

**Fair Housing Is Good Medicine:
Applying the Fair Housing Act's
No-Inquiry Regulation When Housing
and Health Care Are Provided Together**

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ABSTRACT

The Fair Housing Act (FHA) protects individuals with disabilities from discrimination in the housing or rental markets. The FHA's no-inquiry regulation prohibits a landlord from inquiring into an applicant's health condition. Although the FHA routinely has been applied to long-term care facilities – usually to protect a group home or similar facility from unfair zoning practices – the no-inquiry regulation has not been utilized to challenge the admissions practices of assisted living facilities, nursing facilities, and other long-term care facilities. Indeed, at first glance, a no-inquiry rule seems a poor fit for a facility that provides health care along with housing. This article determines that the no-inquiry regulation can be used to limit the health care information demanded of applicants by long-term care facilities. An explicit exception to the no-inquiry regulation allows inquiry to the extent necessary to determine whether an applicant is entitled to priority in admission. Because long-term care facilities are designed for use by individuals with disabilities, such individuals should be considered to have priority. The facility should be entitled to inquire into an applicant's health condition only to the extent necessary to determine whether he or she has care needs that fit within the level of care authorized under the facility's license.

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Introduction

The Fair Housing Act's no-inquiry regulation prohibits a landlord from inquiring into the health condition of an applicant for tenancy.² Most observers immediately will recognize this regulation as good public policy in the context of a standard residential setting. In all or virtually all such circumstances, a tenant's health care problems and needs are, in the vernacular, none of the landlord's business.

What is far from obvious, however, is whether and how the FHA's no-inquiry regulation is to be applied when a landlord also is a care provider for tenants. What if, for example, the landlord provides services as the operator of a long-term care facility such as a nursing facility³ or assisted living facility?⁴

In such situations, public policy considerations do not lead immediately to an obvious conclusion. On one hand, a tenant's health care now is indeed the landlord's business. A counterargument is that the landlord/operator should not be discriminating

² 24 C.F.R. § 100.202(c).

³ "Nursing facility" is the term used by federal law to refer to the facilities that are known in the vernacular as "nursing homes." See 42 U.S.C. §§ 1395i-3 (Medicare certification for "skilled nursing facility"), 1396r (Medicaid certification for "nursing facility"). This article uses the term "nursing facility," although numerous quotations within the article use "nursing home" instead.

⁴ As is discussed subsequently, assisted living differs significantly from state to state. See *infra* at _____. Even the name "assisted living" is not universal across states. A decreasing minority of states use other terms – for example, "residential care facility for the elderly" in California, "housing with services establishment" in Minnesota, and "personal care home" in Pennsylvania." See Cal. Health & Safety Code § 1569.1; Minn. Stat. Ann. § 144D.01(4); 62 Pa. Stat. Ann. § 1001; see also Eric Carlson, Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care, at 72-73 (2005) (chart of names used by states). This article uses the term "assisted living facility" generically to refer to these facilities.

on the basis of an applicant's health care condition, beyond making a threshold determination that the facility can meet the applicant's needs. The FHA's intent would seem to be contradicted by a landlord/operator who cherrypicks those applicants with the "easiest" health care needs. Such discrimination could be prevented or at least inhibited by consistent application of a no-inquiry rule.

This article is the first in depth analysis of this issue.⁵ The article first explains the basic structure and purpose of the FHA and its no-inquiry regulation.⁶ Then the

⁵ The author of this article began discussion of the issue in a short article co-written with Michael Allen, *Why Does the Business Manager Need My Complete Medical History? An Examination of Housing Discrimination in Long-Term Care*, 16 NAELA News 1 (Mar. 2004). Mr. Allen subsequently addressed the same issue briefly within an article that he co-wrote with Robert Schwemm, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L. Rev. 121, 186-93 (2004). Also, a student note discusses the issue obliquely. See Lauren Sturm, *Fair Housing Issues in Continuing Care Retirement Communities (CCRCs): Can Residents be Transferred Without Their Consent?*, 6 N.Y. City L. Rev. 119, 127 (2004) (suggesting that application of the no-inquiry regulation might be unworkable in the context of continuing care retirement communities).

The issue is not addressed in any published ruling of a court or administrative agency. A 2002 consent order enforces the no-inquiry regulation against the Resurrection Retirement Community of Chicago, but the order applies only to areas of the community in which the landlord does not provide long-term care services.

Specifically, the consent order states that the community "provides both housing with no assisted living services and housing with assisted living services." Evidently, the Consent Order applies to the independent living section of the community, and not the assisted living section, based on the provision of the Consent Order that enjoins the community from "[s]teering persons with a disability from [the community] to assisted living facilities because of their disability." Consent Order, *United States v. Resurrection Retirement Community, Inc.*, No. 02-CV-7453 (N.D. Ill. Sept. 17, 2002), available at

article describes nursing facilities and assisted living facilities, with an overview of the law governing each type of facility.

The article then analyzes how the FHA should be applied to long-term care facilities. The analysis considers three primary questions:

- Does the FHA apply to long-term care facilities?
- Does the FHA's no-inquiry regulation apply to both applicants and tenants, or only to tenants?
- Are inquiries by long term care facilities authorized by one of the explicit exceptions to the no-inquiry regulation?

The article concludes that a long-term care facility has authority to make a limited inquiry into an applicant's health condition. Any inquiry must be limited to the information necessary to determine whether the applicant can benefit from the facility's services, and whether the applicant's needs can be met within the parameters of the facility's license.

www.usdoj.gov/crt/housing/documents/resurrectsettle.htm; *see also*

www.usdoj.gov/crt/housing/documents/resurrectcomp.htm (complaint in same case). In any case, the consent order never raises or discusses the issue as to whether and how the no-inquiry regulation can be reconciled with a long-term care provider's legitimate need for residents' health care information.

⁶ Disability-based discrimination also is addressed by the Americans with Disabilities Act and (for federally-funded entities) by Section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794 (Section 504), 42 U.S.C. §§ 12181-89 (ADA's Title III, pertaining to public accommodations). Although the ADA and Section 504 each potentially could be relevant in an admission dispute involving a long-term care facility, neither is analyzed in this article. The focus of this article is on the FHA because only the FHA has an explicit no-inquiry rule applicable to housing.

Fair Housing Act (FHA)

FHA Overview

The original Fair Housing Act (FHA) was enacted as part of the Civil Rights Act of 1968, proscribing discrimination in housing on the basis of race, color, religion, and national origin.⁷ In 1974, “sex” was added as a proscribed factor of discrimination;⁸ in 1988, the Fair Housing Amendments Act added “familial status” and “handicap”.⁹

Regarding handicaps, a House Report from the 1988 legislation notes:

Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice.¹⁰

“Handicap” is construed broadly. The FHA defines “handicap” as “a physical or mental impairment which substantially limits one or more of such person’s major life activities,” and includes instances in which an individual has “a record of having such an impairment” or is “regarded as having such an impairment.”¹¹ The regulations set forth a lengthy but non-exclusive list of examples of a physical or mental impairment.¹² The

⁷ Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968).

⁸ Pub. L. No. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729 (1974).

⁹ Pub. L. No. 100-430, § 6(a)-(b)(2), (e), 102 Stat. 1622 (1988).

¹⁰ H.R. Rep. No. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

¹¹ 42 U.S.C. § 3602(h); *see also* 54 Fed. Reg. 3,232, 3,245 (Jan. 23, 1989) (FHA’s definition of “handicap” is consistent with definition of “individual with handicaps” in Rehabilitation Act of 1973, 29 U.S.C. § 706).

¹² “Physical or mental impairment includes:

“(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or

term “major life activities” also is described broadly, as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”¹³ Notably, the definition of “handicap” under the FHA is substantially equivalent to the definition of “disability” used by the Section 504 of the Rehabilitation Act,¹⁴ and by the Americans with Disabilities Act.¹⁵

more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

“(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.”

24 C.F.R. § 100.201(a).

¹³ 24 C.F.R. § 100.201(b).

¹⁴ 29 U.S.C. § 705(9)(B) (“a physical or mental impairment that substantially limits one or more major life activities”).

¹⁵ 42 U.S.C. § 12102(2)(A) (“a physical or mental impairment that substantially limits one or more of the major life activities of such individual”).

As the ADA reflects, “disability” now is preferred over “handicap” as the legal term of art. *See also*, e.g., Damon Rose, *Don’t Call Me Handicapped!*, BBC News Magazine (Oct. 4, 2004), available at news.bbc.co.uk/1/hi/magazine/3708576.stm. In this article, the term “handicap” is used because that is the term employed by the Fair Housing Act.

The FHA is enforceable either through private litigation or by the Department of Housing and Urban Development (HUD).¹⁶ Actions brought by HUD may be adjudicated in front of an administrative law judge or a federal court.¹⁷

FHA's No-Inquiry Regulation

To a significant extent, the FHA's regulations merely restate the broad statutory prohibitions against handicap-based discrimination. In the FHA itself, the two principal subsections proscribe discrimination in the sale or rental of a dwelling, or in the terms of the sale or rental.¹⁸ The corresponding regulatory language is virtually word-for-word identical to the statutory language.¹⁹

¹⁶ 42 U.S.C. §§ 3610 (enforcement through HUD), 3613 (private litigation).

¹⁷ 42 U.S.C. § 3612.

¹⁸ Under these two subsections, it is unlawful

“(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

“(A) that buyer or renter,

“(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

“(C) any person associated with that buyer or renter.

“(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

“(A) that person; or

“(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

“(C) any person associated with that person.”

