




New Developments in the Fair Housing Act: What You Need to Know

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Faculty

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Agenda

- Continuum of FHA Risk
- Overview of the laws
- Key Issues
- Advertising
- Websites
- Admissions
 - Screening
 - Steering
 - Interpreters
- Private Duty Aides
- Motorized scooters
- Animals
- Reasonable Accommodations


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Continuum of FHA Risk



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graph LR
    A[Stand alone independent – high FHA risk.] --> B[CCRC – moderate to high risk.]
    B --> C[Stand alone assisted living – lower risk.]
    C --> D[Skilled nursing – lowest risk.]
  
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Overview of the Laws

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Discrimination Statutes

- **Fair Housing Act (“FHA”)** prohibits discrimination in the sale or rental of dwellings on the basis of race, color, sex, religion, national origin, familial status, and disability.
- **Americans with Disabilities Act (“ADA”)** prohibits discrimination on the basis of physical or mental disability (among other protected categories) in “public accommodations operated by private entities”.
- For senior housing communities with elements of both residential dwellings and service facilities, both the FHA and ADA apply.



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Examples of discrimination

Denying	Denying admission based upon a disability or other protected class (race, ethnicity, etc.).
Steering	Steering an applicant to other housing based upon a disability or other protected class (race, ethnicity, etc.).
Expense	Making it more expensive for the person to live at the community based upon a disability or other protected class (race, ethnicity, etc.).
Evicting or discharging	Evicting or discharging an individual based upon a disability or other protected class (race, ethnicity, etc.).
Forcing	Forcing a person to “choose” to move out based upon a disability or other protected class (race, ethnicity, etc.).



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What is a “disability”?

- Person has a physical or mental impairment that substantially limits one or more major life activities;
- Person has a record of such impairment; or
- Person is regarded as having an impairment.



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Disabilities

- Commonly seen conditions such as:
 - heart disease,
 - arthritis,
 - blindness,
 - Alzheimer's,
 - non-ambulatory status, &
 - mental conditions such as depression
- Courts interpreting the law in the senior housing context have found that basically all residents are disabled for purposes of being protected by these anti-discrimination laws.



Sanctions for Violating Fair Housing Act

Injunctions to stop the discriminatory practice

Civil Penalties imposed by the government

\$\$ Damages

Attorneys' fees – both for defense of your case and the other party's fees

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Sanctions Example

U.S. v. Fort Norfolk

- A CCRC policy prohibited Healthcare building residents from eating in the dining rooms and attending events at the Residential Tower
- Also required residents who used motorized mobility aids to pay a \$300 non-refundable deposit and purchase liability insurance.

DOJ claimed the policies had a discriminatory effect against individuals with disabilities

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Settlement terms:

- Appoint FHA Compliance Officer and train all employees;
- Post a notice that the community does not discriminate;
- Subject to 3 years of monitoring by DOJ to determine compliance;
- \$40,000 fine;
- \$350,000 fund to compensate individuals who had been subject to discrimination;
- Publish a notice for potential victims in the newspaper (3 columns x 6 inches)

Private plaintiffs are awarded attorney's fees

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Advertising

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Advertising Issues

- Most claims are based on indicating a preference for one group over another (e.g., race or non-disabled).
- Statements in advertising indicating a preference
- Photos



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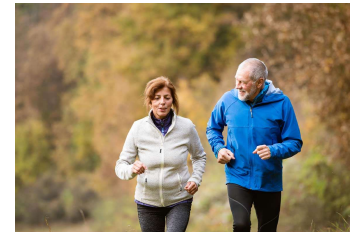
Advertising Issues

- Use of the term “Independent” or “Active”
- Policies – Resident must meet the requirements of “independence” or “active.”
- Requirement in the resident contract that residents be “independent/active” or he/she will have to transfer or move out



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Advertising



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Industry Definition of Independent

- Relates to the services provided by the community:
 - No hands-on care;
 - Resident is primarily responsible for own medical treatment;
 - No medication assistance;
 - No skilled nursing.

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Websites

“Inaccessible web content means that people with disabilities are denied equal access to information. An inaccessible website can exclude people just as much as steps at an entrance to a physical location. Ensuring web accessibility for people with disabilities is a priority for the Department of Justice. In recent years, a multitude of services have moved online and people rely on websites like never before for all aspects of daily living. For example, accessing voting information, finding up-to-date health and safety resources, and looking up mass transit schedules and fare information increasingly depend on having access to websites.”

