects of prior discrimination” in circumstances where the recipient engaged in illegal acts. Affirmative obligations under Title VI also impose the responsibility to remove conditions which result in limitations on participation by protected individuals, even where the recipient did not cause those conditions and to take “reasonable steps to overcome the prior consequences of discrimination.”¹⁴⁶

The principal mechanism for implementing these sorts of obligations is through fair housing planning. Section 504 and the Title II of the ADA, for example, mandate several types of planning activities. Covered entities must engage in self-evaluations to identify programmatic and policy barriers to participation by people with disabilities. Self-evaluations examine application procedures, admissions and occupancy policies, maintenance policies, and other administrative procedures. Practices that have the purpose or effect of violating disability discrimination laws must be modified, and covered entities are required to take affirmative steps to remedy any acts of discrimination revealed by the self-evaluation.¹⁴⁷

Section 504 and Title II of the ADA also require covered entities to develop and implement transition plans designed to identify and remove physical obstacles to program accessibility in existing facilities and housing. HUD and Department of Justice rules both say that the transition plan must include an inventory of architectural barriers, the methods to be used to remove the barriers, the schedule for completion of the plan, identification of the official responsible for implementing the plan and the persons and groups consulted in the development of the plan.¹⁴⁸ Public housing providers covered by HUD Section 504 rules were required to achieve architectural access by 1992.¹⁴⁹ All other providers covered by the HUD rule were required to achieve program accessibility by 1991.¹⁵⁰ Providers covered by Title II of the ADA were required to complete implementation of ADA transition plans by 1995.¹⁵¹ Despite these completion deadlines, entities covered by the ADA and Section 504 are encouraged to continually review and update both the self-evaluations and the transition plans to assure that the programs remain accessible and usable to people with disabilities.¹⁵²

Federal public housing, Section 8 Housing Choice Voucher, and community development rules associated with the HOME program impose additional fair housing planning responsibilities on federally-assisted public housing agencies and state and local governments that receive federal community development block grants and similar funds. Under these mandates, the covered agencies must identify impediments to fair housing in their jurisdictions, and they must design and implement action plans to remove the impediments. These planning activities are ongoing responsibilities with no fixed date for final completion.¹⁵³ Monitoring rules in the Section 8 Housing Choice Voucher program impose a similar requirement.¹⁵⁴

The objective of these planning activities is to assess the civil rights environment surrounding the community, the program or the housing, to increase housing choice, to identify problems that interfere with improving choice, and to utilize existing resources in a manner that removes barriers to choice.¹⁵⁵ For communities or housing providers seeking to implement policies that favor one group of individuals over others, civil rights planning is critical to avoid violations of program eligibility standards, civil rights laws, and civil rights related program requirements. Planning strategies are discussed in Part IV.

Figure 4
Technical Standards for Architectural Access

Law	Agency	Legal Authorities	Minimum Standards	Safe Harbor ^a
Architectural Barriers Act	Standard Setting Agencies for housing include General Services Administration HUD. Minimum guidelines are established by the U.S. Access Board	42 U.S.C. 4151-4157	Uniform Federal Accessibility Standards	
Section 504	All Federal Agencies must adopt regulations	29 U.S.C. 794; for HUD programs, 24 C.F.R., §8.32	For HUD programs, UFAS	Grantees may use substantially equivalent methods of achieving program accessibility
ADA, Title II	Department of Justice and the Access Board	42 U.S.C. §12134, 28 C.F.R. §35.151(c)	UFAS or ADA Accessibility Guidelines	Entities may use substantially equivalent methods of achieving program accessibility
ADA, Title III	Department of Justice and the Access Board	42 U.S.C. §12186, 28 C.F.R. §36.406	ADA Accessibility Guidelines	Entities may use substantially equivalent methods of achieving program accessibility
Fair Housing Act	HUD	42 U.S.C. §3604(f)(3) and (4); 24 C.F.R. §100.205	Fair Housing Accessibility Guidelines	ANSI A117.1-1986, ANSI A117.1-1992, ANSI A117.1-1998, Code Requirement for Housing Accessibility, International Building Code 2000 (as amended by IBC 2001 supplement), Fair Housing Act Design Manual
Massachusetts Housing Bill of Rights	None	G.L. ch. 151B, §4(6)	Standards substantially equivalent to Fair Housing Accessibility Guidelines	
Massachusetts Architectural Access Act	Massachusetts Architectural Access Board	G.L. ch. 22, §13A	Title 521 Code of Massachusetts Regulations	

^aUnits that meet safe harbor standards are deemed to comply with regulatory standards.

ENDNOTES TO PART III

¹ See, Part II, note 18.

² See, Executive Order 11063, *Equal Opportunity in Housing*, 27 Fed. Reg. 11527 (November 20, 1962); Executive Order 12892, *Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing*, 59 Fed. Reg. 2939 (January 20, 1994); 42 U.S.C. §3608(e)(5) (Fair Housing Act) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with [HUD] to further such purposes.”). See also, Massachusetts Executive Order 227 (February 25, 1983) and Executive Order 452 (June 17, 2003).

³ At the constitutional level, provisions such as the Fourteenth Amendment to the U.S. Constitution focus on broad civil rights provisions that ensure equal treatment based on individual characteristics such as race, color, gender, or disability. See, the 14th Amendment to the U.S. Const. Am. 14, §1 (Equal Protection clause); Mass. Const. Art. Am. CV, amending Mass. Const. Part 1, Article 1 (to same effect, based on gender, race, color, creed and national origin); and Mass. Const. Art. Am CXVI, (to same effect, prohibiting discrimination based on disability). In general, constitutional safeguards outlaw deliberate acts of discrimination. Some state and federal statutes involve equally broad statutory mandates, like the federal laws enacted in the years following the Civil War, and similar Massachusetts statutes. See, e.g., 42 U.S.C. §1981 (“All persons shall have the same right in every State and Territory to make and enforce contracts...”); 42 U.S.C §1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”). See also, M.G.L. ch. 93, §102 (to same effect, outlawing discrimination based on gender, race, color, creed and national origin) and ch. 93, §103 (disability).

⁴ P.L. 90-284, Title VIII (April 11, 1968), as amended by the Fair Housing Amendments Act of 1988, Pub. L. 100-430 (September 13, 1988), codified at 42 U.S.C. §3601, *et seq.*

⁵ See, 42 U.S.C. §3602(b) and 24 C.F.R. §100.201 (definition of “dwelling unit” for purposes on disability discrimination); and *Connecticut Hospital v. City of New London*, 129 F. Supp. 2d 123 (D. CT 2001) and the cases described therein.

⁶ 42 U.S.C. §3603(b).

⁷ M.G.L. ch. 151B, §1(11), (12) and (13) (definitions of “multiple dwelling,” “contiguously located housing,” and “other covered housing accommodations”) and §4(7).

⁸ P.L. 88-352, Title VI (July 2, 1964); 42 U.S.C. §2000d, *et seq.*

⁹ P.L. 92-318, Title IX (June 23, 1972); 20 U.S.C. §1681, *et seq.*

¹⁰ P.L. 93-112, Title V, §504 (September 26, 1973); 29 U.S.C. §794.

¹¹ P.L. 94-135 (November 28, 1975); 42 U.S.C. §6101, *et seq.*

¹² See, 24 C.F.R. §1.2(e) (Title VI); 24 C.F.R. §3.105 (Title IX); 24 C.F.R. §8.3 (§504); 24 C.F.R. §146.7 (Age Discrimination Act). The mortgage insurance provisions of Section 221(d)(4) are codified at 12 U.S.C. §1715/(d)(4). It is worth noting that Executive Order 11063 forbids discrimination in housing that receives contracts of insurance or loan guaranties. See, Executive Order 11063, and HUD implementing regulations at 24 C.F.R. §107.15(c). When originally issued, Executive Order 11063 prohibited discrimination in federal housing programs based on race, color, national origin, religion and creed. Executive Order 12892 expanded the scope of Executive Order 11063 to also forbid discrimination on the basis of family status, gender and disability. See, Executive Order 12892. HUD has not promulgated enforcement rules to account for the larger scope of Executive Order 12892.

¹³ 20 U.S.C. §1687 (Title IX); 29 U.S.C. §794(b) (§504); 42 U.S.C. §2000d-4a (Title VI); 42 U.S.C. §6107(4) (Age Discrimination Act).

¹⁴ 24 C.F.R. §1.2(f) (Title VI); 24 C.F.R. §3.105 (Title IX); 24 C.F.R. §8.3 (Section 504); 24 C.F.R. §146.7 (Age Discrimination Act); 24 C.F.R. §107.15(c) (Executive Order 11063). *See also*, 24 C.F.R. §8.28 (Section 504 exemption for landlord in Section 8 voucher program).

¹⁵ 42 U.S.C. §12131.

¹⁶ *See*, 28 C.F.R. §35.130(b)(1) (a public entity may not engage in disability discrimination, “directly or through contractual, licensing or other arrangements...”). *See also*, 56 Fed. Reg. 35694, 35696 (July 26, 1991) (preamble to Title II regulations) (“All governmental activities of public entities are covered, even if they are carried out by contractors.”).

¹⁷ 26 C.F.R. §1.42-9(a).

¹⁸ *See*, 26 C.F.R. §1.42-5(c)(1)(v) (units are not “for use by general public” if owner is found in violation of Title VIII); *see also*, *Memorandum of Understanding Among the Department of the Treasury, the Department of Housing And Urban Development, and the Department of Justice Regarding the LIHTC Program* (August 11, 2000) (“*LIHTC Interagency MoU*”) setting out an interagency agreement to assure compliance with Title VIII by tax credit owners. It is less clear whether the laws applicable to recipients of federal financial assistance, like Title VI and Executive Order 11063, apply in the LIHTC program. Even though HUD regulations for Title VI, Section 504 and Executive Order 11063, and the companion guidance in the *Multi-Family Occupancy Handbook* are plainly referenced in the IRS rule, the Department of Treasury and the Department of Justice do not name LIHTC among the programs subject to civil rights laws applicable to programs of federal financial assistance. *See*, for example, the Justice Department’s *Agency-Recipient Overlap Chart*, which lists only Treasury Department law enforcement grants, and the Catalogue of Domestic Federal Assistance, which does not list LIHTC among the Treasury Department programs that must be listed in the catalogue under the requirements of 31 U.S.C. §6101, *et seq.* *See also*, 66 Fed. Reg. 6760 (January 22, 2001) (list of financial assistance administered by Treasury Department to which Title IX applies). The distinction between laws governing federal financial assistance and Title VIII is critical for enforcement purposes, for compliance with architectural access requirements and with respect to certain obligations to take affirmative steps to further fair housing. It is worth noting that LIHTC may be a program of state government subject to the provisions of Title II of the ADA. Again, there is no guidance on this topic from either the Treasury Department or the Justice Department.

¹⁹ 42 U.S.C. §12181(7) (definition of “public accommodation”). Title III does not regulate “commercial facilities,” including facilities either covered by or exempt from coverage under the Fair Housing Act. 42 U.S.C. §12181(2). The ADA definition of “commercial facilities” includes uses that do not affect housing, such as airports, warehouses and factories. 56 Fed. Reg. 35547. The exemption for facilities covered by Title VIII results in overlapping Fair Housing and Title III coverage when housing and public accommodations such as supportive services are provided in the same facility. *See*, 56 Fed. Reg. 35544, 35551 (July 26, 1991) (preamble to Title III rule).

²⁰ *See*, 56 Fed. Reg. 35552.

²¹ 24 C.F.R. §100.201; 24 C.F.R. §100.205. “Ground floor units” are not the same as first floor units. HUD regulations define a “ground floor” as “a floor of a building with a building entrance on an accessible route” and go on to say that a building may have more than one ground floor. 24 C.F.R. §100.201 (definition of “ground floor”). In practical terms, the rule means that Title VIII’s accessibility requirements apply to the first residential floor, even if it is above grade, over a garage or commercial or retail space. *See*, 56 Fed. Reg. 9471, 9500 (March 6, 1991) (Fair Housing Act Accessibility Guidelines; definition of “ground floor”); 59 Fed. Reg. 33361, 33364 (June 28, 1994) (*Questions and Answers, Fair Housing Act Accessibility Guidelines*).