42 U.S.C. § 3604(f)(1)-(2).

One exception to this mirror-image pattern of the statute and regulations is the inclusion in the regulations of a provision that prohibits an owner or landlord from inquiring into whether an applicant has a handicap, or into the nature or severity of such a handicap.²⁰ On the release of the proposed FHA regulations dealing with disability, HUD explained that this provision was meant to advance legislative intent:

The legislative history of the Fair Housing Amendments Act makes it clear that the Act was intended to prohibit landlords and owners [from] asking prospective tenants and buyers blanket questions about the individuals' disabilities. The House Report explains that the approach taken in section 504²¹ regulations dealing with pre-employment inquiries should apply also to the Fair Housing Amendments Act. House Report at 30.²² Under section 504 regulations, employers may not inquire, as part of pre-employment inquiries, whether an applicant is a handicapped person. Employers may only make pre[-]employment inquiries into an applicant's ability to perform job-related functions. See 45 CFR 84.14; 24 CFR 8.13.²³

¹⁹ Compare 42 U.S.C. § 3604(f)(1)-(2) with 24 C.F.R. § 100.202(a)-(b).

²⁰ 24 C.F.R. § 100.202(c).

²¹ "Section 504" refers to section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794(a). Section 504 prohibits disability-based discrimination by an entity receiving federal funding.

²² H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

²³ 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988); see also 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989)

(discussion of final regulations, identifying no-inquiry regulation as "adaptation of the 'pre-employment inquiries' provision in the section 504 regulations").

The House Report raises the no-inquiry issue in the context of the FHA's proviso that none of its provisions require making a dwelling available to an individual who would be a "direct threat" to others' health and safety, or whose tenancy would result in "substantial physical damage" to others' property.²⁴ The Report concludes that a landlord legally could inquire "whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants,"²⁵ but would be prohibited by the FHA from making general inquiries relating to handicaps:

This provision [regarding "direct threat" and "physical damage"] is not intended to give landlords and owners the right to ask prospective tenants and buyers blanket questions about the individuals' disabilities. Under Section 504 of the Rehabilitation Act, employers may not inquire, as part of pre-employment inquiries, whether an applicant is a handicapped person or as to the nature or severity of the handicap. Employers may only make pre-employment inquiries into an applicant's ability to perform job-related functions. Similarly, under this provision, only an inquiry into a prospective tenant's ability to meet tenancy requirements would be justified. Thus, in assessing an application for tenancy, a landlord or owner may ask an individual the questions that he or she asks of all other

The fact that the no-inquiry regulation is drawn in part from legislative intent, and not exclusively from statutory language, might raise questions as to its enforceability in private litigation. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action to enforce disparate-impact regulations implementing Title VI of Civil Rights Act).

²⁴ 42 U.S.C. § 3604(f)(9); *see also* 24 C.F.R. § 100.202(d) (corresponding provision in regulation).

²⁵ H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

applicants that relate directly to the tenancy (e.g., questions relating to rental history or a targeted inquiry as to whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants), but may not ask blanket questions with regard to whether the individual has a disability. Nor may the landlord or owner ask the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history.²⁶

As promulgated by HUD, the no-inquiry regulation is applicable whether or not an applicant is perceived as potentially threatening to health, safety, or personal property. In fact, the regulation makes no exception for an applicant's potential dangerousness. Housing providers had requested regulatory authorization to inquire into an applicant's "history of antisocial behavior or tendencies," but HUD declined to include the requested exception, reasoning that such an exception "might well be seen as creating or permitting a presumption that individuals with handicaps generally pose a greater threat to the health or safety of others than do individuals without handicaps."²⁷ Presumably this was meant to be consistent with the House Report's narrow concession that a landlord or owner could engage in "a targeted inquiry as to whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants."²⁸

²⁶ H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

²⁷ 54 Fed. Reg. 3,232, 3,247 (Jan. 23, 1989); *see also* Township of W. Orange v. Whitman, 8 F. Supp. 2d 408, 433 n.15 (D. N.J. 1998) (in camera review of medical histories of allegedly dangerous residents, in lawsuit by township to prevent operation of group homes).

²⁸ H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

In recognition that a landlord or owner under certain circumstances might have a legitimate need to inquire into an applicant's handicap, the no-inquiry regulation includes limited exceptions. Two of these exceptions concern the use of illegal drugs, and are not relevant here.²⁹ The other exceptions permit inquiry if the handicap relates to "an applicant's ability to meet the requirements of ownership or tenancy," or if a dwelling or priority for a dwelling is available only to persons with handicaps or persons with a particular type of handicap.³⁰ These exceptions typically arise in regard to federally-funded housing developments that require or prefer tenants with handicaps.³¹

The most-commonly cited case regarding the no-inquiry regulation, *Cason v. Rochester Housing Authority*, concerns a public housing authority that screened applicants for an "ability to live independently, or to live independently with minimal

²⁹ 24 C.F.R. § 100.202(c)(4)-(5).

³⁰ The exceptions are:

"(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

"(2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;

"(3) Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap."

24 C.F.R. § 100.202(c)(1)-(3).

³¹ See, e.g., 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988) (discussion of subsidized housing in release of proposed no-inquiry regulations); 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989) (discussion of subsidized housing in release of final no-inquiry regulations); see also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954 (N.D. Tex. 1993) (receipt of federal funds requires apartment building to house only elderly tenants, but does not allow discrimination against applicants with handicaps).

aid.”³² Applicants were required to fill out a questionnaire regarding any medical conditions, and to submit to an in-home evaluation conducted by a housing authority employee.³³ If deemed necessary by the housing authority, these procedures were supplemented by a nursing evaluation conducted by a social worker, “during which a variety of specific questions concerning the applicant’s disability, personal hygiene and ability to live independently [were] asked.”³⁴

The court conducted a limited analysis of the parameters of the no-inquiry regulation. The housing authority’s practices were “clearly at odds” with the regulation, as the housing authority conceded.³⁵ The court briefly considered the exception relating to “an applicant’s ability to meet the requirements of ownership or tenancy,” by examining the twelve tenant obligations set forth in the federal regulations, and pointing out that none of those obligations had any relationship to an individual’s ability to live independently.³⁶ Ultimately, the court enjoined the public housing authority from making inquiries into an applicant’s ability to live independently.³⁷

Subsequent litigation has explored further how the no-inquiry regulation coexists with publicly-funded housing. The FHA does not invalidate federal funding laws that

³² 748 F. Supp. 1002, 1004 (W.D.N.Y. 1990); *see also* HUD v. Wilmette Real Estate & Mgmt. Co., 2000 WL 1478457 (H.U.D.A.L.J. 2000) (consent order against real estate management company, based on company’s inquiries to applicants as to their ability to live independently).

³³ 748 F. Supp. at 1005.

³⁴ 748 F. Supp. at 1005.

³⁵ 748 F. Supp. at 1008-1009.

³⁶ 748 F. Supp. at 1008-1009; *see* 24 C.F.R. § 966.4(f) (twelve obligations of public housing tenants).

³⁷ 748 F. Supp. at 1011.

allow a landlord to prefer applicants with certain types of disabilities,³⁸ although the right to prefer certain disabilities does not justify screening for an applicant's ability to live independently.³⁹

Exceptions to the no-inquiry regulation are construed narrowly to authorize inquiries only to the extent necessary. In a case decided by the Maine Supreme Court, a federally subsidized housing project was limited by the federal funding to elderly or disabled tenants. Although the housing project thus was allowed to require verification of an applicant's disability, the project could not require a physician's statement describing the applicant's medical condition.⁴⁰ In a case involving a similar fact pattern – inquiries made by a project limited to elderly or disabled tenants – a federal district court in California emphasized that a landlord's inquiries should be as restricted as possible:

³⁸ *Beckert v. Our Lady of Angels Apts., Inc.*, 192 F.3d 601 (6th Cir. 1999) (National Housing Act allowing landlord to admit applicants with physical disabilities but not with chronic mental illness; rejection of applicant with “mental-schizo” condition).

³⁹ *Jaininey v. Maximum Independent Living*, Memorandum of Opinion, No. CV 0879 (N.D. Ohio Feb. 9, 2001) (Cranston-Gonzalez National Affordable Housing Act allowing landlord to prefer applicants with “similar disabilities,” but not allowing rejection based on applicant's inability to live independently).

⁴⁰ *Robards v. Cotton Mill Assocs.*, 713 A.2d 952, 954 (Me. 1998).

The trial court had considered two exceptions: as discussed in this article's text, the exception for a dwelling reserved for individuals with handicaps and, in addition, the exception for “an applicant's ability to meet the requirements of ownership or tenancy.” The trial court made the dubious conclusion that this second exception allowed the housing project to inquire into the applicant's ability to care for himself and an apartment. This issue was not appealed, and thus was not addressed by the Maine Supreme Court. 713 A.2d at 954; *see Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (prohibiting public housing authority from inquiring into applicant's ability to live independently).

[T]he legislative history of the [Fair Housing Act Amendments Act of 1988] and the HUD regulations show that an applicant's privacy rights are to be preserved to the extent possible and that a landlord should use the least invasive means necessary to verify an applicant's qualifications. . . .

[¶] Although a landlord may make necessary inquiries to determine an applicant's qualifications for tenancy, the landlord may not inquire into the nature and extent of an applicant's or tenant's disabilities beyond that necessary to determine eligibility.⁴¹

Long-Term Care Facilities

Nursing Facilities

A nursing facility is the health care facility that the general public is likely to identify as a "nursing home" or "convalescent hospital." In general, nursing facility residents have significant health care needs and, in recent years residents' average health care needs have increased.⁴² Based on 2004 data, 45 percent of nursing facility residents suffer from dementia.⁴³ Over 54 percent of residents are unable to walk without extensive or constant support, and another 4.3 percent are in a bed or recliner at least 22

⁴¹ *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998).

⁴² HHS OIG, Nurse Aide Training, Rep. No. OEI-05-01-00030, at 5, 9-10 (2002), *available at* oig.hhs.gov/oei/reports/oei-05-01-00030.pdf.

