



News for Senior Living Communities: Legal Update

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March 10, 2004



Fair Housing Act

- Applies to all types of housing, public or private, with 4 or more units
- Includes independent living, CCRCs, retirement housing or senior living, assisted living, nursing home and group homes for people with various disabilities
- Does not apply to services without a residential base (e.g., adult daycare)
- Does not apply to non-commercial housing run by religious organizations and private clubs that limit occupancy solely to members



Legal Issues

- Issues
 - Aging in Place
 - Discrimination
 - Admission, transfer and discharge
 - Privacy
 - HIPAA



Fair Housing Act

- Prohibits discrimination based on race, color, sex, national origin, religion and disability
- Disability defined as –
 - (1) “a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”



Anti-Discrimination Laws

- Fair Housing Act (“FHA”)
 - 42 U.S.C. 3601 et seq.
 - 24 C.F.R. 100.1 et seq., as amended by the Fair Housing Amendments Act of 1988 (“FHAA”)
- Americans with Disabilities Act (“ADA”)
 - Title III – Public Accommodations
 - 42 U.S.C. 12.101 et seq.
 - 42 C.F.R. Part 36
- Section 504 of the Rehabilitation Act of 1973 (“Section 504”)
- Connecticut Fair Housing Statute
 - C.G.S. 46a-64c et seq.



Fair Housing Act

- Prohibits discrimination
 - Refusing to sell or rent after the making of a bona fide offer, or refusing to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person;
 - Discriminating in the terms, conditions, privileges of sale or rental or provision of services in connection with the sale;
 - In advertising, prohibiting any preference or limitation; or
 - Representing untruthfully that housing is unavailable for inspection, sale or rental.

Fair Housing Act

- Discrimination includes a “refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling.”

Fair Housing Act

- *Cason v. Rochester Housing Authority* (U.S. District Court, New York, 1990)
 - Persons with disabilities considered by different standard than “able bodied” persons (Housing employee would review confidential medical and social service evaluations)
 - Court found that policy of barring applicants who failed to demonstrate that they could live independently was discriminatory
 - Plaintiffs only had to show that policy had effect of discriminating – no intent required

Fair Housing Act

- Affirmative duty
 - Reasonably accommodate needs of persons with disabilities
 - May require landlord to assume reasonable financial burdens in accommodating persons with disabilities

Fair Housing Act

- UNLAWFUL: to inquire if applicant has disability or to inquire as to the nature of the disability
- LAWFUL: to inquire into “applicant’s ability to meet requirements of ownership or tenancy made of all applicants.”

Fair Housing Act

- Exceptions
 - A reasonable accommodation would fundamentally alter the nature of a program or impose an undue financial or administrative burden
 - A requested accommodation poses a direct threat to the health or safety of others
 - A requested accommodation would result in substantial physical damage to the property of others

Fair Housing Act

- Subsequent HUD guidance for Section 8 and Section 202 housing admission criteria suggests that requirements for tenancy may include “ability to live independently” when the housing provider takes into consideration whether the applicant can meet the requirements of tenancy with the assistance of a third party such as a relative, private aide or outside social services party.

Americans with Disabilities Act

- Title II
 - Applies to all services, programs, and activities provided to the public by State and local governments, except public transportation services.

Americans with Disabilities Act

- Title III
 - Prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.

Americans with Disabilities Act

- Title III - Applies to "public accommodations"
 - Include residential facilities providing social or medical services 28 C.F.R. Section 36.104; 56 Fed. Reg. 35552.
 - Residential care homes
 - CCRCs (?)
 - Nursing home
 - MRCs/ALSAs (?)
 - Does not apply to "housing"
 - Note: Commercial or public areas of a facility may be a "public accommodation"
 - Rental office
 - Public areas

Americans with Disabilities Act

- Exception
 - Person with disability poses a direct threat to the health and safety of others
 - Facility must make an individualized assessment and must make reasonable accommodations if possible to minimize the risk.