²² 56 Fed. Reg. 9471, 9481 (March 6, 1991) (preamble to Fair Housing Act Accessibility Guidelines); 59 Fed. Reg. 33361, 33363 (June 28, 1994) (*Questions and Answers, Fair Housing Act Accessibility Guidelines*).

²³ M.G.L. ch. 151B, §4(6). *See also*, M.G.L. ch. 22, §13A (requirements of Massachusetts Architectural Access Board).

²⁴ M.G.L. ch. 151B, 4(7A)(1). “Publicly assisted housing” includes buildings constructed after July 1, 1950 that are tax exempt, various types of public housing, and developments with federal mortgage insurance. M.G.L. ch. 151B, §1(10). “Multiple dwelling housing” is a multi-family property. M.G.L. ch. 151B, §1(11). “Contiguously located housing” is housing offered for sale or rent which was at any time under common ownership and that is located on contiguous parcels of land, exclusive of public streets, or consists of lots in a sub-divided tract. M.G.L. ch. 151B, §1(12).

²⁵ 24 C.F.R. §8.3 and §8.22. Among other things, this rule means that Section 504 applies to new construction of a scattered site housing project.

²⁶ 28 C.F.R. §35.150.

²⁷ M.G.L. ch. 22, §13A.

²⁸ OMB BULLETIN NO. 00-02, *Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement* (March 9, 2000). *See also*, 28 C.F.R. §42.402(e) (Department of Justice Title VI coordinating regulations). The OMB guidance also provides for several categories of individuals that report mixed-race backgrounds.

²⁹ 760 C.M.R. §47.03 (definition of “minority group member”).

³⁰ *See*, 42 U.S.C. §1436a (restriction on housing assistance to non-citizens) and the HUD implementing regulations at 24 C.F.R. Part 5, Subpart E.

³¹ *See, e.g.*, 8 U.S.C. §1641 (denial of certain means tested public benefits except to “qualified” immigrants).

³² *Espinoza v. Hillwood Square Mutual Association*, 522 F. Supp. 559 (E.D. VA, 1981). *See also*, *Rights and Responsibilities of Landlords and Residents in Preventing Housing Discrimination Based on Race, Religion or National Origin in the Wake of the Events of September 11, 2001* (FHEO, January 6, 2003) posted at:

<http://www.hud.gov:80/offices/fheo/library/sept11.cfm>

³³ HUD Guidebook 7465.7, *Housing Agencies Guidebook: Restrictions on Assistance to Non-Citizens* (July 1995) at par. 1-5; Notice FHEO 95-6, *Fair Housing Issues in Non-Citizen Rule for Field Office and Housing Provider Guidance* (November 30, 1995); *Multi-Family Occupancy Handbook* at par. 3-12(F). *See also*, 65 Fed. Reg. 49994 (August 16, 2000) (HUD programs are excluded from restrictions on receipt of public benefits in 8 U.S.C. §1641) and 66 Fed. Reg. 3613 (January 16, 2001) (restrictions on immigrant receipt of public benefits do not apply to homeless shelters, transitional housing and other programs or services for protection of life and safety).

³⁴ M.G.L. ch. 6A, §16C.

³⁵ 42 U.S.C. §3604; M.G.L. ch. 151B, §4(6), (7) and (11).

³⁶ 42 U.S.C. §3602(k) (definition of “familial status”).

³⁷ 42 U.S.C. §3607(b)(2)(A).

³⁸ M.G.L. ch. 151B, §4(6) and (7).

³⁹ 42 U.S.C. §1437a(b)(3)(B) (public housing and Section 8); *see also*, 12 U.S.C. §1701q(k)(1) (Section 202).

⁴⁰ 760 C.M.R. §5.03 (“elderly household” is a household or a “family” containing at least one elderly person).

⁴¹ *Multi-Family Occupancy Handbook*, par. 3-22(D)(3); *Public Housing Occupancy Guidebook*, par. 2.2 (“There is nothing in the definition of elderly family that excludes children.”).

⁴² 42 U.S.C. §3607(b).

⁴³ 24 C.F.R. §100.306 and §100.307.

⁴⁴ M.G.L. ch. 151B, §4(6) and (7).

⁴⁵ M.G.L. ch. 151B, §4(11).

⁴⁶ *Multi-Family Occupancy Handbook*, par. 3-21(B)(2).

⁴⁷ *See, e.g.*, 24 C.F.R. §882.803(a)(6) (Section 8 Moderate Rehabilitation SRO). Dormitories in educational institutions are the only housing facilities specifically exempted from the requirements of Title IX. *See*, 24 C.F.R. §3.400 and §3.405.

⁴⁸ 24 C.F.R. §146.13(b).

⁴⁹ 24 C.F.R. §146.13(e). *See also*, 51 Fed. Reg. 45270 (December 17,1986) (Guidelines for Application of Standards for Determining Age Discrimination).

⁵⁰ *See, e.g.*, 12 U.S.C. §1701q (Section 202 program of housing and supportive services for people age 62 or more).

⁵¹ 24 C.F.R. 146.13(f).

⁵² 24 C.F.R. 146.13(b).

⁵³ 51 Fed. Reg. 45270.

⁵⁴ *See, e.g.*, *Multi-Family Occupancy Handbook*, par. 3-15(B)(2) (person only qualifies as a “remaining household member” if the individual has attained “legal contract age under state law”).

⁵⁵ M.G.L. ch. 121B, §1 (definition of “handicapped persons of low income).

⁵⁶ 760 C.M.R. §5.07(2). DHCD rules offer a non-exclusive list of qualifying impairments under the definition, including people who use wheelchairs, individuals with other mobility impairments, people with neurological injuries that “suffer from significant coordination deficits,” people who are blind within the meaning of 111 C.M.R. §5.06(4), people who are deaf within the meaning of M.G.L. ch. 6, §191, and people with developmental disabilities who might benefit from a housing authority’s specialized housing programs. 760 C.M.R. §5.07(3).

⁵⁷ 42 U.S.C. §1437a(b)(3)(E). The three standards address different types of functional impairments. For example, the reference to the Social Security Act is aimed at individuals with permanent disabilities who are unable to work by engaging in “substantial gainful activity.” *See*, 42 U.S.C. §423. Individuals who qualify because their ability to live independently could be improved by more suitable housing conditions are people who might benefit from the special design or programmatic features available in assisted housing. That definition includes people with disabilities capable of work. *See, Housing for Physically Handicapped Families and Persons* (Hearings before the Subcommittee on Housing, House Committee On Banking and Currency) (October 21, 1963). People with developmental disabilities are individuals with impairments in one or more major life activities, where the disability manifested before the age of twenty-one. 42 U.S.C. §6001.

⁵⁸ 42 U.S.C. §8013.

⁵⁹ 24 C.F.R. §891.410(c)(2)(ii).

⁶⁰ 24 C.F.R. §5.655(c)(3) (Multi-Family Section 8 Assistance); 24 C.F.R. §960.206(b)(3) (public housing); 24 C.F.R. §982.207(b)(3) (Section 8 Housing Choice Vouchers).

⁶¹ 29 U.S.C. §705(20)(B) and 24 C.F.R. §8.3 (Section 504); 42 U.S.C. §3602(h) (Title VIII); 42 U.S.C. §12102(2) (ADA); M.G.L. ch. 151B, §1(17) (Chapter 151B). The ADA uses the term “individual with disabilities” to describe the class of people protected by that law, while Section 504, Title VIII, and Chapter 151B use the now disfavored term “handicapped person.” The Practice Guide follows the ADA convention, recognizing that many people with disabilities find the term “handicap” objectionable because, like racial slurs, it is a word “overlaid with stereotypes, patronizing attitudes and other emotional connotations.” 66 Fed. Reg. 35698.

⁶² 24 C.F.R. §8.3 (Section 504 definition of “handicap”); 28 C.F.R. §35.104 (same, ADA Title II); 28 C.F.R. §36.104 (same, ADA Title II).

⁶³ 42 U.S.C. §1437a(b)(3)(E).

⁶⁴ 42 U.S.C. §13661 (admissions) and §13662 (termination of assistance).

⁶⁵ M.G.L. ch. 121B, §1 (definition of “handicapped person of low income”).

⁶⁶ 760 C.M.R. §5.01(1)(k).

⁶⁷ 29 U.S.C. §705(20)(C) (Section 504); 42 U.S.C. §3602(h)(3) (Title VIII); 42 U.S.C. §12210 (ADA). *Compare*, M.G.L. ch. 151B, §1(17) (Chapter 151B).

⁶⁸ 24 C.F.R. §8.3 (Section 504 definition of “individual with handicaps” at par. (a)(2)); 24 C.F.R. §100.201 (Title VIII definition of “handicap” at par. (a)(2)); 28 C.F.R. §35.104 (ADA Title II definition of “disability” at par. (1)(ii)); 28 C.F.R. §36.104 (ADA Title III definition of “disability” at par. (1)(iii)).

⁶⁹ 24 C.F.R. §8.3 (definition of “individual with handicaps”).

⁷⁰ *See*, 54 Fed. 3231, 3245 (January 23, 1989) (Title VIII); 56 Fed. Reg. 35696 (ADA, Title II) and 56 Fed. Reg. 35546 (ADA, Title III).

⁷¹ M.G.L. ch. 151B, §4(10).

⁷² 26 U.S.C. §42(h)(6)(B)(iv).

⁷³ 24 C.F.R. §92.252(d) (HOME). *See also*, *Multi-Family Occupancy Handbook*, par. 3-20; HUD Notice PIH 2001-2 (HA) (January 18, 2001).

⁷⁴ M.G.L. ch. 151B, §4(6) and (7). In this regard, it may be worth noting the ADA’s exclusion of gays and lesbians, certain sexual behaviors, gambling, kleptomania, pyromania, and psychoactive substance abuse disorders from the definition of “disability.” 42 U.S.C. §12211.

⁷⁵ Many of the laws and regulations that define different forms of unlawful discrimination are codified in the same sections of the relevant authorities. To avoid repetitive endnotes, readers are directed to the following legal authorities for the laws discussed in this section:

Title VI: 24 C.F.R. §1.4(b)

Section 504: 24 C.F.R. §8.4(b)

Age Discrimination Act: 24 C.F.R. §146.13(a)

ADA Title II: 28 C.F.R. §35.130(b)

ADA Title III: 28 C.F.R. §36.202

Ch. 151B: M.G.L. ch. 151B, §4(6) and (7)

Title VIII: 42 U.S.C. §3604(a), including regulations at 24 C.F.R. Part 100.

Particular authorities are otherwise noted in the remainder of the text.

⁷⁶ 24 C.F.R. §100.65(b)(2).

⁷⁷ 24 C.F.R. §8.4(b)(1)(iv); 28 C.F.R. §35.130(b)(1)(iv); 28 C.F.R. §36.202(b).

⁷⁸ 24 C.F.R. §100.204; 28 C.F.R. §35.130(b)(7); 28 C.F.R. §36.302. Detailed guidance about reasonable accommodations is available from HUD and the U.S. Department of Justice. *See, Joint Statement of the U.S. Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004) (“*Joint Statement on Reasonable Accommodation*”), available at the following web site:

<http://www.hud.gov/offices/fheo/index.cfm>

⁷⁹ 28 C.F.R. §42.405(d)(1).

⁸⁰ Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency*, 65 Fed. Reg. 50121 (August 16, 2000).

⁸¹ *See*, 68 Fed. Reg. 70967 (December 19, 2003) (proposed HUD guidance). Although the HUD guidance is only proposed, and not final, it is based on similar standards in effect for Justice Department grantees. *See*, 67 Fed. Reg. 41455 (June 18, 2002). The Justice Department guidance is the model for guidance issued by virtually all federal agencies. *See, e.g.*, 67 Fed. Reg. 10477 (March 7, 2002) (Treasury Department).