⁴³ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 42 (2005), *available at* www.nccnhr.org/public/245_1267_11874.cfm.

hours per day.⁴⁴ Over 53 and 43 percent of residents suffer from bladder or bowel incontinence, respectively, and over 29 percent have contractures that limit the range of motion in their joints.⁴⁵

Health care interventions are a daily fact of life for many nursing facility residents. Over 4 percent of residents have an ostomy, which is an opening in the skin (such as a colostomy) that provides direct access to the intestinal or urinary tract.⁴⁶ Over 7 percent of residents have indwelling catheter tubes that drain urine from the bladder.⁴⁷ Almost 7 percent of residents receive tube feeding directly into the gastrointestinal system, and over 2 percent of residents receive food or medicine intravenously.⁴⁸

National nursing facility standards are set in large part by the federal Nursing Home Reform Law, enacted as part of the Omnibus Budget Reconciliation Act of 1987.⁴⁹ The Reform Law governs any nursing facility which is certified to receive reimbursement

⁴⁴ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 36 (2005).

⁴⁵ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 38, 52, 54 (2005).

⁴⁶ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 46 (2005).

⁴⁷ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 56 (2005).

⁴⁸ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004*, at 48, 50 (2005).

⁴⁹ Pub. L. 100-203, §§ 4201 and 4211. Because the Nursing Home Reform Law was part of the 1987 budget reconciliation bill, the Reform Law also is known as “OBRA ‘87.”

from the Medicare or Medicaid programs, or both.⁵⁰ Because over 97 percent of the nation’s nursing facilities are certified to participate in at least one of these programs,⁵¹ the Reform Law sets care standards for virtually every nursing facility resident in the country.

The Reform Law made a sea change in federal nursing facility law, consistent with a recommendation of the Institute of Medicine for a revised federal nursing facility law “based on the best professional standards for providing high quality of care and quality of life.”⁵² For example, a fundamental provision of the Reform Law requires that a nursing facility “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan

⁵⁰ The Reform Law is codified at sections 1395i-3 and 1396r of Title 42 of the United States Code. Section 1395i-3 applies to any nursing home that accepts Medicare reimbursement; Section 1396r similarly applies to any nursing home that accepts Medicaid reimbursement. Sections 1395i-3 and 1396r are virtually identical.

The Reform Law refers to a Medicare-certified nursing home as a “skilled nursing facility,” and a Medicaid-certified nursing home as a “nursing facility.” 42 U.S.C. §§ 1395i-3(a), 1396r(a). For simplicity’s sake, this article refers to each type of facility as a “nursing facility.”

⁵¹ HHS, The National Nursing Home Survey: 1999 Summary at 7, *available at* www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf.

⁵² Institute of Medicine (IOM), *Improving the Quality of Care in Nursing Homes*, at 26 (National Academy Press 1986). The Reform Law “was written with both the recommendations of the IOM and [the federal government’s notice of proposed rulemaking] as a model.” 56 Fed. Reg. 48,826, 48,826 (1991); *see also* *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F.Supp.2d 73, 79 (D.D.C. 2002) (Nursing Home Reform Law “adopted many of the recommendations of the IOM Report”).

of care” prepared by a multi-disciplinary team headed by the resident’s physician.⁵³ Also, to establish greater professionalism in nursing facility care, the Nursing Home Reform Law requires that a nursing facility have a licensed nurse on duty around the clock, and employ a professional registered nurse at least eight consecutive hours a day, seven days a week.⁵⁴

Prior to the Reform Law, standards were minimal or nonexistent for those non-nurses who provide most of the hands-on care in a nursing facility.⁵⁵ In response, the Reform Law established a new job classification – certified nurse aide, or CNA – and required that each CNA receive at least 75 hours of training and pass a certification examination.⁵⁶

Assisted Living Facilities

Initial Conceptions

“Assisted living” has been described as a new paradigm in long-term care.⁵⁷ The idealized vision of assisted living is an elder living in her own home, receiving precisely the type and frequency of services that she requires.⁵⁸ Assisted living proponents speak

⁵³ 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).

⁵⁴ 42 U.S.C. §§ 1395i-3(b)(4)(C)(i), 1396r(b)(4)(C)(i).

⁵⁵ Institute of Medicine (IOM), *Improving the Quality of Care in Nursing Homes*, at 89-90 (National Academy Press 1986); 56 Fed. Reg. 48,826, 48,880 (1991).

⁵⁶ 42 U.S.C. §§ 1395i-3(b)(5)(A), (f)(2)(A)(i), 1396r(b)(5)(A), (f)(2)(A)(i); *see also* 42 C.F.R. § 483.75(e).

⁵⁷ *See* Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?* (1993).

⁵⁸ *See, e.g.*, Marshall Kapp & Keren Brown Wilson, *Assisted Living and Negotiated Risk: Reconciling Protection and Autonomy*, 1 J. Ethics, Law, and Aging 6 (1995); Rosalie Kane, *Expanding the Home Care*

disparagingly of nursing facilities' standardization, and champion assisted living as the flexible and individualized alternative to nursing facility care.⁵⁹

Among the assisted living model's virtues, according to these proponents, is its ability to preserve residents' autonomy, dignity, and privacy.⁶⁰ A laudatory AARP report from 1993 states: "Substantial numbers of disabled older people now live in assisted living settings where they receive individualized personal care in accommodations that offer more privacy, space, and dignity than are typically available in nursing homes, and

Concept: Blurring Distinctions Among Home Care, Institutional Care, and Other Long-Term Care Services, Milbank Quarterly, vol. 73, no. 2, at 161-181 (1995).

⁵⁹ See, e.g., Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 2 (1993).

⁶⁰ See, e.g., Assisted Living Quality Coalition, *Assisted Living Quality Initiative: Building a Structure that Promotes Quality*, at 9 (1998) (one purpose of coalition was to "advocat[e] for the assisted living philosophy of independence, privacy, dignity and autonomy"); Keren Brown Wilson, *Assisted Living: Reconceptualizing Regulation to Meet Consumers' Needs and Preferences* 10 (1996) ("Assisted living's philosophy is to provide physically and cognitively impaired older persons the personal and health-related services that they require to age in place in a homelike environment that maximizes their dignity, privacy, independence, and autonomy").

In states' assisted living definitions, a not unsubstantial number of states refer to "autonomy," "dignity," and other similarly ambitious terms. See, e.g., Ill. Admin. Code tit. 77, § 295.100(a) (assisted living as "a social model that promotes [residents'] dignity, individuality, privacy, independence, autonomy, and decision-making ability"); N.J. Stat. Ann. § 26:2H-7.15 (assisted living "promot[ing] resident self-direction and participation in decisions that emphasize independence, individuality, privacy, dignity and homelike surroundings"); Vt. Stat. Ann. tit. 33, § 7102(11) ("promot[ing] resident self-direction and active participation in decision-making while emphasizing individuality, privacy and dignity").

at lower cost.”⁶¹ The assisted living facility frequently is praised as being the polar opposite of a nursing facility in regard to resident independence and other appealing characteristics:

Proponents assert that [assisted living facilities] differ from new nursing home facilities and make comparisons when explaining what assisted living is. Nursing facilities are institutional, hospital-like settings that do not respect the individual’s need for independence, dignity, and choice. In contrast, [assisted living facilities] provide home-like environments where respect for the resident’s independence, dignity, and choice are the primary concerns.⁶²

Assisted Living in Practice

Although, in initial envisionings, assisted living was to be provided in the elder’s home,⁶³ assisted living today is normally provided in and by an assisted living facility.⁶⁴

⁶¹ Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at vii (1993).

⁶² Paula Carder, *The Social World of Assisted Living*, J. Aging Studies, vol. 16, at 1 (2002), *reprinted in* Gray Areas: Ethnographic Encounters with Nursing Home Culture 263, 271 (Phillip Stafford ed. 2003) (internal quotations omitted).

⁶³ *See, e.g.*, Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 86 (1993) (some interviewees retaining position that “assisted living is a form of home care”).

⁶⁴ *See, e.g.*, Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 1 (1993) (assisted living “not a nursing home yet not, strictly speaking, community care”); Eric Carlson, *Critical Issues in Assisted Living: Who’s In, Who’s Out, and Who’s Providing the Care*, at 11-12 (2005).

Facilities commonly are required to obtain state licenses⁶⁵ In certain states, the license is held by the service provider, which may or may not be the entity responsible for providing the housing.⁶⁶

Today, a realistic description of assisted living would focus on how a facility meets elders' day-to-day needs. Simply put, an assisted living facility offers housing and necessary services to older individuals who (in most instances) need assistance with at least some activities of daily living.⁶⁷

⁶⁵ Eric Carlson, Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care, at 72-73 (2005). Approximately two-thirds of the states use the term "assisted living" in the license. *Id.* Other terms include "boarding home," "home for the aged," "personal care home," and "residential care facility for the elderly." Wash. Rev. Code Ann. § 18.20.020(1) (boarding home); Mich. Comp. Laws Ann. § 333.20106(3) (home for the aged); 62 Pa. Stat. Ann. § 1001 (personal care home); Cal. Health & Safety Code § 1569.2(k) (residential care facility for the elderly).

⁶⁶ Robert Mollica et al., State Residential Care and Assisted Living Policy: 2004, at 1-8 through 1-9 (March 2005); Robert Mollica, Setting Policy for Assisted Living 8 (1995) ("States have adopted one of two approaches to regulation: 1) licensure of a program or facility that combines housing and services and 2) licensure or certification of services provided in assisted living.").

The issues discussed in this article may not come into play if housing and services are provided independently. In that situation, the housing provider may be subject to the FHA's no-inquiry regulation in the same way that the regulation is applied to any "typical" landlord.

⁶⁷ See, e.g., Assisted Living Federation of American, What Is Assisted Living?, *available at* www.alfa.org/public/articles/details.cfm?id=126 ("defin[ing] an Assisted Living residence as a special combination of housing, personalized supportive services and health care designed to meet the needs -- both scheduled and unscheduled -- of those who need help with activities of daily living"); Assisted Living Assocs. L.L.C. v. Moorestown Twp., 996 F. Supp. 409, 415-16 (D.N.J. 1998).