<https://www.ada.gov/resources/web-guidance/>

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Issues regarding accessibility:

Poor color contrast

Lack of text alternatives on images

No captions on videos

Inaccessible online forums

Mouse only navigation

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Advertising – Best Practices

- No statements that show a preference.
- Website is accessible (navigation and text).
- Individuals in photos represent population (race, disability, etc.)
- Best practice is to use house logo and state “We are an equal opportunity housing provider.”



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Admissions

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Admissions

- Claims are based on a claim that a community denied an individual admission for an improper reason (e.g., race, ethnicity, disability, etc.).
 - Screening out individuals for an improper reason (e.g., race, ethnicity, disability, etc.).
 - Steering an applicant to another location for an improper reason (e.g., race, ethnicity, disability, etc.).
 - Refusal to make a reasonable accommodation to an applicant.

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Rental Applicants: “No Inquiry” Rule

Rule: You can't ask about a potential resident's health conditions (i.e., disability) when they are applying to rent an apartment.

As a rental landlord, a resident's health conditions do not play into the landlord/tenant relationship

- Landlord needs to know, “can you pay rent?”

So even **asking** about health conditions is a disability discrimination!

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“No Inquiry” Rule Exception for CCRCs

- CCRCs contracting for the *life care* of a resident **CAN** inquire about disability status to admit applicant to the appropriate point within the continuum of care
- CCRCs must be able to evaluate an applicant's health status for actuarial forecasts and may base decisions to admit based on financial/actuarial considerations
- **CAUTION** – inquiries must be done carefully, narrowly, and consistently for all applicants or else give rise to claims of pretext for discrimination
 - Stick to the forms, stick to the process – BE CONSISTENT

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Admissions - Not OK

- Denial is based on other prohibited considerations (disability, race, etc.).
- FHA prohibits making an inquiry into an individual's disability.
- Refusal to make reasonable accommodation.
- You would be uncomfortable here. You should try the AL down the street."
- "We don't admit anyone...."
- with Parkinson's
- with a walker
- with a live in attendant

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Admissions - OK

- Can deny admission because the individual:
 - is a current direct threat to self or others;
 - has poor credit;
 - has a bad payor source; or
 - fails actuarial test.
- Current Direct Threat

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Current Direct Threat

The FHA allows a housing provider to reject an applicant or terminate a lease if the individual is the is a current direct threat to the health and safety of others, or whose tenancy is likely to result in substantial damage to the property of others.

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based upon reliable, objective evidence (e.g., current conduct or a recent history of overt acts).

"Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability." Dept. of Justice

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Guidance on Direct Threat

- The assessment must consider:
 - (1) the nature duration and severity of the risk of injury;
 - (2) the probability that injury will actually occur; and
 - (3) whether there are any reasonable accommodations that will eliminate the direct threat.
- Must consider whether the individual has received intervening treatment or medication that has eliminated the direct threat.
- If there is a measure that may mitigate the threat, you may be required to allow it as a reasonable accommodation.

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Admissions – Best Practices

- Everyone is invited to apply.
- No one speculates on whether an individual would be admitted and never indicate that someone wouldn't be admitted before they even submit an application.
- Each applicants goes through the entire process and an individualized decision is made.
- If the applicant raised the possibility of an accommodation (special parking spot, private duty assistance), you have to consider it. They are not required to use the term "reasonable accommodation" when they make their request.
- If you decide to reject an applicant, keep the message simple. "Thank you for your interest, but we are unable to admit you at this time."
- If the individual needs ASL interpreter, you must provide it (in person or through a service/device).

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Private Duty Aides

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Private Duty Aides

- Nursing and Assisted Living Facilities can generally prohibit private duty aides or limit them.
- CCRC's have to be very careful regarding limitations on private duty aides in the independent section of a community.
 - Can't prohibit overnight aides.
 - Can't limit hours.
 - Can't require additional fees just to have an aide.
 - Can require them to abide by community rules.
- Independent only should be very careful about any limitations.

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Motorized Scooters

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Motorized Scooters

- When adopting and implementing safety rules, management must make an effort to provide full access to facilities and services.
- Can't ban motorized scooters or carts in retirement community common areas.
- Management cannot routinely require advance certification of need or competency testing for motorized cart use, but may follow up if disability is not apparent or resident displays inability to drive safely.
- Management cannot require insurance or security deposits for motorized cart use, but may require repair of damage.
- Can adopt rules of the road and safety limitations (e.g., speed limit).

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Dining

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Dining

Can't prohibit motorized scooters.

Can't require residents to self transfer to a chair.

Usually, can't bar disabled residents from accessing a dining area just because he/she is disabled.

Can't prevent an aide from assisting an individual when dining.

Can't require disabled individuals to eat in their units.