⁸² 68 Fed. Reg. 70967.

⁸³ *See*, notes 44 and 45, and accompanying text.

⁸⁴ *See*, note 73 and accompanying text.

⁸⁵ 28 C.F.R. §35.130(c); 28 C.F.R. §36.202(c) and (d).

⁸⁶ *See*, 760 C.M.R. §19.01(1) (purpose of Facilities Consolidation Fund is to create community based housing opportunities for people with mental illness and mental retardation).

⁸⁷ 24 C.F.R. §8.3(b)(1)(iv).

⁸⁸ 24 C.F.R. §8.3(c)(1). While the rule is, on its face, a proscription of separate housing for categories of people with disabilities in the absence of a statutory or presidential mandate to the contrary, HUD has on occasion interpreted the rule less stringently, at least where the federal funds in question are to be used for narrow and remedial purposes, and for a limited time period in the implementation of judicial consent decree. *See*, Letter from Office of Community Planning and Development and Office of Fair Housing and Equal Opportunity (June 18, 2001) concerning use of HOME funds in connection with settlement of *Wyatt v. Sawyer*, 219 F.R.D. 529 (M.D. Ala. 2004). (Letter on file with author.) Recently, HUD appeared to adopt a more flexible approach in proposed rules for the Supportive Housing Program (SHP). A July 20, 2004 notice of proposed rule-making offered SHP providers two options; the ability to target services to people with particular disabilities, so long as the provider served all people with disabilities who could benefit from the services offered in connection the program; and the ability to establish a preference for individuals with particular disabilities, where the preference “is necessary to provide qualified individuals with disabilities housing, aid, benefit, or services that are as equally effective as those provided to others.” *See*, 69 Fed. Reg. 43488 (July 20, 2004). The SHP statute does not authorize separate housing or services for categories of people with disabilities. 42 U.S.C. §11382(2). HUD’s explanation for the proposed rule does not reconcile the two apparently conflicting rules codified at 24 C.F.R. §8.3(b)(1)(iv) and §8.3(c)(1).

⁸⁹ 24 C.F.R. §8.4(d); 28 C.F.R. §35.130(d); 28 C.F.R. §36.203(a).

- ⁹⁰ 24 C.F.R. §8.4(b)(3); 28 C.F.R. §35.130(b)(2); 28 C.F.R. §36.203(b).
- ⁹¹ 24 C.F.R. §100.70(d)(2); §100.202(c).
- ⁹² 63 Fed. Reg. 70255 (December 18, 1998) (guidance on occupancy standards under family status provisions of Title VIII).
- ⁹³ 24 C.F.R. §100.202(c). *See also, Joint Statement on Reasonable Accommodation*, pages 11 to 14.
- ⁹⁴ 42 U.S.C. §3604(c); M.G.L. ch. 151B, §4(7)(c).
- ⁹⁵ *See*, 61 Fed. Reg. 14378 (April 1, 1996). The original Part 109 can be found at 54 Fed. Reg. 3231, 3308 (January 23, 1989).
- ⁹⁶ *See, e.g.*, the repealed 24 C.F.R. §109.5 (marketing to older persons does not violate Title VIII when consistent with provisions of Fair Housing Act regarding “housing for older persons”).
- ⁹⁷ *Lane v. Cole*, 88 F. Supp. 2d 402 (E.D. Pa. 2000) (racial harassment); *DiCenso v. Cisneros*, 96 F.3d 1004 (7 Cir. 1996) (sexual harassment); *Neudecker v. Boisclair Corporation*, 351 F. 3d 361 (8 Cir. 2003) (disability harassment).
- ⁹⁸ *See, e.g.*, 24 C.F.R. Part 245, Subpart B (Multi-Family Section 8 Assistance); 24 C.F.R. §92.303 (HOME rental housing); 42 U.S.C. §1437c-1 (federal public housing resident advisory boards); 760 C.M.R. 6.09 (state public housing).
- ⁹⁹ *See*, 24 C.F.R. §1.4(b)(vi) and (vii) (Title VI); 24 C.F.R. §6.4(c)(1)(x) (implementing Executive Order 11603); 24 C.F.R. §8.4(b)(1)(ii) and (vi) (§504); 28 C.F.R. §35.130(b)(1)(ii) and (vi) (ADA). *See also*, 760 C.M.R. §6.09(2)(a)(2). (state public housing).
- ¹⁰⁰ *NAACP Boston Chapter v. Sec’y. of Housing and Urban Dev.*, 817 F.2d 149 (1 Cir. 1987).
- ¹⁰¹ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000).
- ¹⁰² FHEO Handbook No. 8024.01, *Title VIII Complaint, Intake, Investigation, and Conciliation Handbook* (November 1998) (the “*Title VIII Handbook*”).
- ¹⁰³ 24 C.F.R. §1.4(b)(2)(i) (Title VI). *See also*, 24 C.F.R. §8.4(b)(4) (Section 504); 28 C.F.R. §35.130(b)(3) (ADA Title II); 28 C.F.R. §36.204 (ADA Title III).
- ¹⁰⁴ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000).
- ¹⁰⁵ *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).
- ¹⁰⁶ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).
- ¹⁰⁷ 24 C.F.R. §5.655(c)(1)(iv) (Multi-Family Section 8 Assistance); 24 C.F.R. §960.206(b)(1)(iii) (federal public housing); 24 C.F.R. §982.207(b)(1)(iii) (Section 8 Housing Choice Vouchers).
- ¹⁰⁸ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).
- ¹⁰⁹ 760 C.M.R. §4.08.
- ¹¹⁰ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (2000). The Section 8 preference statute is codified at 42 U.S.C. §1437f(o)(6)(A).

¹¹¹ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).

¹¹² See, FHEO Notice 96-3, *Administration of the Civil Rights-Related Program Requirements of the Department's Housing and Community Development Programs Under the March 16, 1995 Delegation and Redelegation of Authority* (July 23, 1996).

¹¹³ 24 C.F.R. §1.4(b)(3) (Title VI), 24 C.F.R. §92.202(a) (HOME).

¹¹⁴ 24 C.F.R. §891.125(c) (Section 202 and Section 811); 24 C.F.R. §941.202(b) and (c) (public housing); 24 C.F.R. §983.6(b)(3) (Section 8 Housing Choice Vouchers).

¹¹⁵ 26 U.S.C. §42(d)(5)(C).

¹¹⁶ 26 U.S.C. §42(m)(B)(ii)(III).

¹¹⁷ 24 C.F.R. §941.203.

¹¹⁸ 26 C.F.R. §1.42-5(c)(1)(v) ; *LIHTC Interagency MoU*.

¹¹⁹ See, 24 C.F.R. §200.620 and §200.625. See also, *Affirmative Fair Housing Marketing Handbook*.

¹²⁰ 24 C.F.R. §92.351(a)(1).

¹²¹ *MassHousing Tenant Selection Regulations*, III(B).

¹²² 760 C.M.R. §4.08.

¹²³ *LIP Guidelines*, p. 13; *40B NEF Guidelines*, par. 20.

¹²⁴ 24 C.F.R. §1.4(b)(2).

¹²⁵ 42 U.S.C. §1437d(s).

¹²⁶ 24 C.F.R. §903.7(c)(1).

¹²⁷ 24 C.F.R. §982.204(f).

¹²⁸ 760 C.M.R. §5.10(3); 760 C.M.R. §47.08. State public housing affirmative action rules are based on regulations that were repealed in 1996. See, 760 C.M.R. §33.06 and §47.08 (savings clause).

¹²⁹ *LIP Guidelines*, p. 15; *Chapter 40B NEF Guidelines*, sec. 22 and 23.

¹³⁰ See, 24 C.F.R. §1.6 (Title VI); 24 C.F.R. §8.55 (§504); 24 C.F.R. §92.508(a)(7)(i) (HOME); 24 C.F.R. §107.30 (Executive Order 11063); 24 C.F.R. §108.20 and §108.25(c) (affirmative fair housing marketing); *Public Housing Occupancy Guidebook*, par. 3.3; 24 C.F.R. §982.204(b)(5) (Section 8 Housing Choice Vouchers).

¹³¹ *Multi-Family Occupancy Handbook*, par. 4-16(D)(4).

¹³² 760 C.M.R. §47.08.

¹³³ 24 C.F.R. §982.54(d)(5) and (6).

¹³⁴ 24 C.F.R. §982.301(a)(2) and (b)(12). HUD may also approve payment of administrative fees to PHAs to help large families and families with a person with disabilities locate suitable housing. Notice PIH 2000-28 (HA) (August 9, 2000).

¹³⁵ 24 C.F.R. §982.301.

¹³⁶ 24 C.F.R. §965.508 and §982.517(e).

¹³⁷ 760 C.M.R. §5.08(2) (state public housing); 24 C.F.R. §960.203(d) (federal public housing); 24 C.F.R. 982.552(c)(2) (Section 8 Housing Choice Voucher program).

¹³⁸ See, e.g., 760 C.M.R. §5.03 (definition of family) and §6.04(l)(3) (income disregards) and 24 C.F.R. §5.403 (federal definition of live-in aide).

¹³⁹ *Route 128: Boston's Road to Segregation* (Report of the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights and the Massachusetts Commission Against Discrimination, January 1975), p. 15; *Boston Housing Authority v. Cassio*, 428 Mass. 112 (1998).

¹⁴⁰ In 1800, 240 African Americans were “deported” from Boston under authority of state law. Bergman, Peter L., *The Chronological History of the Negro in America* (New York, 1969), p. 27.

¹⁴¹ *Heritage Homes of Attleboro, Inc. v. The Seekonk Water District*, 648 F.2d 761 (1 Cir. 1981).

¹⁴² See, e.g., *Weeks v. Waltham Housing Authority*, C.A. No. 76-402-F (D. Mass., Entry of Judgment, July 22, 1977); *NAACP, Boston Chapter v. Harris*, 567 F. Supp. 637 (D. Mass. 1983); *Gardner v. Quincy Housing Authority*, C.A. No. 82-3873-N (D. Mass., Settlement Agreement, March 25, 1985).

¹⁴³ *We Don't Want Your Kind Living Here: A Report on Discrimination in the Greater Boston Rental Market* (Fair Housing Center of Greater Boston, April 24, 2001).

¹⁴⁴ 42 U.S.C. §3605(e).

¹⁴⁵ See, note 2 and accompanying text.

¹⁴⁶ 24 C.F.R. §1.4(b)(6).

¹⁴⁷ 24 C.F.R. §8.51; 28 C.F.R. §35.105.

¹⁴⁸ 24 C.F.R. §8.24(d) and §8.25(c) (Section 504; public and assisted housing), 28 C.F.R. §35.150(d) (ADA, Title II).

¹⁴⁹ 24 C.F.R. §8.25(c).

¹⁵⁰ 24 C.F.R. §8.24(c)(2).

¹⁵¹ 28 C.F.R. §35.150(c). Policies, practices, and facilities previously addressed by public entities under Section 504 transition plans were exempt from the requirements of this rule. See, 28 C.F.R. §35.150(d)(4).

¹⁵² See, e.g., *The Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (U.S. Department of Justice, November 1993) at pages 44 to 45 and HUD Notice PIH 2003-31, *Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988* (HUD, November 30, 2003) at page 3.

¹⁵³ See, 24 C.F.R. §91.225(a)(1) (community development rules); 24 C.F.R. §903.7(o)(2) (public housing); 24 C.F.R. §982.53 (Section 8 Housing Choice Vouchers).

¹⁵⁴ 24 C.F.R. §985.3(g) and (h).

¹⁵⁵ *Fair Housing Planning Guide* (Office of Fair Housing and Equal Opportunity, March 1996), Vol. 1, §2.4.