The extent of these assisted living services differs significantly from state to state, as assisted living standards are set almost exclusively by state law.⁶⁸ To this point, federal law is virtually silent on assisted living standards.⁶⁹

The extent of available services also may vary greatly from facility to facility within the same state. Some states license multiple levels of assisted living; in these states, residents with greater needs reside in facilities licensed at a higher level.⁷⁰ Also, although state law may establish the services that an assisted living facility is authorized to provide, the law often does not require that such a facility provide all or even most of the authorized services.⁷¹

Assisted living facilities often are able to make available a significant level of health care. Increasingly, residents who in the past would have required nursing facility

⁶⁸ See generally Robert Mollica et al., *State Residential Care and Assisted Living Policy: 2004* (March 2005); Eric Carlson, *Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care* (2005).

⁶⁹ Eric Carlson, *Long-Term Care Advocacy* § 5.04[2] (Matthew Bender 2005).

⁷⁰ Eric Carlson, *Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care*, at 19-21 (2005); see, e.g., Ariz. Admin. Code 9-10-701, -702 (3 licensure levels); Mont. Code Ann. § 50-5-226 (2)-(4) (same); Code Me. R. 10-149-113, § 2.8 (two licensure levels); Mo. Ann. Stat. § 198.006(16), (17) (same); N.Y. Pub. Health Law § 4651(15) ("enhanced" certification if certain standards are met).

⁷¹ Robert Mollica et al., *State Residential Care and Assisted Living Policy: 2004*, at 1-20 through 1-22 (March 2005); Eric Carlson, *Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care*, at 33-35 (2005).

admission, now are able to receive necessary health care services in an assisted living facility.⁷²

Is an Assisted Living Facility a “Home”?

Assisted living operators not infrequently claim to provide a “homelike” environment,⁷³ but it is unclear to what extent an assisted living facility can be considered a “home” like any other. The 1993 AARP report notes:

The status of residents in newly emerging assisted living programs is less clear. If residents have bachelor apartments with doors that lock from the inside or if they have bathrooms and kitchenettes, is their unit a home in the real sense or only in the artificial sense of the rhetoric that asks nursing home residents to regard the facility as home? If it is a home in the real sense, then the resident should enjoy all the protections of the Fair

⁷² See, e.g., Eric Carlson, Critical Issues in Assisted Living: Who’s In, Who’s Out, and Who’s Providing the Care, at 28-32 (2005).

⁷³ See, e.g., N.J. Stat. Ann. § 26:2H-7.15 (assisted living “promot[ing] resident self-direction and participation in decisions that emphasize independence, individuality, privacy, dignity and homelike surroundings”); Paula Carder, *The Social World of Assisted Living*, J. Aging Studies, vol. 16, at 1 (2002), reprinted in *Gray Areas: Ethnographic Encounters with Nursing Home Culture* 263, 271 (Phillip Stafford ed. 2003) (assisted living “provid[ing] home-like environments where respect for the resident’s independence, dignity, and choice are the primary concerns”) (internal quotations omitted); Keren Brown Wilson, Assisted Living: Reconceptualizing Regulation to Meet Consumers’ Needs and Preferences 10 (1996) (“Assisted living’s philosophy is to provide physically and cognitively impaired older persons the personal and health-related services that they require to age in place in a homelike environment that maximizes their dignity, privacy, independence, and autonomy.”).

Housing Act and should exercise reasonable control over what occurs at the premises.⁷⁴

As discussed above, an assisted living facility may be seen as housing, a service provider, or both.⁷⁵ This uncertainty raises legal questions that depend for their answers on the facility's qualities and practices, and how the facility is characterized.⁷⁶

For example, when an assisted living resident is injured, the facility is likely to argue in its defense that the standard of care is closer to that of an apartment building, than of (for example) a nursing facility. This argument was advanced in a case involving a 93 year-old assisted living resident who had drowned in a canal behind the facility. In reversing a directed verdict that had been granted in the facility's favor, the Florida District Court of Appeal noted that the facility "seem[ed] to be arguing that [it] may be deemed a 'living facility' but . . . not an '*assisted living facility*.'"⁷⁷ The court rejected this argument, reasoning that individuals choose assisted living facilities specifically to receive assistance with activities of daily living:

⁷⁴ Rosalie Kane and Keren Brown Wilson, AARP, Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?, at 10 (1993).

⁷⁵ See *supra* at ___.

⁷⁶ See, e.g., Keren Brown Wilson, Assisted Living: Reconceptualizing Regulation to Meet Consumers' Needs and Preferences i (1996) ("most controversial and unresolved issues in assisted living" including "[t]o what extent do assisted living settings function as housing that should be governed by landlord/tenant law?" and "[a]re assisted living settings residential settings, or are they care facilities that should be governed by protective statutes and regulations?").

⁷⁷ *Selvin v. DMC Regency Residence, Ltd.*, 807 So. 2d 676, 682 n.4 (Fla. Dist. Ct. App. 2001) (emphasis in original).

There is also a fundamental distinction about the residents in assisted living facilities that is not true of the general public. Unlike people who choose to live in single family homes, the residents of this assisted living facility have their home there because they must. They have been forced by the afflictions of age, by deteriorating cognitive and mental acuity as well as physical decline, to give up their conventional homes, apartments and condominiums they had chosen as permanent places of residence when they were active and able. Now their mental and physical conditions, however, have made it necessary for their own personal safety to live in a place where trained personnel can give them care and attention to protect them from the dangers of their failing faculties. In short they have turned to assisted living facilities not in the same way that the general public chooses ordinary homes -- for simple shelter -- or to visit parks and recreation areas, but instead for protection from the ordinary risks of everyday life associated with the steady decline in their own abilities to look after themselves. What plaintiff appears to claim is that this facility failed to exercise due care in the single thing -- the sole function -- that made him seek out such a facility.⁷⁸

In a similar vein to the facility's "living facility" argument in the Florida appeal, assisted living operators have expended considerable time and energy to promote the idea

⁷⁸ Selvin v. DMC Regency Residence, Ltd., 807 So. 2d 676, 681 (Fla. Dist. Ct. App. 2001); *see also* Menorah Campus Independent Senior Apartments, Inc. v. Novello, ___ N.Y.S.2d ___, 2005 WL 3749732, 2005 N.Y. Misc. LEXIS 3079 (N.Y. Sup. Ct. 2005) (no assisted living license required; all care services provided by home care agency affiliated with housing provider).

that, through “negotiated risk agreements,” a facility could have a resident waive the facility’s responsibility for certain care needed by the resident.⁷⁹ A provider attorney notes that “[n]egotiated risk agreements are intended to enable residents to reside in a non-institutional assisted living setting even though they may have care needs that would normally require that they reside in a skilled nursing environment.”⁸⁰ Under this conception of negotiated risk, the assisted living operator hopes to be relieved of responsibility for the care need that, absent the negotiated risk agreement, would require the resident’s move to a nursing facility.

To this point, no court has issued a ruling that directly addresses the validity of the negotiated risk concept. More generally, the concept of an assisted living facility as “home” also is relatively unexamined.

⁷⁹ See, e.g., Kenneth L. Burgess, *Negotiated Risk Agreements In Assisted Living Communities* 41 (Assisted Living Federation of America 1999) (negotiated risk agreement containing “acknowledgment by an informed resident that he bears the risk of the choices made as part of the negotiated risk contract”); Kenneth L. Burgess, *Negotiated Risk Agreements – One Year Later*, *Assisted Living Today*, Nov./Dec. 2001, at 36 (state’s prohibition of liability waivers had “fatally curtailed” negotiated risk); Allen Lynch & Sarah Teachworth, *Risky Business: The Enforceability and Use of Negotiated Risk Agreements*, 1 *Seniors Housing & Care Journal* 5 (2002) (waivers of liability in negotiated risk); see also Eric Carlson, *In the Sheep’s Clothing of Resident Rights: Behind the Rhetoric of “Negotiated Risk” in Assisted Living*, *NAELA Q.*, Spring 2003, at 4 (invalidity of liability waivers in negotiated risk agreements).

⁸⁰ Joel S. Goldman, *Potential Legal Roadblocks Ahead for Assisted Living* in ALFA Fall 2001 National Conference & Expo Conference Proceedings 299 (Oct. 21-23, 2001), as cited in Allen Lynch & Sarah Teachworth, *Risky Business: The Enforceability and Use of Negotiated Risk Agreements*, 1 *Seniors Housing & Care Journal* 5 n.11 (2002).

Is a Long-Term Care Facility Barred From Inquiring Into Medical Conditions of Applicants or Residents?

Public Policy Considerations

Application of the no-inquiry regulation to long-term care raises two broad issues. One issue is akin to the negotiated risk issue mentioned above.⁸¹ Across-the-board application of a do-not-inquire rule would tend to excuse a care provider from knowledge of, and responsibility for, a resident's health condition, similar to how a negotiated risk agreement might release a provider from responsibility for a certain aspect or aspects of a resident's care needs. In either case, important aspects of a resident's care needs are designated as none of the facility's concern.

The second issue concerns the appropriate and inappropriate uses of applicants' medical information. An appropriate use is to determine whether the applicant's care needs can be met in a long term care facility. Such determinations are particularly relevant for assisted living facilities, since their capacity to provide care is less than that of nursing facilities.⁸² Although assisted living facilities now are allowed to accommodate a greater range of medical conditions than was the case in the past,⁸³ state

⁸¹ *See supra* at ___.

⁸² *See, e.g.*, Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 37 (1993) ("Typically a team was involved in making initial determinations about suitability for entrance and/or care plans upon admission."); Assisted Living Quality Coalition, *Assisted Living Quality Initiative: Building a Structure that Promotes Quality*, at 68 (1998) (assisted living guidelines calling on facility to conduct "initial screening of the applicant to determine the setting's ability to meet the resident's anticipated health and service needs and preferences").