Americans with Disabilities Act

- Title II
 - Prohibits discrimination on the basis of disability in all services, programs, and activities provided or made available to the public by State and local governments (public entities), except public transportation services.
 - HUD enforces Title II when it relates to state and local public housing, housing assistance and housing referrals.

Americans with Disabilities Act

- Persons with disabilities entitled to receive care in the most integrated setting
- Does not require fundamental alterations to a program
- Does not require making changes that result in an undue burden

Americans with Disabilities Act

- Requires reasonable modifications to policies, procedures, or practices when such modifications are necessary to afford services and privileges to persons with disabilities unless such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.

Americans with Disabilities Act

- Type A facility (offers a comprehensive long-term care insurance benefit that keeps monthly fees at a stable level whether the resident is in a residential apartment, assisted living or nursing home)
 - May be able to ask similar extensive and detailed questions that health insurers ask in insurance application
- Type B or C facilities that offer discounted health services or only fee-for-service care may not have the same financial reasons for asking extensive and detailed questions

Americans with Disabilities Act

- Prohibits eligibility criteria to screen out disabled persons unless such criteria are necessary for the provision of the services or other amenities offered.

Americans with Disabilities Act

- Operator bears the burden to show that it offers a bona fide insurance plan and that admission policies are not a subterfuge to avoid the ADA.
 - Examples of business/insurance justifications for disability based distinctions
 - Justified by legitimate actuarial data or by past or anticipated experience applying legitimate underwriting principles
 - Necessary to ensure financial solvency
 - Necessary to prevent an "unacceptable" increase in cost of coverage or drastic changes in scope of services

Americans with Disabilities Act

- Specifically permits distinctions based on health when underwriting criteria are used to determine eligibility for health coverage benefits.
 - Applicable to CCRCs

Section 504 of the Rehabilitation Act

- Earliest (since 1973) and the most broad-based federal anti-discrimination law
- Applies to all facilities that receive federal financial assistance

Operational Issues

- Advertising and Marketing
 - Any advertisement or marketing that has effect of communicating a preference or limitation that has a discriminatory impact is in violation of the FHA.
 - Focus in features of the retirement or housing community and available services and activities
 - Do not focus on descriptions of the active and independent residents.
 - Use Fair Housing logo
 - Creates a presumption that there is no discriminatory policy
 - Logo and Fair Housing statement available at www.hud.gov

Operational Issues

- Admission (cont.)
 - Permitted inquiries provided by FHA (24 C.F.R. 100.202(c))
 - Ask same questions of all applicants with or without disabilities
 - Ask about applicant's ability to meet requirements of tenancy
 - Ask if applicant can meet activities of daily living needs by self or with assistance of aide
 - Focus on ability of applicant to meet requirements of tenancy and not on physical and mental condition of the resident
 - Permitted to ask whether an applicant is qualified for units designed specifically to accommodate person with a particular disability (e.g., an accessible unit)

Operational Issues

- Admission
 - FHA prohibits "steering"
 - Suggesting or indicating a resident or applicant would not be suited for a particular facility or would be better suited for a different facility because he/she is a member of a protected class
 - DOJ uses testers to uncover such practices

Operational Issues

- Admission (cont.)
 - Admission agreements
 - Challenges have been brought for language restricting persons in wheelchairs, limiting the use of wheelchairs, limiting dining room access and not allowing a resident from hiring an aide.
 - Agreements should explicitly state the facility's non-discrimination policy
 - Recommend legal review of admission agreements

Operational Issues

- Admission (cont.)
 - Discriminatory to make inquiries to determine if an applicant has disability or to inquire about the nature or severity of a disability.