PART IV: IMPLEMENTING SELECTION PREFERENCES FOR LOCAL RESIDENTS

OVERVIEW OF PART IV

To successfully navigate the requirements of affordable housing programs and meet local needs, a provider must lease to eligible families and comply with program-specific tenant selection requirements. Within that framework, in most programs, an owner has substantial discretion to shape the content of tenant selection practices and therefore the characteristics of the people who live in the development. These issues were discussed in Parts I and II.

The same concept applies to civil rights considerations. Civil rights related program requirements have no less import to a provider than any other requirements associated with operating a property. Moreover, it is uniformly accepted that there is no justification for intentional, deliberate acts of housing discrimination. Within *that* framework, an owner is permitted to make choices that have a civil rights impact, so long as those choices do not result in an *unlawful* discriminatory effect or disparate impact, and, where applicable, so long as the provider complies with civil rights-related program requirements and the obligation to affirmatively further fair housing. These matters were addressed in Part III.

Part IV offers a civil rights context for thinking about local selection preferences. It borrows from the methods used by the courts to evaluate claims of disparate impact or discriminatory effect under the Fair Housing Act.¹ Under that approach, admissions practices have a disparate impact if the policies are “facially neutral in their treatment of different groups but... in fact fall more harshly on one group than another and cannot be justified by business necessity.”² A practice is not unlawful unless it imposes a “significantly adverse or disproportionate impact” on protected individuals.³ Even if there is a substantial effect, the practice may still be justified by a “business necessity sufficiently compelling to justify the challenged practice.”⁴ However, the practice is only lawful in the absence of a less discriminatory alternative available to meet the justifiable need.⁵ The courts have applied this methodology in two situations; where the burden of a practice falls more harshly on an identified group of protected individuals like tenants or applicants,⁶ and where the burden affects a community by perpetuating segregation.⁷

These standards evolved in the context of litigation. Their precise formulation is not uniform among all the federal courts of appeal. As litigation standards, they impose shifting burdens of proof and persuasion on plaintiffs and defendants.⁸ The objective of Part IV is not to analyze the litigation merits of disparate impact claims. Instead, the Practice Guide uses the principles articulated in a judicial context to suggest a five part road map for providers to understand how to implement selection preferences consistent with civil rights considerations:

1. To understand whether a policy falls more harshly on one group over another, providers must identify the housing market from which eligible individuals will apply and the characteristics of likely applicants.
2. Second, it is critical to evaluate the impact of the policy on groups of eligible people within the housing market.

3. If there is an impact on one or more protected groups, then it is important to determine if the impact is significant and disproportionate.
4. Where the burden is significant, owners should determine if the selection preference is justified by some objective necessity.
5. Finally, providers must still identify the least burdensome and most narrowly tailored practice to meet the identified need.

Part IV is organized around each of these considerations. It also addresses two special issues; the problem of affirmative action and race-conscious selection practices, and the role played by the obligation to affirmatively further fair housing. The objective of Part IV is to present both the legal theories and the mechanics that affect the legality of selection preferences. Consequently, Part IV concludes with a case study that illustrates the concepts discussed in this section of the Practice Guide.

A. UNDERSTANDING THE HOUSING MARKET AND THE APPLICANTS

1. Defining the Housing Market

Most judicial decisions examining questions of disparate impact rely on statistical information from a geographically defined housing market area.⁹ Civil rights related program requirements provide useful examples of different methods to define a housing market. HUD monitoring of affirmative fair housing marketing in the Multi-Family Section 8 Assistance program relies on the metropolitan statistical area as the basic measure for a housing market.¹⁰ In evaluating PHA performance in expanding housing choice under the Section 8 Management Assessment Program (SEMAP) applicable to the Section 8 Housing Choice Voucher program, HUD requires PHAs to map areas of poverty and racial segregation in the PHA's jurisdiction and in neighboring jurisdictions.¹¹ For purposes of assessing bonus rating factors for deconcentration of poverty under SEMAP, PHAs may consider an area that most closely matches its operating area, such as the city, county, or metropolitan statistical area.¹² DHCD has used various housing market measures to assess PHA compliance with its affirmative action requirements, including the metropolitan statistical area, the local city or town, the Regional Housing Marketing Area used by local planning agencies, and areas proposed by the PHA.¹³

Unless otherwise required by the particular program, no one of these standards is definitive. "The correct inquiry is whether the policy in question" has an impact on a protected group within "the total group to which the policy applied."¹⁴ The provider need only make a sensible choice based on day-to-day experience about the housing market from which eligible applicants are likely to apply, and, for voucher programs, the market in which participants will live.

2. Applicant Characteristics

A housing provider must also understand the characteristics of the people eligible for the housing within the housing market. For example, in most federal housing programs, eligibility is limited

to families with incomes at or below 80% of area median income. Consequently, the starting point for a housing provider evaluating a selection preference in federally-assisted housing is the universe of households within the housing market area that have eligible incomes. Other eligibility criteria such as age or disability may also be important factors to consider in evaluating the universe of possible applicants.

A complete discussion about the sources of information for understanding the characteristics of the market area has been the topic of other publications, and is beyond the scope of the Practice Guide.¹⁵ One useful source of information is the on-line Comprehensive Housing Affordability Strategy (CHAS) data available from HUD. CHAS data provides demographic information on a municipal, county and state level, and includes data on racial and ethnic characteristics, family type, household size, income levels and housing problems.¹⁶ Other on-line data related to the CHAS provides information about the numbers of people with disabilities in individual communities.¹⁷ CHAS data can be a useful tool for identifying the people who will be affected by a particular practice. It is used in the case study that appears at the end of Part IV.

B. EVALUATING IMPACT

A selection practice results in a civil rights impact only if it affects a particular protected class of eligible people, *as compared to another class of eligible people*.¹⁸ An impact can occur in a number of possible dimensions, all of which should be evaluated. Marketing materials that advertise a selection preference may reduce the number of minorities on a waiting list. The use of the preference in selecting tenants may affect comparative rates of selection among different racial or ethnic groups. It may also affect participation profiles in a project or program.¹⁹ Consequently, providers should carefully identify each aspect of marketing, waiting list management, tenant selection, and admission practice to determine the effect of a practice on the groups of people protected by civil rights laws.

C. THE SUBSTANTIALITY OF THE IMPACT

The fact that a particular selection practice favors one group over another does not by itself result in a civil rights violation. Disparities must be “significantly adverse or disproportionate” to violate the law.²⁰ There are several mathematical tests used to measure discriminatory effect. Often, the measures are most reliable with large samples of data. Courts apply these tests not so much as bright line rules, but rather as benchmarks against which it is possible to gauge the substantiality of impact. The measures are described here as a general framework for thinking about impact. Because “no single test controls in measuring disparate impact,”²¹ they are not offered as absolute “safe harbor” standards.

1. Selection and the Four-Fifths Rule

In concluding that the selection preferences at issue in *Langlois v. Abington Housing Authority* violated fair housing law, the court relied in part on similar federal laws that bar employment discrimination. The decision applied the so-called “four-fifths” rule used by the federal Equal Employment Opportunity Commission (EEOC) to measure disparate impact in the employment context. The rule is intended to gauge the discriminatory effect of selection from within an

existing pool of qualified candidates. Under the Four-Fifths rule, “a selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of disparate impact.”²² The case study in the Appendix to Part IV is an example of how the Four-Fifths Rule may be applied.

2. Probability of Discriminatory Outcome

The Four-Fifths rule is used to define the degree of acceptable and unacceptable tolerances in participation rates. The courts sometimes use other statistical concepts to assess the probability of a discriminatory outcome in light of a particular practice. The object of these tests is to assess whether or not an observed outcome is due to chance, or so different from plausible expectations, “that random chance could not reasonably account for the outcome.”²³ If a chance occurrence is unlikely, there is a disparate impact sufficient for a complaining party to establish a fair housing violation. The most sophisticated probability tests use a statistical tool called the “standard deviation,” a test that measures the extent to which actual outcomes deviate from expected outcomes. The mathematical formula for determining standard deviations is described in Figure 5. For close circumstances, a housing provider might decide to hire a statistician to assist with calculating these tests.

Most times, the improbability of particular outcome, or anticipated outcome, will be a matter of common sense. Indeed, to the courts, statistical significance alone does not prove discrimination. Rather, the numerical differences “must be of ample magnitude to be of practical importance” to the families affected by the selection practice. “This is, of course, a value judgment” for which “[t]here is no bright line rule...”²⁴

Examples of cases where courts found an unlawful disparate impact without precisely calculating the standard deviations include a 48.5% disparity in evictions between Blacks and Whites,²⁵ an 18% percent difference between the number of minority participants and minority applicants on the waiting list for a PHA Section 8 program,²⁶ and differences between minority waiting list and participation rates ranging from 9% to 51% in *Langlois v. Abington Housing Authority*.²⁷

3. The Effect of Delay

The discussion so far has focused on the actual or projected effect local resident selection preferences might have on denial and exclusion from participation in the housing or housing program. In some situations, there may be a lesser impact on participation, but significant disparities in the waiting time to admission. To understand the delay in admission resulting from a selection preference, a provider must analyze the rate of turnover of units, the characteristics of the waiting list, and the relative waiting time on the list between members of protected groups and more favored groups on the waiting list.²⁸ It is worth paying particular attention to the effect of an open, as opposed to closed waiting list. On a closed waiting list, a non-resident applicant to housing with a 100% selection preference for local residents will wait until all residents on the list are offered units. On an open waiting list, a constant flow of new applications from residents “for all practical purposes may be the equivalent of a denial.”²⁹

Figure 5
Standard Deviation and *Castenada v. Partida*

The Supreme Court decision in *Castenada v. Partida*³⁰ is one case where the Court explained the concept of a standard deviation. The decision centered on a claim of discrimination in the make-up of a grand jury pool consisting of 870 people. Mexican-Americans characterized 79.1% of the population from which the jury pool was drawn, but only 38.9% of the jury pool. In considering the disparity between the number of Mexican-Americans and the number of non-Mexican-Americans in the pool, the Court expressed the measure of standard deviation “as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.”³¹

Noting that 220 people were selected to serve as jurors during the period of time at issue, the Court went on to subtract the actual number of Mexican-American jurors (100) from the expected number of Mexican-American jurors (79.1% of 220, or 174), dividing the result (74) by the standard deviation of 12, resulting in 6 standard deviations. The result is 2 to 3 times greater than an outcome that would suggest a random outcome, and therefore indicates a high probability of discrimination.

This method of calculating the probability of discrimination against a particular group can be depicted as follows:

Step 1: Calculate the standard deviation by taking the square root of:

	(Total number in the pool of qualified candidates)	(870)
X	(Percentage of protected group in the pool)	(79.1% Mexican-Americans)
X	<u>(Percentage of all others in the pool)</u>	<u>(20.9% Non-Minorities)</u>
	(Product)	143.82

In Step 1, the standard deviation is the square root of 143.82; that is 11.99, or 12.