⁸³ *See supra* at ___.

laws continue to bar admission or retention of individuals with certain medical conditions.⁸⁴

Another appropriate use of applicants' medical information is to conduct assessments and prepare service plans. This is one topic on which providers, regulators, and consumer advocates are in agreement – good long-term care requires that a resident's needs be assessed early and often, and that assessments are used to develop individualized plans.⁸⁵

⁸⁴ See, e.g., Ga. Comp. R. & Regs. r. 290-5-35-.15; R.I. Gen. Laws § 23-17.4-2(9); see also *infra* at ____.

Such limitations on admission or retention are subject to challenge as being unduly discriminatory against individuals with handicaps. See, e.g., *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1300-301 (D. Md. 1993) (invalidation under FHA of county requirement that group home residents be capable of evacuating independently in an emergency); *Baggett v. Baird*, 1997 WL 151544, at *14-16, 1997 U.S. Dist. LEXIS 5825, at *40-49 (N.D. Ga. 1997) (invalidation under FHA of state requirement that assisted living residents be ambulatory); *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 19 F. Supp. 2d 567, 571-75 (N.D.W.V. 1998) (refusal to dismiss causes of action under ADA and FHA challenging state requirement that assisted living residents be ambulatory).

⁸⁵ See, e.g., 42 U.S.C. §§ 1395i-3(b)(2)-(3), 1396r(b)(2)-(3) (assessments and care plans in nursing facilities); 42 C.F.R. § 483.20(b), (k) (same); Sarah Greene Burger et al., *Nursing Homes: Getting Good Care There*, at 38-57 (Impact Publishers 2nd ed. 2002); Assisted Living Workgroup, *Assuring Quality in Assisted Living: Guidelines for Federal and State Policy, State Regulation, and Operations* 123-27 (2003) (unanimous support for recommendations relating to assessments and service plans); Assisted Living Quality Coalition, *Assisted Living Quality Initiative: Building a Structure that Promotes Quality*, at 68 (1998) (assisted living guidelines providing that “[a]fter execution of a contract and within a reasonable time after move-in, the setting conducts a more complete assessment of the resident by an appropriately qualified person,” for development of service plan); Joint Commission on Accreditation of Healthcare Organizations, *2003-2005 Accreditation Manual for Assisted Living*, at 103-104, 112-18 (assessments and

What is *not* appropriate or permissible is to use medical information to deny admission to those residents whose care needs, although appropriate for a facility, may require relatively more staff attention, or be perceived as distasteful by staff members or other residents. Statutory authority here is strong, although litigated cases are few and far between. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act each prohibit discrimination based on medical condition.⁸⁶ The most prominent published case, *Wagner v. Fair Acres Geriatric Center*, concerns a nursing facility that had refused admission to a woman due to her Alzheimer’s disease.⁸⁷ The federal district court ruled in favor of the nursing facility but the Third Circuit reversed, speaking in strong terms against disability-based discrimination in admission to long-term care facilities:

Here there was ample evidence that [the woman’s] aggressive behaviors rendered her . . . a challenging and demanding patient. We find that this fact alone cannot justify her exclusion from a nursing home Otherwise nursing homes would be free to “pick and choose” among patients, accepting and admitting only the easiest patients to care for,

service plans); N.J. Admin. Code tit. 8, § 8:36-7.1 (same); Utah Admin. Code §§ 432-270-12, 432-270-13 (same).

⁸⁶ 42 U.S.C. § 12182(a) (under ADA, no disability-based discrimination in “place of public accommodation”); 29 U.S.C. § 794(a) (under Section 504, no disability-based discrimination in federally-funded program or activity); *see* 42 U.S.C. § 12181(7)(F) (“place of public accommodation” in ADA includes “hospital , or other service establishment”).

⁸⁷ 49 F.3d 1002 (3rd Cir. 1995).

leaving the more challenging and demanding patients with no place to turn for care.⁸⁸

Thus, across-the-board application of a no-inquiry rule would not necessarily be in the interests of long-term care applicants or residents. Denying access to an applicant's medical information is beneficial to the applicant to the extent that it prevents discrimination based on medical condition at the time of admission. On the other hand, denying access seems to be counterproductive if the facility uses the information only to deny admission – appropriately -- to those applicants whose medical conditions disqualify them for admission under relevant state law.⁸⁹ Also, denying access may have negative consequences to applicants (and residents) to the extent that it fosters the idea that a long-term care operator is only a “landlord” without responsibility for residents’ well-being.

Legal Analysis

Are Long-Term Care Facilities Subject to the FHA?

Case Law

Case law overwhelmingly supports the proposition that long-term care facilities are subject to the FHA. Notably, a heavy majority of the cases relate to zoning or similar disputes. The ubiquitous issue in dispute is whether the property owner (or lessee, in some instances) has the right to operate a particular type of facility on the property⁹⁰

⁸⁸ 49 F.3d at 1015.

⁸⁹ Note, however, that the relevant state law may be challengeable as being unlawfully discriminatory against individuals with handicaps. *See supra* at fn __.

⁹⁰ *See infra* at __.

The provision -- or non-provision -- of services is close to irrelevant in determining whether a particular building is subject to the FHA. The line instead is drawn based on whether the building serves as a home or, on the other extreme, as a transitory resting place.⁹¹

Specifically, the FHA applies only if the building in question is a “dwelling,”⁹² which is defined as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”⁹³ The term “family” explicitly is defined to include “a single individual.”⁹⁴

The term “residence,” however, is not defined within the FHA; in the absence of a statutory definition, courts have looked to the dictionary for guidance. An oft-cited dictionary definition (first employed by a court in 1975) defines “residence” as “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.”⁹⁵ Numerous courts have employed this same definition,⁹⁶ and as recently as 2004.⁹⁷

⁹¹ See *infra* at ___.

⁹² See 42 U.S.C. § 3604(a)-(f)(3) (proscribing various discriminatory acts relating to sale or rental of a “dwelling,” or relating to “the provision of services or facilities in connection” with such a “dwelling”).

⁹³ 42 U.S.C. § 3602(b).

⁹⁴ 42 U.S.C. § 3602(c).

⁹⁵ *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (FHA applies to “‘residential center’ for dependent, neglected or needy children”).

In identifying those buildings that are *not* considered residences, the key definitional words are the nouns (“sojourn” or “visit”) rather than the adjectives (“temporary” or “transient”). A hotel or motel, if intended for use solely by short-stay travelers, is not considered a “dwelling” under the FHA.⁹⁶ In the vast majority of cases, however, temporary housing is liberally recognized as a “dwelling,” provided that the individual has nowhere else to live or, more generally, that the

⁹⁶ See, e.g., *United States v. Columbus Country Club*, 915 F.2d 877, 881 (3rd Cir. 1990); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 (1st Cir. 1993); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3rd Cir. 1996); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (“Most courts that have considered the scope of the term “dwelling” in the FHA have cited the analysis of *United States v. Hughes Memorial Home* with approval.”) (citation omitted); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996); *Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308 (D. Or. 1996); *Louisiana Acorn Fair Hous. v. Quarter House*, 952 F. Supp. 352, 359 (E.D. La. 1997); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 132 (D. Conn. 2001) (“[m]ost courts” using dictionary definition).

⁹⁷ *Home Quest Mortg. LLC v. Am. Family Mut. Ins. Co.*, 340 F. Supp. 2d 1177, 1184 (D. Kan. 2004) (“courts have widely followed the definition of this term as first set forth in *United States v. Hughes Memorial Home*”).

⁹⁸ *Patel v. Holley House Motels*, 483 F. Supp. 374, 375, 381 (S.D. Ala. 1979) (citing dictionary definition from *Hughes Mem'l Home*). Of the cases discussed in this section, *Patel* is anomalous in that it does not concern a zoning or similar dispute. The motel’s owner allegedly refused to sell the motel after learning that two of the prospective buyers were of Indian origin.

A jail cell also is not considered a dwelling, although in that instance the exclusion from FHA coverage is due not to shortness of stay, but to the incompatibility of housing rights with incarceration. *Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1161-63 (D.N.M. 2000); *Gold v. Griego*, 2000 U.S. Dist. LEXIS 14897, at *6-8 (D.N.M. 2000).

housing in question is “home” for at least the short term. Courts rightly cite the FHA’s remedial purpose, as well as the common-sense proposition that the FHA’s protections are particularly important for those individuals on the margins of the housing market.⁹⁹

Homeless shelters too are generally considered dwellings,¹⁰⁰ as are farmworker camps.¹⁰¹ In reference to homeless shelters, a federal district court pointed out that

the homeless are not visitors or those on a temporary sojourn in the sense of motel guests. Although the Shelter is not designed to be a place of

⁹⁹ See, e.g., *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1105-106 (3d Cir. 1996); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 (1st Cir. 1993); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 132-33 (D. Conn. 2001); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996); *Woods v. Foster*, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995).

¹⁰⁰ See, e.g., *Turning Point v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996) (assuming without discussion that FHA applies to homeless shelter); *Support Ministries for Persons with AIDS, Inc. v. Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992) (assuming without discussion that FHA applies to residence for homeless persons with AIDS); *Stewart B. McKinney Foundation, Inc. v. Town Plan & Zoning Comm’n*, 790 F. Supp. 1197 (D. Conn. 1992) (assuming without discussion that FHA applies to residence for individuals with AIDS who are homeless or at risk of becoming homeless); *but see Johnson v. Dixon*, 786 F. Supp. 1, 4 (D. D.C. 1991) (“It is, moreover, doubtful if ‘emergency overnight shelter,’ as the District conceives itself to be providing, i.e., a place of overnight repose and safety for persons whose only alternative is to sleep in alleys or doorways, can be characterized as a ‘dwelling’ within the meaning of the Act, even if it may seem like home to them.”).