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Animals

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Animals

- There are two types of Assistance Animals: Service Animals and Emotional Support / Therapy Animals.
- Assistance animals are not "pets."
- An independent living or CCRC property must make exceptions to its "pet policy" (e.g., size, weight, requiring a deposit) for certain animals used by disabled people.
- Service animals and Emotional Support/Therapy animals may be required to conform to hygiene and conduct standards, as would be specified by most pet policies, such as not being aggressive toward other residents, excessive noise, or having a foul odor.
- Animal owners are responsible for caring for the animal including, waste clean-up, feeding and other typical owner functions.



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Service Animals

- Service Animal: a dog trained to perform a task or function that assists the disabled person in dealing with a symptom of a disability.
- Examples include a dog that assists with vision impairment (a "seeing eye" dog), may be able to detect a seizure, or can hear an alarm and alert the disabled person.
- Service animals must be allowed anywhere on the premises that a resident or guest is allowed, including dining rooms.



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Emotional Support/Therapy

- Emotional support/therapy animals: any animal (for example, dog, cat, bird) needed by a disabled resident to relieve symptoms of a disability (often an emotional or psychological disability such as depression or anxiety).
- Emotional support / therapy animals are allowed in the resident's apartment but may be excluded from dining rooms and other common areas (except as necessary for ingress and egress to and from the apartment, such as hallways).
- An emotional support/therapy animal is **not** a service animal.



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Assistance Animals: Inquiries

If the person's disability is "readily apparent" or known (for example, blindness), management should not ask about the disability or the need for the assistance animal

There is a presumption that the disabled person knows what he or she needs to alleviate the disability

Management can ask for a letter from a practitioner or therapist attesting to the person's disability and need for the assistance animal to alleviate symptoms of the disability



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Reasonable Accommodations

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Reasonable Accommodation

Per HUD, “A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces, or to fulfill their program obligations.”

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Reasonable Accommodation

What is reasonable?

Is an accommodation or modification necessary for full use and enjoyment?	Does not cause an undue financial and administrative burden.	Does not cause a basic change in the nature of the housing program available.	Will not cause harm or damage to others.
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Not required to provide an accommodation that will result in an *undue financial or administrative burden*.

Not required to provide an accommodation that will result in a *fundamental alteration in the nature of the program*.

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What is a Fundamental Alteration?

- A modification that alters the essential nature of a provider's operations.

Example – Tenant has a severe mobility impairment that limits his ability to walk. He asks housing provider to transport him to the grocery store and assist with shopping. Provider does not provide transportation so this would be a fundamental alteration and would not be necessary (i.e., adding a new service that the community didn't otherwise provide).

- What if the community believes the accommodation is *unreasonable*?

- Duty to engage in an interactive dialogue to determine if there is an alternative solution.

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Possible Reasonable Accommodations

- Assigning a closer parking space for a resident who has difficulty walking.
- Allowing an aide to sit with a resident and assist the resident with cutting up her meal.
- Allowing a resident to bring in a 60-pound seeing eye dog when the community has a policy that prohibits pets over 10 pounds.
- Bringing in an ASL interpreter to assist a resident during the admissions process or during a health assessment.

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Modifications

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Reasonable Modifications

- Under the Fair Housing Act, a reasonable modification is a structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises. Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas. Examples include the installation of a ramp into a building, lowering the entry threshold of a unit, or the installation of grab bars in a bathroom. Under the Fair Housing Act, prohibited discrimination includes a refusal to permit, **at the expense of the person with a disability**, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.

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Reasonable Modifications

- In summary, the FHA requires a landlord to allow a reasonable modification of a unit or common area but the following limitations apply:
 - The modification must be paid for by the tenant;
 - The tenant must get the approval of the landlord prior to making a reasonable modification;
 - The landlord cannot require the tenant to move to a different unit in lieu of making a reasonable modification;
 - If the landlord wants a modification that is more costly than the modification proposed by the tenant, the tenant is only required to agree if the landlord agrees to pay the difference; and
 - It is generally not "reasonable" for a landlord to require a tenant to restore widened doorways to prior width.

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HUD v. Oakmont Senior Communities of Michigan

- Unlicensed independent living community was required to **cease**:
 - Health status reviews of residents returning from the hospital
 - Requiring residents to sign in and out of the premises
 - Mandatory routine safety checks (e.g., for failure to appear at a meal)
 - Routine monitoring or restriction of diets
 - Mandatory liability insurance for motorized mobility devices
 - Requiring residents to disclose medical information
 - Policy requiring residents to be capable of "living independently," without needing personal care
 - Conditioning occupancy on reasonable behavior requirements, absence of "flight risk," and bowel and bladder control



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