Step 2: Calculate the extent to which participation differs from the standard deviation:

	Expected number of minority participants: 220 participants X 79.1% minority =	174
-	Actual minority participants:	<u>100</u>
	Result	74

Result divided by standard deviation of 12: 74/12 = 6 standard deviations

4. *Perpetuation of Segregation*

The Four-Fifths Rule and other techniques for measuring substantiality of impact focus on the effect of selection practices on eligible applicants. However, fair housing laws are intended not just to end acts of discrimination against individuals but also to reverse patterns of residential segregation.³² Consequently, a practice that has the effect of perpetuating segregation can violate Title VIII, whether or not it “produces a disparate effect on different racial groups.”³³

Perpetuation of segregation claims are usually asserted in situations where denial of municipal services, or municipal land use decisions, including zoning and local decisions under Chapter 40B, have the possible effect of limiting housing opportunities for racial and ethnic minorities to predominantly minority neighborhoods, or excluding minorities from opportunity in non-minority communities.³⁴ Demolition and relocation activities that fall more harshly on minority families and result in continuation of segregation may also be challenged.³⁵ One court ruled that a housing authority selection preference for working families was unlawful because it would perpetuate segregated living patterns in public housing in violation of previous court orders.³⁶

Perpetuation of segregation claims focus on where people live, where they might expect to live, and the effect of a particular selection practice or siting decision on living patterns within a community’s borders and in the housing market.³⁷ Where there are significant racial disparities among neighborhoods, or among areas of the market, a practice will be unlawful if it excludes minorities or prevents integration, exacerbates existing patterns of segregation, or tips a racially mixed area into segregation.³⁸

There is no single measure that defines one area as segregated and another as integrated. Some measures require an evaluation of a number of factors. Under HUD’s siting rules, for example, an “area of minority concentration” is defined as any area where the proportion of minority residents “substantially exceeds” that of the jurisdiction as a whole. Whether a differential is “substantial” depends on the demographics of the housing market, including living patterns, numbers of minority and non-minority families, patterns of reinvestment and disinvestment, and other trends.³⁹ Other measures are fixed. HUD’s *Fair Housing Planning Guide*, applicable to programs subject to consolidated planning requirements, like HOME and CDBG, defines a “racially non-impacted location” as an area where a particular ethnic or racial group represents less than 30% of the total population of the area.⁴⁰ By that measure, a neighborhood where 30% or more of the population is characterized by minority residents would be considered segregated. In contrast, the HOPE VI public housing revitalization grant agreement and HUD processing standards for the Section 811 program define a “racially concentrated area” as a location where the percentage of racial or ethnic minorities is 20% or more than the percentage of minorities in the housing market area.⁴¹

It is worth noting that the Census Bureau evaluates segregation by reference to five categories, based on nineteen statistical measures. The five categories evaluate the *evenness* of the distribution of minorities within an area, the *isolation* of racial and ethnic groups from other groups, the *concentration* of racial and ethnic minorities in a particular geographic area, the degree to which racial and ethnic minorities are *centralized* around the urban core, and the extent

of *clustering* of minorities in adjoining areas.⁴² These factors are described in greater detail in Figure 6.

FIGURE 6

RECOGNIZING SEGREGATION

HUD policy offers single measures of segregation that focus on the difference between the percentages or numbers of minorities in a particular location, as compared to other areas, or the overall housing market. Dissimilarity is only one of nineteen standards, grouped into five facets, used by the Census Bureau to measure residential segregation.⁴³ The five facets of segregation consist of the following:

Evenness compares the distribution of racial and ethnic groups within a geographic area.

Dissimilarity is one facet of evenness. It measures the percentage of a particular group that would have to move to be evenly distributed within an area. A dissimilarity index of 0 or 0% represents complete integration, and 1.0 or 100% represents complete segregation.

Exposure measures the possibility of contact between minority group and majority group members; that is, the extent to which different groups share common residential areas. One expression of exposure is *isolation*. The greater the degree of isolation, up to 1.00, the greater the measure of segregation.

Concentration corresponds to the amount of physical space occupied by a group. Higher levels of concentration mean that more people occupy a smaller area and therefore are more segregated. A score of 1.00 represents maximum concentration.

Centralization ascertains the degree to which a group is located near the center of an urban area. A centralization value of zero means that a group is uniformly distributed within an area. Values that increase towards 1 reflect more centralization and more segregation.

A high degree of *clustering* indicates that large numbers of minorities live close to one another in adjoining areas. Values that increase towards 1 reflect higher degrees of clustering.

Table A-7 in the Appendix depicts sample segregation data from the Springfield, MA metropolitan statistical area.

D. MATCHING NEED TO PREFERENCES

The fact that a selection practice has a discriminatory effect does not mean that the practice violates civil rights laws. A discriminatory practice can be justified by a “legitimate and substantial” governmental or business interest.⁴⁴ A “legitimate” interest should be measured in part by reference to the requirements of the housing program, and in part by reference to the particular needs of a local community.

1. Program Requirements

When evaluating need, any selection preference ought to be assessed first with reference to program requirements.⁴⁵ For example, HUD rules for Section 8 Housing Choice Voucher, the Project Based Section 8 Voucher, and the Multi-Family Section 8 Assistance programs all require providers to extend the benefits of any selection preference for local residents to individuals who work in the preference area.⁴⁶ A more narrowly defined preference only for families that live in the community would not be permissible even if justified by an identifiable need.

2. Consistency With Actual Need

The federal Section 8 statute offers a useful template for matching selection preferences to local housing conditions. The law permits a system of local preferences, based on “local housing needs and priorities, as determined... from generally accepted data sources...”⁴⁷ The local needs analysis required by the Section 8 statute suggests that housing providers should assure that there is some correlation between the actual need for the housing to be constructed and the preference scheme. Useful, and acceptable data sources include the housing and homeless needs assessments and housing market analyses required by HUD’s consolidated planning rules for its community development and planning programs,⁴⁸ the housing needs statement from PHA plans,⁴⁹ and the information collected by a PHA for purposes of complying with Section 8 Management Assessment Program standards for expanding housing opportunities.⁵⁰ CHAS data, data from the U.S. Census Bureau and information included by municipalities in Local Affordable Housing Plans approved by DHCD may also be helpful.⁵¹

E. TAILORING PREFERENCES TO THE LEAST DISCRIMINATORY IMPACT

Where justified by a legitimate interest, a selection practice with a discriminatory affect is permitted, so long as “no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.”⁵²

1. Limited Preferences

One strategy for reducing the disproportionate effect of local selection preferences is to limit the extent of the preference. For example, a housing authority might adopt a selection preference for local residents for 50% of the admissions to the property, instead of all admissions. A provider might also limit use of a selection preference for local residents to initial lease-up, in order to reduce the impact of the preference on later applicants.

2. Using Other Characteristics to Meet Need

A simple selection preference that favors local residents is not the only way to meet local need. Part II explained that many programs permit specific preferences for particular categories of people, like working families, homeless households, or victims of domestic violence. Providers are not limited to the permitted preferences identified in program rules. For example, the trial court in *Langlois v. Abington Housing Authority* noted that a local selection preference might be appropriate for families displaced by a fire, or households with a significant housing burden because of economic factors like a loss of local jobs.⁵³

Preferences can also be structured with multiple factors that diminish discriminatory effect. To meet the needs of local households, an owner might adopt a selection preference for *all* eligible families with housing problems, like high cost burdens, substandard housing, or overcrowding. Within that preference the owner could offer a priority to local resident families with housing problems. Another approach would award one preference point for family characteristics like local residence or housing problems and impose a limit of one point for each applicant household. Under this approach, local applicants would be on an equal footing with non-resident applicants with housing problems.

3. Expanding the Residency Preference Area

Housing providers are not required to limit local resident selection preferences to residents of the city or town where the housing is located. A residency preference area can be expanded to larger sub-units of the housing market. For example, if the housing market is the metropolitan statistical area, the preference area can include the county in which the community is located, or cities and towns that are contiguous to the community. Providers should be thoughtful about taking this approach. Many metropolitan areas are characterized by extremely high levels of concentration and centralization of minorities. Such conditions indicate that minority households are segregated in particular areas of the metropolitan statistical area. A local resident selection preference based on an expanded residency preference area that excludes locations where minority households live will likely have a discriminatory effect.

F. SELECTION PREFERENCES BASED ON PROTECTED CHARACTERISTICS

In considering local need, housing providers are sometimes guided by the desire to serve households with characteristics that are relevant for civil rights purposes. Selection practices that favor applicants based on civil rights-related characteristics are not “facially neutral.” They represent the deliberate choice to distribute housing benefits based on protected status. Part II explained that some housing programs base eligibility on or permit selection preferences that are based on factors like disability, or status as an elder, or age, where the age preference is designed to benefit families with children. From a fair housing perspective, this type of preference is encouraged because it is intended to create a civil rights benefit.⁵⁴

Preferences that are designed to provide a civil rights benefit based on race are more complex. Civil rights laws are intended to meet fair housing goals “within constitutional limitations.”⁵⁵

Judicial interpretations of the U.S. Constitution subject race conscious decision-making to a form of “strict scrutiny” under which “racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”⁵⁶ Classifications based on other characteristics protected by civil rights laws, such as disability, are subject to far less rigorous constitutional standards.⁵⁷

The concept of strict scrutiny does not rule out race conscious decisions in the housing context. For example, a properly tailored race conscious selection procedure may be an appropriate remedy for past acts of deliberate discrimination.⁵⁸ Such procedures may also be permitted to reverse or prevent a recognized racial imbalance.⁵⁹ More recently, the Supreme Court ruled that educational institutions may take race into account as an admissions factor in order to promote racial and ethnic diversity within the student body.⁶⁰

Despite these court decisions, it is critical to bear in mind that race conscious decision-making is permitted only in those limited circumstances where the practice is narrowly tailored to address a compelling interest. A properly tailored race conscious selection practice ought to at least have the following features:

1. The practice should identify with specificity the particular interest the practice is aimed at, such as preventing or reversing racial imbalance. A generalized desire to remedy “societal discrimination” will not be sufficient. Instead, it will be necessary to identify specific actual or anticipated imbalances in the characteristics of a community, a housing program or a waiting list.
2. A race conscious practice should be time-limited, either implemented once, or subject to continual review and adjustment.
3. In general, race should not be a determinative factor in selection. While race may be one among many factors, admission or selection should be based on the individual merits of the applicant.
4. Measures that are intended to increase or promote minority access are generally permitted. However, quotas that establish fixed limits on participation “are of doubtful validity.”
5. The practice should be carefully and narrowly tailored to achieve the interest at issue, assessing such factors as the need for race conscious approach, the effectiveness of alternative approaches, the flexibility and expected duration of the practice, the relationship of specific numerical goals to the housing market, and impact of the practice on less favored parties.⁶¹

DHCD’s affirmative action admissions requirements for state public housing and the selection practices required for 40B projects with funding from non-governmental entities are examples of race conscious practices that meet these criteria. The public housing affirmative action requirement permits race conscious selections. It is effective only when there are identified racial disparities between the characteristics of public housing occupants and the characteristics of eligible families in the housing market area.⁶² The 40B mandate neutralizes the potentially discriminatory effect of a selection preference for local residents. That protocol applies only at the initial leasing of rental units or marketing of homeowner units. It does not permit selections

based on race. Instead, it assures racial balance in the pool of eligible applicants who are then selected by lottery.⁶³ In each case, the actual selection for participation is based on individual screening that assesses every applicant's suitability for admission based on criteria applicable to all households, without regard to race.

G. MONITORING AND FOLLOW-UP

Tenant selection is an ongoing process. Applicants leave or may be removed from waiting lists, or may be rejected for admission based on standard screening procedures. Occupants move away from units, and new tenants are selected. The demographic characteristics of waiting lists and occupancy patterns are also affected by the changing characteristics of the families that apply for the housing, the characteristics of the households that qualify for the preferences, the extent to which the housing is broadly marketed and made available to applicants from the entire housing area, and how the waiting list is ordered, for example, by date and time of application or by lottery.

Because waiting lists and occupancy profiles are dynamic, the civil rights effect of selection practices often change over time. Some housing programs require providers to monitor the changing civil rights impact of waiting list and selection practices and take corrective action in the event problems emerge.⁶⁴ Ongoing HUD monitoring of fair housing compliance is a feature of the public housing and Section 8 Housing Choice Voucher programs.⁶⁵ Consequently, it is important for providers to monitor the civil rights effect of selection practices and to change course when a negative result is observed.