¹⁰¹ *Lauer Farms v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996); *see also Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308 (D. Or. 1996) (concluding with little analysis that FHA applies to farm labor camp).

permanent residence, it cannot be said that the people who live there do not intend to return -- they have nowhere else to go. As recognized by the Hughes and Baxter courts,¹⁰² the length of time one expects to live in a particular place does [sic] is not the exclusive factor in determining whether the place is a residence or a “dwelling.” Because the people who live in the Shelter have nowhere else to “return to,” the Shelter is their residence in the sense that they live there and not in any other place.¹⁰³

Similar reasoning applies in the farmworker cases. During the approximately five months of the growing season, farmworker camps or cabins are considered “dwellings” because they are “home” for farmworkers and their families, even if the farmworkers maintain homes in another state.¹⁰⁴

Many cases concern claims by group homes or similar facilities that they are being prevented from operating in a particular neighborhood. Courts routinely conclude that a group home is a “dwelling” under the FHA; more often than not,

¹⁰² “Hughes” is *United States v. Hughes Mem’l Home*, the case which first employed the dictionary definition of “residence.” “Baxter” is the subsequently-discussed case of *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989), in which an AIDS hospice was found subject to the FHA. See *infra* at ____.

¹⁰³ *Woods v. Foster*, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995). *Woods* concerns a claim by female residents of the shelter that they were sexually assaulted by male employees.

¹⁰⁴ *Lauer Farms v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996). In *Villegas*, farmworkers alleged that they had been denied housing because they had children.

courts reach this conclusion implicitly, accepting the application of the FHA as a given.¹⁰⁵

When applicability of the FHA has been litigated explicitly in the group home setting, courts have found that the group home is “home” for the individuals in question, and have determined that the provision of services does not lessen the FHA’s applicability. It would be a perverse interpretation of the FHA, in one court’s views, if the provision of necessary services were to negate the FHA’s protections:

The court declines to accept the argument that, because plaintiffs live in an environment that is conducive to the recovery process, that environment changes the nature of the place where they live from a residence to that of a rehabilitative facility. If this were the case, then any group living

¹⁰⁵ *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) (group home); *New Jersey Coalition of Rooming & Boarding House Owners v. Mayor of Asbury Park*, 152 F.3d 217 (3d Cir. 1998) (rooming and boarding house); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277 (3d Cir. 1993) (community living arrangement); *Familystyle of St. Paul, Inc. v. St. Paul*, 923 F.2d 91 (8th Cir. 1991) (group home); *ReMed Recovery Care Ctrs. v. Township of Willistown*, 36 F. Supp. 2d 676 (E.D. Pa. 1999) (group home for brain-injured adults); *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845 (S.D. Ohio 1996) (adult care facility); *United States v. Massachusetts Indus. Fin. Agency*, 910 F. Supp. 21, 26 n.2 (D. Mass. 1996) (residential school for emotionally disturbed adolescents); *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994) (group home); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (group home); *North Shore-Chicago Rehab., Inc. v. Vill. of Skokie*, 827 F. Supp. 497 (N.D. Ill. 1993) (residence for brain injured adults); *Horizon House Developmental Servs., Inc. v. Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992) (group home).

arrangement that facilitated recovery of a handicapped person would lose the protections of the FHA.¹⁰⁶

Such reasoning, both explicit and implicit, has led to the application of the FHA to hospices¹⁰⁷ and nursing facilities.¹⁰⁸ In affirming the FHA's applicability to a nursing facility, the Third Circuit noted that "[t]o the handicapped elderly persons who would reside there, [the nursing facility] would be their home, very often for the rest of their lives."¹⁰⁹

In accord with this line of reasoning, courts also have not hesitated to apply the FHA to assisted living facilities. Each case concerns an assisted living facility's

¹⁰⁶ Connecticut Hosp. v. City of New London, 129 F. Supp. 2d 123, 132 (D. Conn. 2001) (group housing for individuals undergoing outpatient treatment or substance abuse).

¹⁰⁷ Baxter v. City of Belleville, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (denial of special use permit for hospice for individuals with AIDS); Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990) (same).

¹⁰⁸ Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 459 (3d Cir. N.J. 2002) (zoning board's refusal to grant variance for nursing facility); United States v. Puerto Rico, 764 F. Supp. 220 (D.P.R. 1991) (Puerto Rican agency's refusal to grant permit for operation of nursing facility); Caron v. City of Pawtucket, 307 F. Supp. 2d 364 (D.R.I. 2004) (longtime retirement home denied licensure to operate as nursing facility); United States v. Lorantffy Care Ctr., 999 F. Supp. 1037 (N.D. Ohio 1998) (U.S. Justice Department alleging racial discrimination by nursing facility operator). The *Lorantffy* opinion never classifies the Lorantffy Care Center, but it is identified as a nursing facility in the press release of the filing of the action, and on the Medicare program's Nursing Home Compare website. See www.usdoj.gov/opa/pr/1997/February97/054cr.htm (press release); www.medicare.gov/NHCompare/home.asp (Nursing Home Compare website).

¹⁰⁹ Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996) (refusal to grant zoning variance for nursing facility).

challenge under the FHA to a zoning decision; in none of the cases did the defendants challenge the facility's classification as a "dwelling."¹¹⁰ Like a nursing facility, the assisted living facility clearly was "home" for its residents.

It should be noted that no case has suggested that "dwelling" under the FHA is to be interpreted differently in relation to the no-inquiry regulation, from how it is interpreted in relation to other types of issues or disputes arising under the FHA. As

¹¹⁰ See *Assisted Living Assocs. L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 414-416 (D.N.J. 1998) ("spot-zoning" to prohibit operation of assisted living facility); *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 785 (6th Cir. 1996) (zoning rules requiring neighborhood approval for operation of adult foster care home "hous[ing] six elderly disabled residents who suffer from Alzheimer's disease and other forms of dementia, organic brain syndrome, and other ailments"); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 766 (E.D.N.Y. 1999) (rezoning to prohibit construction of "congregate care facility . . . provid[ing] such services as assistance with bathing, dressing, bathroom usage, taking medicine and other similar daily living activities"); *Town & Country Adult Living, Inc. v. Vill./Town of Mt. Kisco*, 2003 WL 21219794, 2003 U.S. Dist. LEXIS 8519 (S.D.N.Y. 2003) (denial of variance to expand assisted living facility); *Barry v. Town of Rollinsford*, 2003 WL 22290248, 2003 U.S. Dist. LEXIS 17800 (D.N.H. 2003) (refusal to grant exception to build assisted living facility); see also *Weinstein v. Cherry Oaks Retirement Community*, 917 P.2d 336, 338 (Colo. Ct. App. 1996) ("personal care boarding home," at the time the term used in Colorado for an assisted living facility; application of the Colorado Fair Housing Act, recognized as "almost identical" to the federal FHA, in discrimination claim brought by resident against facility).

One anomaly in this line of authority is a case in which a building was to contain housing for physically disabled older adults in the upper floors, along with an adult day care facility on the ground floor. Because the adult day care facility was to provide services to the entire community – not just to the building's residents – the Ninth Circuit concluded that the FHA's accommodation requirement did not apply in relation to the adult day care facility. *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. Cal. 1997); see 42 U.S.C. § 3604(f)(3)(B) (FHA's accommodation requirement).

discussed, the definition of “dwelling” has been addressed most frequently in zoning-related disputes. If long-term care facilities are treated as “dwellings” in zoning-related disputes (and they are), then they also should be treated as “dwellings” for purposes of the no-inquiry regulation.¹¹¹

Administrative Commentary

The reasoning of these cases is supported by two federal administrative pronouncements. In 1991, accompanying the release of the ADA regulations, the Justice Department addressed in a preamble the relationship between the ADA and the FHA.¹¹² The ADA applies to “public accommodations,” including a “service establishment” such as a hospital, or a “social service center establishment” such as a senior citizen center or a homeless shelter.¹¹³ Also, unlike the FHA, the ADA’s “public accommodations” classification applies to hotels, motels, and other short term “places of lodging.”¹¹⁴

The Justice Department explained that a residential facility with services, such as a nursing facility or an assisted living facility, might be covered under both the ADA and the FHA.¹¹⁵ Under the ADA, the inquiry focuses on whether a residential facility “is intended for or permits short-term stays [so as to be categorized as a “place of lodging”], or appropriately can be categorized as a service establishment or as a social service

¹¹¹ See, e.g., *Assisted Living Assocs. L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 414-416 (D.N.J. 1998).

¹¹² 28 C.F.R. Part 36, App’x B.

¹¹³ 42 U.S.C. § 12181(7)(F), (K).

¹¹⁴ 42 U.S.C. § 12181(7)(A).

¹¹⁵ 28 C.F.R. Part 36, App’x B. at 679 (reference to “nursing homes [and] residential care facilities”).

establishment.”¹¹⁶ The FHA inquiry is to be independent, based on the FHA standards.¹¹⁷ Thus, enactment of the ADA – and more specifically, the ADA’s explicit coverage of “service establishments” and “social service center establishments” – did not indicate any intent by Congress to reduce the FHA’s application to residential facilities that provide services.

Three years later, in 1994, HUD issued supplementary guidelines to address the FHA’s accessibility requirements for new construction.¹¹⁸ In response to a question regarding application of the FHA to continuing care facilities – defined as facilities that “incorporate housing, health care and other types of services” – HUD explained such a facility’s status as a “‘dwelling’ . . . depend[ed] on whether the facility [was] to be used as a residence for more than a brief period of time.”¹¹⁹ Three factors were to be considered:

- (1) the length of time persons stay in the project;

¹¹⁶ 28 C.F.R. Part 36, App’x B. at 679 (reference to “nursing homes [and] residential care facilities”); *see also* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1006 n.3 (3d Cir. 1995) (case against nursing facility submitted to jury under Section 504 of the Rehabilitation Act (29 U.S.C. § 794), after court and counsel agreed that “standards and proofs” under Section 504 and ADA were similar, and so there was no need to submit the ADA claim); Lindgren v. Camphill Vill. Minn., Inc., 2002 WL 1332796, at 5-7, 2002 U.S. Dist. LEXIS 11078, at 20-22 (D. Minn. 2002) (refusal to grant summary judgment against ADA claim made by autistic resident against “family-style” community).