Operational Issues

- Services/Administration/Policies
 - FHA prohibits discrimination in the "provision of services or facilities" in connection with a dwelling
 - Areas of concern may include dining rooms, parking, motorized carts, scooters and wheelchairs.
 - U.S. v. The Hillhaven Corp., 960 F.Supp. 259, USDC (D. Utah, Central Division), 1997
 - HUD v. County Manor Apartments, HUD ALJ Decision, 2001
 - U.S. v. Savannah Pines LLC, USDC (D. Nebraska), 2001 (Consent Order 2003)

Operational Issues

- Reasonable Accommodations
 - Cannot refuse to make reasonable accommodations when necessary to give the resident equal opportunity to use and enjoy a dwelling
 - Not required to make accommodations that fundamentally alter the nature of the program or impose an undue financial or administrative burden on the provider
 - Does not require that a dwelling be made available to a person if tenancy would constitute a direct threat to health or safety of others or would result in substantial physical damage to the property of others

Operational Issues

- Reasonable Accommodations
 - Transfers (moving along the continuum)
 - State regulation may "define" who must be transferred to a higher level of care.
 - State regulations are being challenged for discrimination
 - CCRC life care contracts
 - Address transfers
 - Address how reasonable accommodations will be made for persons with disabilities

Operational Issues

- Reasonable Accommodations
 - Direct Threat
 - "Significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services" (ADA, 28 CFR 36.208(b)).
 - FHA and Section 503 do not define "direct threat"
 - Courts interpret "direct threat" narrowly
 - Facility must clearly demonstrate that a "direct threat" exists and document the explanation

Enforcement

- Individual Civil Action
 - Statute of limitations is 2 years (tolled for a pending administrative hearing)
 - Compensatory and punitive damages
- HUD
 - Aggrieved individual has one year after an alleged discriminatory housing practice has occurred or terminated to file a fair housing complaint
 - Compensatory, but not punitive, damages
 - State fair housing complaint (CHRO)

Operational Issues

- Reasonable Accommodations
 - Transfers (moving along the continuum)
 - Key issues to consider
 - Who makes decision?
 - Must residents be permitted to have aides?
 - Does decision involve a reasonable accommodation and not a health and safety issue?

Enforcement

- Department of Justice (DOJ)
 - Investigate and bring action without a individual complaint
 - Consent Orders
 - www.usdoj.gov/crt/housing
- US Attorney General
 - Civil action in US district court when cause to believe that person or group has engaged in pattern or practice of resistance to rights of the FHA or has denied any rights under the FHA and such denial raises issue of general importance

Privacy Issues

- HIPAA Privacy Regulations
 - Applies to – Any health care provider who submits claims electronically or transmits health information electronically with respect to a number of other identified transactions (e.g., eligibility verification, pre-authorization and referrals)
 - Compliance Date: April 14, 2003

Privacy Issues

- HIPAA Privacy Regulations
 - Connecticut laws concerning protection of health information generally remain in effect
 - Protections for psychiatric and HIV-related information
 - Connecticut laws regarding minors

Privacy Issues

- HIPAA Privacy Regulations
 - Requirements concerning disclosure and use of protected health information (“PHI”)
 - Uses and Disclosures
 - Consent Optional
 - Notice of Privacy Practices and Acknowledgement
 - Authorizations
 - Opportunity to Agree/Object
 - Exceptions
 - Minimum Necessary

Privacy Issues

- HIPAA Privacy Regulations
 - Impact on federal laws
 - More stringent protections remain in place
 - Comply with both
 - Example: Federal drug and alcohol requirements

Privacy Issues

- HIPAA Privacy Requirements
 - Individual Rights
 - Notice of Privacy Practices
 - Right to Request Confidential Communications
 - Right to Request Restrictions
 - Right to Access
 - Right to Request Amendment
 - Right to Request Accounting
 - Business Associates
 - Administrative Requirements

Privacy Issues

- HIPAA Privacy Regulations
 - Safeguards/Security Controls
 - Focus on:
 - Computers
 - Physical Access
 - Faxing
 - Employee work areas
 - Posted PHI
 - Medical records



Privacy Issues

- HIPAA Privacy Regulations
 - Safeguards/Security Controls (cont.)
 - Focus on:
 - Other paperwork
 - Disposal of PHI
 - Oral communications
 - Phone conversations
 - Hallway conversations
 - Appointment reminders/answering machines



Questions