H. AFFIRMATIVELY FURTHERING FAIR HOUSING

Part III discussed the obligation to affirmatively further fair housing under which recipients of HUD assistance must identify conditions of discrimination and impediments to fair housing choice, and must take steps to reverse those conditions and remove those impediments. The principal tools for meeting this mandate include the Analysis of Impediments to Fair Housing Choice (AI), which jurisdictions must complete as part of the Consolidated Plan for funds administered by HUD's Office of Community Planning and Development, an AI that PHAs must complete as part of the public housing agency plan, and the transition plans and self-evaluations required by HUD's Section 504 rules for people with disabilities.⁶⁶ Applicants for competitive HUD grants are also required to further fair housing by taking "specific steps to: (1) Overcome the effects of impediments to fair housing choice that were identified in the jurisdiction's Analysis of Impediments (AI) to Fair Housing Choice; (2) Remedy discrimination in housing; and/or (3) Promote fair housing rights and fair housing choice."⁶⁷

The responsibility to further fair housing is both a planning and implementation requirement. Careful planning takes into account all aspects of a housing program, including initial decisions about the people who will be served with the particular housing resources, the scan of the civil rights environment, the choice of admissions preferences, the design of a marketing plan, the development of an outreach and application procedure, the construction of a waiting list, and the screening and admission of individual households. Implementation means taking specific actions to remove identified impediments to choice. Action plans should be consistent with the

overriding mission of the housing agency or the housing program.⁶⁸ An agency may exercise considerable discretion in designing an action plan. However, to make no plan, to take no action, to engage in deliberate acts of discrimination, or to engage in activities that result in a disparate impact will violate the obligation to affirmatively further fair housing.⁶⁹

The responsibility to affirmatively further fair housing means that providers should do more than determine that selection practices are neutral with respect to civil rights considerations. It is an obligation for housing providers to explicitly address fair housing considerations in tenant selection plans, making certain that the operation of housing programs improve choice and promote opportunity.

APPENDIX TO PART IV: CASE STUDY BARNEYTOWN, MASSACHUSETTS

The following case study is designed to illustrate the principles discussed in Part IV of the Practice Guide. Using sample CHAS data tables, it depicts a small suburban city in western Massachusetts. For purposes of the Practice Guide, the city is renamed with the fictional name of Barneytown. Barneytown is located in Hampden County, in the Springfield metropolitan statistical area. The data tables are found at the end of the case study. Tables A-1 through A-6 depict CHAS data for all renters, plus Black and Hispanic renters in Hampden County and Barneytown. Table A-7 shows segregation indices for the Springfield, MA metropolitan statistical area (MSA), from the U.S. Census Bureau. Although CHAS data displays information about renters and homeowners, the tables depicted here only show renter data. To simplify the presentation, the Census Bureau data also depicts only the basic data fields available on segregation in the Springfield MSA.

In the case study, a hypothetical provider has purchased 50 condominium units to be used as family rental housing, scattered among 10 twenty-five unit buildings in a condominium complex located in Barneytown. The developer intends to subsidize the rents in each of the 50 units with Project Based Section 8 Housing Choice Vouchers and is considering use of a selection preference for Barneytown residents for all admissions to the units. The case study evaluates the civil rights impact of proposed selection preference. Readers should keep in mind that the examples in Part IV are based on hypothetical assumptions about the characteristics of applicants. Real-life situations will be affected by many variables, like marketing and screening. It is therefore important to use the hypothetical examples in Part IV to understand the process for evaluating preferences and not as fixed standards that can be relied on in all circumstances.

A. Understanding the Housing Market and the Applicants

A survey of the CHAS data for Barneytown and Hampden County indicates that there are 1,593 renter households in Barneytown with incomes less than 80% of AMI who might qualify for occupancy in federally assisted housing. Of these families, 24 or 1.5% are Black, and 30 or 1.8% are Hispanic. Altogether, 3.3% of Barneytown's low-income renters are minority families. In contrast, Blacks comprise 12% and Hispanics 30.4% of the low-income renters in the surrounding area of Hampden County. Consequently, 42.5% of Hampden County's low-income renter households consist of minority families. The segregation indices for the county show high levels of concentration for all minorities. In addition, significant levels of centralization and dissimilarity affect Blacks and Hispanics.

The sample CHAS data from Barneytown illustrates how a provider might evaluate the housing market. The provider might successfully market the development to a mix of applicants that reflects demographic patterns in the county. In that case, the waiting list might consist of 100 households, of which 42.5% or 43 are minority. If half of the 100 families on the initial waiting list are local residents, and if the waiting list of local residents also reflects the demographics of the community, perhaps 3.3% or 2 of the households on the list will be minority families from Barneytown.

B. Evaluating Impact

Use of a selection preference for local residents at the Barneytown project will likely result in significant disparities between Whites and minorities in admission and occupancy. With 50 families to be selected for the 50 available units from the waiting list of 100, and with 50 local residents on the list, only the two minority local residents are likely to be admitted out of all minority applicants. In other words, 4% of the occupants will be Black or Hispanic, compared to 43% of the waiting list.

C. The Substantiality of the Impact

1. The Four-Fifths Rule

Use of a preference for local residents for all selections from the Barneytown waiting list of 100 suggests a violation of the Four-Fifths Rule, and therefore a substantial and disproportionate adverse impact on minority applicants. One use of the Four-Fifths rule measures comparative selection rates between Whites and non-Whites. Using this approach in the case study, with 43 applicant minorities, a 100% selection preference for local residents will likely result in the admission of 2 local minority households, a minority selection rate of 4.6%. Of the 57 white, non-minority applicants, 48 local residents are likely to be selected, a rate of 84.2%. The selection rate of minority families compared to white households is 4.6% divided by 84.2%, that is, 5.5%, a rate glaringly less than the 80% required by the Four-Fifths rule.

A second approach to using the Four-Fifths rule measures comparative selection rates for minorities with and without a local selection preference. In the case study, with 50 available dwelling units and a 100 person waiting list comprised of 43 minority applicants, each minority applicant would have one chance in two of selection in the absence of a preference for local residents; that is, a likely minority selection rate of 50%. If the use of the local residency preference resulted in admission of 2 minority local residents, the admission rate would be 2 out of 43, or 4.6%. The ratio of anticipated minority admissions with the local preference, as compared to without the local preference is 4.6% to 50%, or 9.2%, well below the 80% required by the Four-Fifths rule.

2. Probability of Discriminatory Outcome

The statistical measure of the standard deviation is a tool that assesses the likelihood that a discriminatory outcome is the result of chance, as opposed to illegal discrimination. Applying the formula to the Barneytown case study results in a standard deviation of about 5, calculated by taking the square root of 100 (the total number on the waiting list) times 43% (the probability of selecting a minority without the selection preference) times 57% (the probability of selecting a non-minority without the selection preference). The expected number of minority occupants without implementing a preference for local residents is 43% of 50 units, or 21, and the number of minority occupants with the selection preference is 2. The difference between 21 and 2, is 19. Nineteen divided by a standard deviation of 5 is 3.8 standard deviations, larger than the two to three standard deviations that might be tolerated under the Supreme Court decision in *Castaneda*.

3. Delay

The effect of a local selection preference in the case study has two dimensions; one with a closed waiting list, and one if the waiting list remains open. In the case study, the initial waiting list is comprised of 50 Barneytown residents, of which two are minorities. All 50 are selected for admission at initial lease-up. The remaining non-residents on the waiting list consist of 41 minority and 9 White applicants. With a closed waiting list, delay in admission is a function of unit turnover. If 2 units turnover each year, it will take 25 years to serve a non-resident waiting list that is 82% minority. In comparison, the resident waiting list, which is 96% White, is immediately housed. Another way of stating the effect of delay with a closed list is to examine the comparative effect, by race, on the original waiting list of 100 applicants. From that perspective, a delay in selection affects 9% of the original White applicants, and 41% of the original minority applicants. Under either approach, the disparities are glaring.

Those disparities are likely to grow with an open waiting list. As time goes on, the waiting list will grow longer. If one Barneytown resident applies for each non-Barneytown applicant, an annual volume of 4 applications will assure that no non-residents will be selected for admission to the 2 units that turn over each year. Since minorities are likely to represent only 3.3% of the resident applicants, and 42.5% of the non-residents, a lengthy delay in minority admission is the practical equivalent of complete denial.

4. Segregation

Barneytown is not an area of minority concentration or a racially concentrated area. Moreover, there is a significant disparity between the city, where only 3.3% of low-income renters are minorities, and the county, where 42.5% of low-income renters are minorities. A local selection preference will likely maintain that segregated *status quo*.

D. Matching Need to Preferences

1. Program Requirements

In using Project Based Section 8 Vouchers, the Barneytown provider must comply with HUD's rules for the Section 8 Housing Choice Voucher program. A selection preference only for families that *reside* in the city would violate the regulation that requires that the benefit of a local selection preference be extended to applicants that live in or *work* in the residency preference area.

HUD targeting rules for the Section 8 Housing Choice Voucher program may also be at issue. Under the targeting rules, 75% of the annual aggregate admissions to the PHA's program must consist of extremely low income families with incomes at or below 30% of AMI. Perhaps the PHA in the case study requires the provider to comply with this standard. Of the 1,537 qualifying local Barneytown renters with incomes less than 80% of AMI, 531 are extremely low income households. Consequently, to serve only local residents, lease all project units, *and* comply with program requirements, the provider must assure that the waiting list is comprised of a sufficient number of extremely low-income families. Since only one-third of Barneytown's

eligible renters meet this criteria, a selection preference where all units are offered first to local residents might not result in admissions that meet targeting requirements.

2. Consistency With Actual Need

Eligibility in the Section 8 Housing Choice Voucher program is limited to households with incomes at or below 80% of AMI. Because 1,537 Barneytown renter households have incomes less than 80% of AMI and qualify for the proposed 50 units of housing, it might be plausible to argue that all units should be distributed based on a selection preference for local residents. However, it is equally clear that a 100% preference for local residents will have a substantial disparate effect on minority applicants. Such a result would not likely be approved under HUD's fair housing compliance policies. The effect on minority participation would also likely fail to comply with the corresponding civil rights related program requirements of the Section 8 program. In such situations, it is important for the provider to look deeper in considering local need.

In the Barneytown hypothetical, the developer is constructing family housing. CHAS data indicates that of the 1,593 low-income renter households in the city, 477 are non-elderly "related" families likely to have children, just 30% of all eligible households. In contrast, 21,626 eligible Hampden County households are non-elderly related families, 47% of the total eligible renter households. In situations like these, the desire to meet local resident need for family housing with a local resident selection preference for all units does not closely fit the rate of need among eligible residents, as compared to the housing market. Consequently, a 100% local resident selection preference might not be justified.

E. Tailoring Preferences to the Least Discriminatory Impact

1. Limited Preferences

A selection preference for local residents for all units in the Barneytown project clearly will have a discriminatory effect. However, a limited local selection preference may still be possible. One way to evaluate that possibility is to project the effect of a selection preference for local residents for 50% of the admissions.

If the 100 family waiting list in the case study is evenly divided between local residents and residents of the county, and the waiting list is demographically like Hampden County and Barneytown, then 3.3% or 2 of the 50 Barneytown households will be minority families and 42.5% or 22 of the 50 non-resident families will be minorities. In such a circumstance, the outcome of a 50% selection preference for local residents might result in an occupancy pattern where 24% of the occupants are minorities and 76% will be non-minorities. The chart on the following page depicts this outcome in detail.

It is evident that even with a 50% local selection preference, there are disparities between the percentage of minorities in occupancy (24%) and the percentage of minorities in the market area and on the waiting list (42.5%). However, the admission rate of minorities on the waiting list is 12 households out of 24, or 50%, a rate that is equal to the non-minority selection rate of 38

families out of 76, also 50%. Under the Four-Fifths Rule, because the minority selection rate is equal to the non-minority rate, the impact of the 50% local resident selection preference is not so substantial that it would trigger a civil rights violation. It is also worth noting that the incidence of minority occupants is 1.8 standard deviations beyond what might otherwise be observed without a selection preference, less than the 2 or 3 standard deviations usually tolerated.