¹¹⁷ 28 C.F.R. Part 36, App’x B. at 679 (reference to “nursing homes [and] residential care facilities”).

¹¹⁸ 59 Fed. Reg. 33,362 (June 28, 1994); *see* 42 U.S.C. § 3604(f)(3)(C) (FHA’s new construction requirements).

¹¹⁹ 59 Fed. Reg. at 33,364 (June 28, 1994).

- (2) whether policies are in effect at the project that are designed and intended to encourage or discourage occupants from forming an expectation and intent to continue to occupy space at the project; and
- (3) the nature of the services provided by or at the project.¹²⁰

These guidelines are consistent with case law in focusing on the length and nature of the stay as the key factors in determining whether a particular facility is a dwelling subject to the FHA.¹²¹ Provision of services is only relevant, per factor #3, to the extent that the service sheds light on whether resident is meant to be in a facility for a short period of time.

It is noteworthy too that the FHA itself contemplates that some “dwellings” will provide services. A central FHA provision prohibits discrimination “in the provision of services or facilities in connection with such dwelling.”¹²² Also, discrimination is defined to include “a refusal to make reasonable accommodations in rules, policies, practices, or *services*, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”¹²³ Of course, it is not obvious that these “services” include the types of services provided by long-term care facilities. Arguably, the terms “services” and “facilities” are meant to refer to such routine

¹²⁰ 59 Fed. Reg. at 33,364 (June 28, 1994).

¹²¹ *See supra* at ____.

¹²² 42 U.S.C. § 3604(f)(2).

¹²³ 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

amenities as lawnmowing and laundry rooms. On the other hand, there is nothing in the statute or the regulations that compels such a limited reading of either word.¹²⁴

**The No-Inquiry Rule Applies Only to Initial Applicants,
and Not to Existing Tenants**

By its terms, the FHA's no-inquiry regulation applies to applicants but not to existing tenants or residents. The relevant subsection (c), in its entirety, states:

(c) It shall be unlawful to make an inquiry to determine whether an *applicant* for a dwelling, *a person intending to reside in that dwelling* after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person.

However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all *applicants*, whether or not they have handicaps:

- (1) Inquiry into an *applicant's* ability to meet the requirements of ownership or tenancy;
- (2) Inquiry to determine whether an *applicant* is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;
- (3) Inquiry to determine whether an *applicant* for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;
- (4) Inquiring whether an *applicant* for a dwelling is a current illegal abuser or addict of a controlled substance;

¹²⁴ See 24 C.F.R. § 100.65 (b)(4) (referring without elaboration to "privileges, services or facilities").

(5) Inquiring whether an *applicant* has been convicted of the illegal manufacture or distribution of a controlled substance.¹²⁵

Despite the fact that the no-inquiry regulation refers to applicants but not existing tenants, a 1991 administrative ruling indicates that existing tenants are protected against blanket inquiries about handicaps.¹²⁶ In the underlying incident, the landlord had called the tenant at six a.m., reporting that he (the landlord) had heard that the tenant had AIDS, and asking the tenant about the state of the tenant’s health.¹²⁷ The HUD administrative law judge concluded that the no-inquiry regulation did not apply – because the tenant was a “sitting tenant” rather than an “applicant” – but found that the landlord’s inquiry had violated other, more general, provisions of the FHA and its regulations.¹²⁸ These

¹²⁵ 24 C.F.R. § 100.202(c) (emphasis added).

¹²⁶ HUD v. Williams, 1991 WL 442796 (H.U.D.A.L.J. 1991).

¹²⁷ HUD v. Williams, 1991 WL 442796, at *6, 18 (H.U.D.A.L.J. 1991).

¹²⁸ HUD v. Williams, 1991 WL 442796, at *13-18 (H.U.D.A.L.J. 1991).

The administrative law judge is on very solid ground in concluding that the no-inquiry regulation does not apply to sitting tenants. The no-inquiry provisions pertain to “an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person.” 24 C.F.R. § 100.202(c).” Notably, this terminology is used only in the “no-inquiry” subsection. The remainder of section 100.202 refers more broadly to a “buyer or renter; [a] person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or [a]ny person associated with that person.” 24 C.F.R. § 100.202(a), (b) (subsection formatting omitted).

Also, as previously mentioned, the no-inquiry regulation is based on analogous Section 504 regulations relating to *pre-employment* inquiries by an employer. *See supra* at ___; 7 C.F.R. § 15b.15 (Agriculture Dep’t regulations implementing Section 504); 24 C.F.R. § 8.13 (HUD regulations implementing Section 504); 34 C.F.R. § 104.14 (Education Dep’t regulations implementing Section 504); 45 C.F.R. § 84.14 (HHS regulations implementing Section 504); *see also* 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988) (FHA

provisions bar discrimination in the sale or rental of a dwelling, in the terms and conditions of a sale or rental, and in the provision of services in connection with a dwelling.¹²⁹

To support the conclusion that a no-inquiry rule could be drawn from the general provisions of the FHA, the administrative law judge cited the House of Representatives Report accompanying the FHA, as well as the preamble to the FHA regulations.¹³⁰ In the section cited by the administrative law judge, the House Report points out that the FHA’s “direct threat” provision – that nothing in the FHA requires that tenancy be offered to an individual who would be a threat to others’ health, safety, or personal property -- prohibits a landlord from asking “the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history.”¹³¹

In a similar vein, the administrative law judge noted that the preamble “provides that a ‘housing provider may judge handicapped persons on the same basis it judges all other applicants and residents’, and that the housing provider ‘may not treat handicapped

no inquiry regulation drawn from Section 504 regulations on pre-employment inquiries); 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989) (same). If, as is the case, the Section 504 regulations relate only to inquiries made of job applicants and not current employees, the FHA’s analogous no-inquiry regulation reasonably can be interpreted to apply to rental applicants (and related individuals) but not to sitting tenants.

¹²⁹ 42 U.S.C. § 3604(f)(1)-(2); 24 C.F.R. § 100.202(a)-(b).

¹³⁰ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991).

¹³¹ H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191; *see* HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991).

applicants or tenants less favorably than other applicants or tenants.”¹³² The administrative law judge also quoted the preamble for the proposition that a “housing provider may consider for *all* applicants, including handicapped applicants, such concerns as past rental history, violations of rules and laws, [or] a history of disruptive, abusive, or dangerous behavior.”¹³³

This analysis led the administrative law judge to conclude that the landlord’s early-morning call was a violation of the FHA and its regulations -- even if, as the opinion acknowledged, “the text of the statute and corresponding regulation leave some fog over the question of whether Congress meant to protect sitting tenants as well as applicants from certain inquiries.”¹³⁴ Regardless of this “fog”, the administrative law judge stated his conclusion broadly:

Thus, since the House Report and preamble appear to support the interpretation that sitting tenants are included, and since there is no reason readily imaginable or argued to support the concept that Congress would intend protection from intrusive questioning for prospective tenants, but

¹³² HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991); *quoting from* 24 C.F.R. Ch. I, Subch. A, App. I at 577 (1990).

¹³³ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991); *quoting from* 24 C.F.R. Ch. I, Subch. A, App. I at 577 (1990) (emphasis in original).

¹³⁴ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991); *see, e.g.* 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988) (discussion accompanying release of proposed no-inquiry rule, stating that “legislative history of the Fair Housing Amendments Act makes it clear that the Act was intended to prohibit landlords and owners [from] asking *prospective* tenants and buyers blanket questions about the individuals’ disabilities”) (emphasis added).

not sitting tenants, I find that section 804(f) of the Act [42 U.S.C. § 3604] and 24 CFR 100.202 provide that owners of housing do not have the right to ask sitting tenants, as well as prospective tenants, blanket questions about their disabilities. As argued by the Government, permitting landlords to ask their sitting tenants blanket questions about their disabilities that bear no relationship to the health of others would create an “open season” on the privacy rights, sensibilities and civil rights of persons with disabilities, and would thereby violate the Act and regulations.¹³⁵

An exception was noted: “However, although blanket questioning of sitting and prospective tenants as to their disabilities is not permissible, certain inquiries of individual tenants may be permissible,”¹³⁶ if there exists a “‘a nexus between the fact of the individual’s tenancy and [an] asserted direct threat’ to the health or safety of other individuals.”¹³⁷ Absent such a nexus, according to the administrative law judge, “such an inquiry is impermissible under the [FHA].”¹³⁸

With much more limited analysis, a federal district court made a similar statement in a case involving a federally-subsidized housing project that had inquired into tenants’ ability to live independently:

¹³⁵ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991).

¹³⁶ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991).

¹³⁷ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991); *quoting from* H.R. Rep. No. 100-711, at 29 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2190. The administrative law judge mistakenly cites to page 30 of the House Report, rather than page 29.

¹³⁸ HUD v. Williams, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991).

Although a landlord may make necessary inquiries to determine an applicant's qualifications for tenancy, the landlord may not inquire into the nature and extent of an applicant's *or tenant's* disabilities beyond that necessary to determine eligibility.¹³⁹

The court does not specify whether it is relying on the no-inquiry regulation itself or on the broader statutory prohibitions. Unlike the administrative law decision discussed immediately above, the court never addresses the fact that the no-inquiry regulation by its terms applies only to an "applicant."¹⁴⁰

These conclusions of the administrative law judge and the federal district court may well be correct in a typical landlord-tenant context. Generally, a landlord has no legitimate need for information about a tenant's health condition, and allowing such inquiries would indeed intrude upon the privacy of individuals with disabilities.¹⁴¹

¹³⁹ *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998) (emphasis added).

¹⁴⁰ *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998); *see supra* at ____; *but see* Lauren Sturm, *Fair Housing Issues in Continuing Care Retirement Communities (CCRCs): Can Residents be Transferred Without Their Consent?*, 6 N.Y. City L. Rev. 119, 127 (2003) (concluding that "*Niederhauser v. Independence Square Housing* extended the regulation to cover existing tenants").