Selection and Occupancy: 50% Local Preference						
	Units	List	Minority List	Minority Occupants	Non-minority List	Non-minority Occupants
Residents (50%)	25	50	2 (3.3% of 50 residents)	1 (50% of 2)	48 (96.7% of 50 residents)	24 (50% of 48 residents)
Non-Residents (50%)	25	50	22 (42.5% of 50 non-residents)	11 (50% of 22)	28 (57.5% of 50 non-residents)	14 (50% of 28 non-residents)
Total	50	100	24 (24% of 100 on list)	12 (24% of 50 units)	76 (76% of 100 on list)	38 (76% of 50 units)

2. Using Other Characteristics to Meet Need

The CHAS data in the hypothetical Barneytown example indicates that of the 477 family renter households with incomes less than 80% of AMI, 243 families live with housing problems consisting of high cost burdens, overcrowding, or substandard housing. A selection preference for Barneytown residents with housing burdens may be one method of more closely tailoring the preference to housing need. However, the county data indicates much higher rates of housing burden among family renters in Hampden County, suggesting that a single preference for local residents with housing burdens will exclude large numbers of eligible minority renters. In such circumstances, the provider might want to consider more complex strategies, such as limited selection preferences for local residents with housing problems, or a limited priority for local residents within a preference for all applicants with housing problems.

3. Expanding the Residency Preference Area

In the case study, the provider might choose to expand the residency preference area as another strategy to reduce the possibility of a discriminatory effect in connection with a selection preference for local residents. The residential segregation data in Table A-7 suggests that the provider ought to exercise caution in examining this possibility. With Black and Hispanic concentration indices ranging from 94.6% to 97.6%, that data indicates that minorities are almost totally concentrated in one area of the Springfield metropolitan statistical area. With such a high level of segregation, the provider must be sure that the expanded residency preference area includes those concentrated neighborhoods or communities to avoid a civil rights violation.

F. Affirmatively Furthering Fair Housing

The Barneytown case study indicates that the goal of furthering fair housing would not be served in that community by a selection preference where all units would be directed to local residents. Such a preference would likely cause, rather than remedy, discrimination. It would preserve conditions of segregation and diminish choice in the market area. In some respects, the significant absence of minority renters in Barneytown suggests that *any* selection preference for local residents should be carefully constructed, implemented, and monitored not only to avoid a discriminatory effect, but also to promote choice.

It is worth considering whether other approaches might have the opposite result. For example, a local resident selection preference for 50% of admissions can be viewed as nearly neutral, at least with respect to substantiality of the discriminatory effect. However, the 24% occupancy rate by minorities that results from the 50% local resident selection preference is significantly higher than the percentage of minorities living in the community. To the extent that the eventual occupancy percentages of minority families exceeds the percentage of minorities in the community, it can also be seen as a practice that improves civil rights conditions in Barneytown.

Table A-1					
Hampden County, Massachusetts			CHAS Data Book		
Data Current as of 2000			All Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Small Related (2 to 4)	Large Related (5 or more)	All Other Households	Total Renters
	(A)	(B)	(C)	(D)	(E)
1. Very Low-Income (Household Income < or = to 50% MFI)	9,294	11,622	3,496	8,416	32,828
2. Household Income (Household Income < or = to 30% MFI)	5,906	7,117	2,199	5,920	21,142
% with any housing problems	56	77.8	89.1	67.2	69.9
% Cost Burden >50% and other housing problems	2.1	7	35.6	2.4	7.3
% Cost Burden >30% to	0.5	3.1	7.9	0.1	2
% Cost Burden	1.7	4.2	9.1	1.4	3.2
% Cost Burden >50% only	31.8	49.1	29.1	50.3	42.5
% Cost Burden >30% to	19.9	14.4	7.5	13	14.8
3. Household Income >30% to 50%	3,388	4,505	1,297	2,496	11,686
% with any housing problems	44.3	66.3	74.3	69.2	61.4
% Cost Burden >50% and other housing problems	1.2	0.3	1.9	0.4	0.8
% Cost Burden >30% to	0.6	2.9	10.9	2	2.9
% Cost Burden	0.8	6.5	32.6	1.9	6.8
% Cost Burden >50% only	13	11.9	4.2	17	12.4
% Cost Burden >30% to	28.6	44.8	24.8	47.9	38.5
4. Household Income >50 to 80% MFI	2,422	5,072	1,376	4,292	13,162
% with any housing problems	26.5	24.5	47.7	25.4	27.6
% Cost Burden >50% and other housing problems	1.4	0	0.3	0	0.3
% Cost Burden >30% to	0	0.8	2	0	0.5
% Cost Burden	1.4	5.1	38.7	2.7	7.2
% Cost Burden >50% only	4.3	0.7	0	0.2	1.1
% Cost Burden >30% to	19.4	17.9	6.8	22.4	18.5
5. Household Income >80% MFI	2,003	8,597	1,311	8,025	19,936
% with any housing problems	9.1	5.4	33.1	3.1	6.7
% Cost Burden >50% and other housing problems	1	0	0	0	0.1
% Cost Burden >30% to	0	0	0	0	0
% Cost Burden	1	4.4	32.5	1.8	4.8
% Cost Burden >50% only	2.2	0	0.3	0	0.3
% Cost Burden >30% to	4.9	1.1	0.3	1.3	1.5
6. Total Households	13,719	25,291	6,183	20,733	65,926
% with any housing problems	41.1	40.5	64.9	34	40.9

Table A-2				
Hampden County, Massachusetts		CHAS Data Book		
Data Current as of 2000		Black Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Family	All Other Households	Total Renters
1. Very Low-Income (Household Income < or = to 50% MFI)	739	2,271	1,031	4,041
2. Household Income (Household Income < or = to 30% MFI)	488	1,370	739	2,597
% with any housing problems	65.4	72.9	63.2	68.7
3. Household Income >30 to 50%	251	901	292	1,444
% with any housing problems	39	70.9	64.4	64.1
4. Household Income >50 to 80% MFI	194	832	470	1,496
% with any housing problems	12.4	30.3	18.1	24.1
5. Household Income >80% MFI	112	981	675	1,768
% with any housing problems	3.6	8.6	1.2	5.4
6. Total Households	1,045	4,084	2,176	7,305
% with any housing problems	42.6	48.3	34.4	43.4

Table A-3				
Hampden County, Massachusetts		CHAS Data Book		
Data Current as of 2000		Hispanic Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Family	All Other Households	Total Renters
1. Very Low-Income (Household Income < or = to 50% MFI)	1,154	7,929	2,297	11,380
2. Household Income (Household Income < or = to 30% MFI)	949	5,270	1,872	8,091
% with any housing problems	45.1	81	61.3	72.2
3. Household Income >30 to 50%	205	2,659	425	3,289
% with any housing problems	27.3	63.4	58.4	60.5
4. Household Income >50 to 80% MFI	90	1,987	556	2,633
% with any housing problems	26.7	33.8	25.4	31.8
5. Household Income >80% MFI	26	1,495	536	2,057
% with any housing problems	0	25.2	17.9	22.9
6. Total Households	1,270	11,411	3,389	16,070
% with any housing problems	40	61.4	48.2	56.9

Table A-4					
Barneytown, Massachusetts			CHAS Data Book		
Data Current as of 2000			All Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Small Related (2 to 4)	Large Related (5 or more)	All Other Households	Total Renters
	(A)	(B)	(C)	(D)	(E)
1. Very Low-Income (Household Income < or = to 50% MFI)	391	193	34	297	915
2. Household Income (Household Income < or = to 30% MFI)	216	113	24	178	531
% with any housing problems	56.9	65.5	100	69.1	64.8
% Cost Burden >50% and other housing problems	9.3	0	41.7	0	5.6
% Cost Burden >30% to	0	0	0	0	0
% Cost Burden	4.6	0	0	0	1.9
% Cost Burden >50% only	31.5	53.1	41.7	52.2	43.5
% Cost Burden >30% to	11.6	12.4	16.7	16.9	13.7
3. Household Income >30% to 50%	175	80	10	119	384
% with any housing problems	40	75	100	74.8	59.6
% Cost Burden >50% and other housing problems	11.4	0	0	0	5.2
% Cost Burden >30% to	0	0	0	0	0
% Cost Burden	5.7	0	0	3.4	3.6
% Cost Burden >50% only	17.1	25	0	8.4	15.6
% Cost Burden >30% to	5.7	50	100	63	35.2
4. Household Income >50 to 80% MFI	210	240	10	218	678
% with any housing problems	50	31.3	0	29.4	36
% Cost Burden >50% and other housing problems	16.7	0	0	0	5.2
% Cost Burden >30% to	0	4.2	0	0	1.5
% Cost Burden	0	0	0	0	0
% Cost Burden >50% only	9.5	0	0	0	2.9
% Cost Burden >30% to	23.8	27.1	0	29.4	26.4
5. Household Income >80% MFI	145	585	54	583	1,367
% with any housing problems	13.8	5.1	25.9	4.8	6.7
% Cost Burden >50% and other housing problems	6.9	0	0	0	0.7
% Cost Burden >30% to	0	0	0	0	0
% Cost Burden	0	1.7	25.9	1.7	2.5
% Cost Burden >50% only	0	0	0	0	0
% Cost Burden >30% to	6.9	3.4	0	3.1	3.5
6. Total Households	746	1,018	98	1,098	2,960
% with any housing problems	42.6	23.5	49	27.7	30.7

Table A-5				
Barneytown, Massachusetts		CHAS Data Book		
Data Current as of 2000		Black Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Family	All Other Households	Total Renters
1. Very Low-Income (Household Income < or = to 50% MFI)	0	10	10	20
2. Household Income (Household Income < or = to 30% MFI)	0	0	0	0
% with any housing problems	N/A	N/A	N/A	N/A
3. Household Income >30 to 50%	0	10	10	20
% with any housing problems	N/A	100	100	100
4. Household Income >50 to 80% MFI	0	0	4	4
% with any housing problems	N/A	N/A	0	0
5. Household Income >80% MFI	0	0	0	0
% with any housing problems	N/A	N/A	N/A	N/A
6. Total Households	0	10	14	24
% with any housing problems	N/A	100	71.4	83.3

Table A-6				
Barneytown, Massachusetts		CHAS Data Book		
Data Current as of 2000		Hispanic Renters		
Household by Type, Income, & Housing Problem	Elderly 1 & 2 member households	Family	All Other Households	Total Renters
1. Very Low-Income (Household Income < or = to 50% MFI)	0	0	20	20
2. Household Income (Household Income < or = to 30% MFI)	0	0	20	20
% with any housing problems	N/A	N/A	50	50
3. Household Income >30 to 50%	0	0	0	0
% with any housing problems	N/A	N/A	N/A	N/A
4. Household Income >50 to 80% MFI	0	10	0	10
% with any housing problems	N/A	0	N/A	0
5. Household Income >80% MFI	0	14	10	24
% with any housing problems	N/A	0	100	41.7
6. Total Households	0	24	30	54
% with any housing problems	N/A	0	66.7	37

Table A-7

Residential Segregation, 2000							
Springfield MSA							
Race / Ethnicity	Total Population	Minority Population	Absolute Centralization Index	Absolute Clustering Index	Absolute Concentration Index	Dissimilarity Index (D)	Isolation Index
Amer. Indian and Alaska Native	589,434	3,967	0.487	0.002	0.950	0.310	0.013
Native Hawaiian and Other Pacific Islander	589,434	1,257	0.659	0.006	0.976	0.560	0.011
Black or African American	589,434	44,824	0.732	0.219	0.967	0.634	0.278
Hispanic	589,434	74,177	0.767	0.214	0.954	0.627	0.324
Asian	589,434	13,056	0.286	0.025	0.946	0.419	0.058

ENDNOTES TO PART IV

¹ For HUD's summary of the analysis, see, *Title VIII Handbook*, par. 2-4.

² *Latinos Unidos de Chelsea en Accion v. Sec'y. of Housing and Urban Development*, 799 F.2d. 774 (1 Cir. 1986).

³ *Pfaff v. U.S. Department of Housing and Urban Development*, 88 F.3d 739 (9 Cir. 1996); *Wallace v. Chicago Housing Authority*, 298 F. Supp. 2d 710 (N.D. Ill. 2003) and the subsequent proceedings in the same case at 321 F. Supp. 2d 968 (N.D. Ill. 2004).

⁴ *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984).

⁵ *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2 Cir. 1988); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (2002).

⁶ *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (2002).

⁷ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977). See also, *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984); *Wallace v. Chicago Housing Authority*, 298 F. Supp. 2d (N.D. Ill. 2003) and 321 F. Supp. 2d 968 (N.D. Ill. 2004).

⁸ See, e.g., *Langlois v. Abington Housing Authority*, 234 F. Supp. 33 (D. Mass. 2002); *Mountain Side Mobile Estates Partnership v. Sec'y. of HUD*, 56 F.3d 1243 (10 Cir. 1995); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1983).

⁹ See, e.g., *Smith v. Town of Clarkton*, 682 F.2d 1055 (4 Cir. 1982). In some circumstances, other definitions of the "market" may be more appropriate. For example, in *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243 (9 Cir. 1995), where the court examined the legality of a landlord's limit on family size, it was assumed for purposes of decision that it was appropriate to rely on national statistics. However, the court noted that most federal appeals courts defined the relevant market area as limited to the municipal boundaries, or a county, or other, smaller area.

¹⁰ *Affirmative Fair Housing Marketing Handbook*, par. 2-12(C).

¹¹ 24 C.F.R. §985.3(g)(3)(C).

¹² 24 C.F.R. §985.3(h)(1).

¹³ See, repealed 760 C.M.R. §5.08(3)(b) and §33.08(5).

¹⁴ *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984).

¹⁵ See, e.g., *Housing Needs Workbook: Assessing Community Housing Needs* (Massachusetts Housing Partnership, May 2003); and HUD's *Fair Housing Planning Guide*.

¹⁶ CHAS data is selected for discussion purposes in the Practice Guide because it displays information about family income levels in a way that is consistent with HUD definitions of low-income, very low-income and extremely low-income households. It also provides data about family types, renter and homeowner data, statistics about housing need, and information about White, Black and Hispanic households, all at municipal, county and state levels. The data is available at:

<http://socds.huduser.org/chas/index.htm>

On-line data from the Census Bureau is more detailed, providing information for census block groups, census tracts, municipalities, metropolitan statistical areas, and other geographic levels. Census information is also much more

detailed with respect to racial and ethnic groups. However, because census data is not displayed in a manner that neatly fits income eligibility standards in housing programs, it is not relied on in the Practice Guide. More information about census data is available at:

http://factfinder.census.gov/home/saff/main.html?_lang=en

¹⁷ See the disability data tables at the following web site maintained by HUD's Office of Community Planning and Development:

<http://www.hud.gov/offices/cpd/systems/census/cdbgdisabled2/index.cfm>

¹⁸ See, *Title VIII Handbook*, par. 2-4(C); see also, *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243 (9 Cir. 1995); *Latinos Unidos de Chelsea en Accion v. Sec'y. of Housing and Urban Development*, 799 F.2d 774 (1 Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).

¹⁹ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).

²⁰ *Pfaff v. U.S. Department of Housing and Urban Development*, 88 F.3d 739 (9 Cir. 1996).

²¹ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000).

²² 29 C.F.R. §1607.4(D), cited in *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002). Some courts may apply variations of the Four-Fifths rule to account for anomalies. The EEOC regulation focuses on selection from a pool of eligible employees. Housing waiting lists are affected by marketing practices, and a marketing program that announced a local resident selection preference might discourage applications by significant numbers of non-residents, of whom a large number are likely to be minorities. As a consequence, the characteristics of the pool of applicants from which tenants are selected might not reflect the housing market. To account for such anomalies, one variation of the Four-Fifths rule measures the comparative selection rate of minorities with and without a local preference, instead of measuring disparities between races. See, *Langlois v. Abington Housing Authority*. Significant disparities between the characteristics of a provider's waiting list and the demographics of the eligible applicant pool could also indicate discriminatory marketing practices, a separate violation of fair housing requirements. See, 24 C.F.R. §100.75.

²³ *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220 (S.D. N.Y. 1999); see also, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* (U.S. Department of Justice, September 1998) ("*Title VI Manual*"), p. 86.

²⁴ *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220 (S.D. NY, 1999).

²⁵ *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984).

²⁶ *Comer v. Cisneros*, 37 F.3d 775 (2 Cir. 1994).

²⁷ *Langlois v. Abington Housing Authority*, No. C.A. 98-12336-NG (D. Mass. 1998) (preliminary injunction). In the absence of conclusive evidence of discriminatory intent, the courts sometimes take into account the extent of impact plus the presence of "some direct evidence that the defendant purposefully discriminated..." to find a violation of the Fair Housing Act. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977).

²⁸ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (2002).

²⁹ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000).

³⁰ *Castenada v. Partida*, 430 U.S. 482 (1977).

³¹ An outcome which is more than two or three standard deviations from the expected norm is generally considered anomalous because “a disparity of two standard deviations corresponds to a 5% probability that a particular outcome is random, while a disparity of three standard deviations corresponds to a 0.3% probability that the observed outcome could be attributable to chance.” See, *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220 (S.D. N.Y. 1999).

³² *NAACP, Boston Chapter v. Sec’y of HUD*, 817 F.2d 149 (1 Cir. 1987).

³³ *Wallace v. Chicago Housing Authority*, 321 F. Supp. 2d 968 (N.D. Ill. 2004).

³⁴ See, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977) (denial of petition for rezoning); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6 Cir. 1986) (referendum repeal of sewer extension approval); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2 Cir. 1988) (denial of petition for rezoning); *Macone v. Town of Wakefield*, 277 F.3d 1 (1 Cir. 2002) (denial of Chapter 40B petition).

³⁵ *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 299 F. Supp. 2d 959 (E.D. Mo. 2004); *Wallace v. Chicago Housing Authority*, 321 F. Supp. 2d 968 (N.D. Ill. 2004).

³⁶ *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220 (S.D. N.Y., 1999).

³⁷ For example, in *Davis v. New York Housing Authority*, racial disparities between working and non-working applicants were analyzed to show that a selection preference for working families would slow efforts to desegregate some housing developments and would increase segregation in others. In *Macone v. Town of Wakefield*, involving Chapter 40B, the evidence indicated that the community where the housing was proposed for construction was predominantly White and that some units would be set aside for minority households under DHCD selection guidelines. However, the challenge failed because there was no evidence of racial disparities in living patterns in the area surrounding the community, no information about historical patterns of discrimination within the community and no evidence that any minorities would actually move into the proposed development. In the absence of “proof that any minority would actually denied housing,” the court dismissed the case.

³⁸ *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977) (disparities within market); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2 Cir. 1988) (patterns of segregation within community); *Shannon v. Department of HUD*, 436 F.2d 809 (3 Cir. 1970) (tipping).

³⁹ *Civil Rights Monitoring Handbook*, Appendix 8.

⁴⁰ *Fair Housing Planning Guide*, par. 2.5.

⁴¹ The 1997 form of revitalization grant agreement is reprinted in the *HOPE VI Guidebook* (Office of Public Housing Investments, 1997) at page 5.C.15. For the Section 811 program, see, HUD Notice H-2003-16, *Fiscal Year 2003 Policy for Capital Advance Authority Assignments, Instructions and Program Requirements for the Section 202 and Section 811 Capital Advance Programs, Application Processing and Selection Instructions, and Processing Schedule* (July 17, 2003).

⁴² See, *Racial and Ethnic Residential Segregation in the United States: 1980-2000* (U.S. Census Bureau, August 2002).

⁴³ *Id.* Census Bureau data on residential segregation can be found on-line at:

<http://www.census.gov/hhes/www/resseg.html>

⁴⁴ *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000).

⁴⁵ *Id.*

⁴⁶ 24 C.F.R. §982.207(b)(1)(v) (Housing Choice Vouchers and Project Based Section 8 Vouchers); 24 C.F.R. §5.655(c)(1)(vi) (Multi-Family Section 8 Assistance).

⁴⁷ 42 U.S.C. §1437f(o)(6)(A)(ii).

⁴⁸ 24 C.F.R. §91.205 and §91.210 (requirements for local governments); 24 C.F.R. §91.305 and §91.310 (requirements for state governments).

⁴⁹ 24 C.F.R. §903.7(a).

⁵⁰ 24 C.F.R. §985.3(g)(3)(C).

⁵¹ For references to CHAS and Census Bureau data, see note 15. For Local Affordable Housing Plans, see, 760 C.M.R. §31.07 and DHCD's *Planned Production Regulation*.

⁵² *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1 Cir. 2000). See also, *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3 Cir. 1977). See also, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7 Cir. 1977) (zoning ordinance is permissible exercise of local governmental authority, but will violate Title VIII if effect is to preclude the development of any integrated housing). There are different legal formulations for the kind of justification needed to overcome discriminatory effect. Often the formulations are particular to the specific facts of individual cases. At one end of the spectrum, some courts have required a showing of a "compelling governmental interest." See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179 (8 Cir. 1974) (zoning). At the other end, the existence of some law or rule permitting a particular action was adequate to establish at least an initial justification for a practice with a discriminatory effect. In other cases, the courts have looked for "reasonableness." *Pfaff v U.S. Department of Housing and Urban Development*, 88 F.3d 739 (9 Cir. 1996) (occupancy standards for families are reasonable in light of desire to preserve property). Still other cases distinguish between practices that are objective and those that lend themselves to subjective decision making. *Robinson v. Hanley*, 610 F.2d 1032 (2 Cir. 1979). While the court in *Langlois* employed a "legitimate and substantial interest" approach, its decision noted that local preferences authorized by the Section 8 statute might meet that standard.

⁵³ *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002).

⁵⁴ See, e.g., 24 C.F.R. §146.13(f) (age distinctions will not violate Age Discrimination Act of 1975 where they provide special benefits to elders or children).

⁵⁵ 42 U.S.C. §3601.

⁵⁶ *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

⁵⁷ See, e.g., *City of Cleburne, Texas v. Cleburne Living Center*, 105 S.Ct. 3249 (1985) (classifications based on race, alienage or national origin are subject to strict scrutiny; those based on gender are subject to a "heightened standard of review;" distinctions based on age or disability need only be rationally related to a legitimate government purpose).

⁵⁸ *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203 (6 Cir. 1987).

⁵⁹ *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2 Cir. 1973).

⁶⁰ *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

⁶¹ *United States v. Starrett City Associates*, 840 F.2d 1096 (2 Cir. 1988); see also, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) and *Walker v. City of Mesquite*, 169 F.3d 973 (5 Cir. 1999).

⁶² 760 C.M.R. §5.10(3).

⁶³ *NEF Guidelines*, par. 22.

⁶⁴ *See, e.g.*, 24 C.F.R. §903.7(b)(2) (PHA must monitor civil rights effect of site based waiting lists), HUD Notice CPD-00-09, *Accessibility Notice: Section 504 of the Rehabilitation Act of 1973 and The Fair Housing Act and their applicability to housing programs funded by the HOME Investment Partnerships Program and the Community Development Block Grant Program* (December 26, 2000) (recipients of HUD funds should update Section 504 self evaluations).

⁶⁵ *Civil Rights Monitoring Handbook*, Chapter 4, Section 4.

⁶⁶ *See*, 24 C.F.R. §91.225(a)(1) (Consolidated Plan requirement for local jurisdictions); 24 C.F.R. §903.7(o)(3) (PHA plans); 24 C.F.R. §8.24, §8.25 and §8.51 (Section 504).

⁶⁷ *A User's Guide to HUD Programs and the 2003 SuperNOFA Process* (HUD, April 2003), p. 9.

⁶⁸ *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan*, 369 N.J. Super. 2 (2004).

⁶⁹ *See, McGrath v. Department of Housing and Urban Development*, 722 F. Supp. 902 (D. Mass. 1989) (in absence of an act of discrimination, HUD has discretion to determine how to affirmatively further fair housing); *NAACP, Boston Chapter v. Sec'y of HUD*, 817 F.2d 149 (1 Cir. 1987) (abetting deliberate acts of discrimination violates affirmative fair housing obligations); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002) (selection preferences with discriminatory effect violate responsibility to affirmatively further fair housing).

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