¹⁴¹ *But see* *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787, 799 (W.Va. 2001) (if tenant requests accommodation for "a disability which is not apparent to a person untrained in medical matters, it is reasonable for a landlord . . . to require a second concurring opinion from a qualified physician . . . to substantiate the tenant's need"); *see also* *Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1255 n.22 (D. Haw. 2003) (quoting same language from *In re Kenna Homes Coop. Corp.*); 42 U.S.C. § 3604(f)(3)(B) (under FHA, landlord's obligation to make reasonable accommodation).

Neither *Williams* nor *Niederhauser*, however, supports a per se rule against inquiries of sitting tenants.¹⁴² Properly understood, the relevant issue in each is whether a specific inquiry can be considered handicap-based discrimination in rental, the terms and conditions of rental, or the provision of services related to rental.¹⁴³

In fact, the conclusions of *Williams* and *Niederhauser* do not transfer to a long-term care context. Unlike apartment tenants, long-term care operators have a legitimate need for information about residents' disabilities and health care needs, in order to plan and provide care. There is a world of difference between a landlord inquiring into a tenant's AIDS or ability to live independently, and a long-term care operator seeking information for the purposes of care planning. For good reason, the administrative law judge in *HUD v. Williams*, and the federal judge in *Niederhauser*, concluded that the landlords' inquiries were discriminatory conduct proscribed by the FHA and its regulations.¹⁴⁴ That same conclusion, however, often would not hold in the long-term care context, because the inquiry from the facility operator likely might be driven not by animus or prejudice, but by a legitimate desire – indeed, an obligation -- to provide appropriate care.¹⁴⁵

¹⁴² The only per se rule here is the no-inquiry regulation that by its terms applies to applicants but not tenants. *See* 24 C.F.R. § 100.202(c).

¹⁴³ 42 U.S.C. § 3604(f)(1)-(2); 24 C.F.R. § 100.202(a)-(b).

¹⁴⁴ *See* 42 U.S.C. § 3604(f)(1)-(2); 24 C.F.R. § 100.202(a)-(b).

¹⁴⁵ *See, e.g.*, 42 U.S.C. §§ 1395i-3(b)(2)-(3), 1396r(b)(2)-(3) (assessments and care plans in nursing facilities); 42 C.F.R. § 483.20(b), (k) (same); N.Y. Pub. Health Law § 4659(2) (individualized service plan for each assisted living resident “developed with the resident, the resident’s representative and resident’s legal representative if any, the assisted living operator, and if necessary a home care services agency”).

The administrative law judge in *HUD v. Williams* acknowledged that a post-admission inquiry from a landlord might be appropriate given the proper “nexus” between a tenant’s handicap and the safety of other individuals – in other words, if the tenant’s handicap was a matter of the landlord’s legitimate interest.¹⁴⁶ In the long-term care context, the resident’s care needs legitimately are of concern to the facility operator, and there is an obvious nexus between a resident’s handicaps and the operator’s obligation to provide necessary care services.

Thus, in general, the FHA should not prohibit a long-term care facility from requesting and obtaining medical information from existing residents. The no -inquiry regulation applies only to applicants, and the FHA’s relevant statutory language is not violated by post-admission inquiries related to assessments and care planning.

The operators’ legal obligations to provide care – obligations derived both from federal and state quality of care standards, and from contractual obligations to residents – distinguish the long-term care setting from those situations in which a landlord intervenes on behalf of a tenant who does not want any interference. The facility operator is not a meddling do-gooder, but is performing services as required by law and contract. *Cf. Larkin v. Michigan Dep’t of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (discrimination under FHA not excused by benign intent); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993) (same); *Horizon House Developmental. Servs., Inc. v. Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992) (same).

¹⁴⁶ *HUD v. Williams*, 1991 WL 442796, at *14 (H.U.D.A.L.J. 1991). By allowing inquiries in certain circumstances into a tenant’s dangerousness, the administrative law judge establishes that a no-inquiry rule for sitting tenants is not equivalent to the no-inquiry regulation as applied to applicants. As discussed previously, HUD explicitly declined in the regulation to allow pre-admission inquiries regarding an applicant’s potential threat to others. *See supra* at ____.

Does an Exception to the No-Inquiry Regulation Allow a Long-Term Care Facility to Obtain Medical Information from an Applicant?

Still to be addressed is the right of a long-term care facility to make inquiries of *applicants* regarding their health conditions and disabilities. As discussed above, the no-inquiry regulation contains five exceptions.¹⁴⁷ Of these five exceptions, two related exceptions are relevant to the types of inquiries typically made by long-term care living facilities during the admission process.¹⁴⁸ One exception applies when a handicap or particular type of handicap is a prerequisite for admission; the other applies when a handicap or particular type of handicap gives priority for admission.¹⁴⁹

Overview of Exceptions

Handicap as Prerequisite

Specifically, the “handicap as prerequisite” exception states that the no-inquiry regulation does not prohibit an “[i]nquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap.”¹⁵⁰ Regarding the interpretation of this provision, the little available legal authority is focused generally on situations in which subsidized housing has been reserved for individuals with handicaps. In the release of the proposed regulations, HUD explained:

For example, some Federal and State housing programs are designed for, and occupied by, persons with handicaps. Only persons with handicaps

¹⁴⁷ See *supra* at ____.

¹⁴⁸ 24 C.F.R. § 100.202(c)(2).

¹⁴⁹ 24 C.F.R. § 100.202(c)(2)-(3).

¹⁵⁰ 24 C.F.R. § 100.202(c)(2).

are eligible to live in such dwellings. The owner or operator of such a housing facility may inquire of applicants to determine whether they have a handicap for the purpose of determining eligibility.¹⁵¹

In the release of the final regulations, HUD again emphasized the necessity of inquiries in determining eligibility for subsidized housing. In response to various public comments, however, HUD broadened its discussion, and the broadened discussion included discussion of eligibility for non-subsidized housing:

[S]ome of these commenters recognized that the ability to make these inquiries often is necessary to determine eligibility for government housing programs; for example, some Federal and State housing is designed for, and occupied by, persons with handicaps. Only persons with handicaps are eligible to live in such dwellings. Beyond this, as the Department explained in the proposed rule, the Fair Housing Amendments Act does not prohibit the exclusion of non-handicapped persons from dwellings. A privately owned unsubsidized housing facility may lawfully restrict occupancy to persons with handicaps. The owner or operator of such a housing facility must therefore be permitted to inquire of applicants to determine whether they have a handicap for the purpose of determining eligibility.¹⁵²

Case authority is slight. As discussed previously, the FHA does not prevent a housing provider from limiting admission to applicants with certain types of disabilities

¹⁵¹ 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988).

¹⁵² 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

but denying admission to applicants with other types of disabilities, when the housing has been subsidized by government programs that authorize such criteria.¹⁵³

Handicap as Priority

Commentary and case authority also are limited in regards to the second exception, relating to priority for admission. In the release of the proposed regulation, HUD gave an unsurprising example of how a handicap might qualify an applicant for priority in admission:

A housing provider may choose to offer some or all of its units to persons with handicaps on a priority basis and may inquire whether applicants qualify for such a priority. For example, a housing provider may offer accessible units to persons with mobility impairments on a priority basis and may ask applicants whether they have a mobility impairment which would qualify them for such a priority.¹⁵⁴

HUD's discussion in the release of the final regulation is almost identical, but with one additional instruction. The discussion again gives the example of a priority for applicants with mobility impairments, and then adds the admonition that a housing

¹⁵³ Beckert v. Our Lady of Angels Apts., Inc., 192 F.3d 601 (6th Cir. 1999); (National Housing Act allowing landlord to serve residents with physical disabilities, but to reject applicants with chronic mental illness); Jainnney v. Maximum Independent Living, Memorandum of Opinion, No. CV 0879 (N.D. Ohio Feb. 9, 2001) (Cranston-Gonzalez National Affordable Housing Act allowing landlord to prefer applicants with "similar disabilities"); *see supra* at ___.

¹⁵⁴ 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988).

provider “may not in such circumstances ask applicants whether they have other types of impairments.”¹⁵⁵

Long-Term Care and Disqualifying Handicaps

Before examining the regulatory exceptions in a long-term care context, it is instructive to consider how long-term care facilities differ from apartment buildings in their admissions practices. An important difference – particularly for consideration of handicap-based discrimination -- is that certain handicaps can disqualify an individual for admission to a long-term care facility. Such disqualifications are infrequent in nursing facilities, but a common reality in assisted living.

Disqualifications are infrequent in nursing facilities because the facilities are required to care for virtually any long-term care need. As mentioned previously, a nursing facility has the broad obligation under the Nursing Home Reform Law to “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.”¹⁵⁶ The Reform Law’s regulations require that a nursing facility ensure that a resident have access to a wide variety of “special services,” including injections, tracheal suctioning, and care for a colostomy or tracheostomy.¹⁵⁷

A nursing facility is not a hospital, however, and some medical conditions are simply beyond a nursing facility’s expertise. To cite obvious examples, a nursing facility cannot be expected to set broken bones or perform surgery.

¹⁵⁵ 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

¹⁵⁶ 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).

¹⁵⁷ 42 C.F.R. § 483.25(k).

In the long-term care context, a more realistic example is ventilator care. The Reform Law’s regulations do not require explicitly that a nursing facility provide ventilator care, and only a small (but increasing) minority of facilities do so.¹⁵⁸

An inability to provide necessary care is much more a possibility in the assisted living context. In many cases, this inability is a matter of law. State licensure laws generally prohibit an assisted living operator from admitting individuals with certain handicaps. In many cases, proscribed handicaps are set forth explicitly in state law. In Wisconsin, for example, a community-based residential facility (a term used by Wisconsin for assisted living) is prohibited from admitting an applicant who

- “is confined to a bed by illness or infirmities,” unless the confinement is temporary or the individual is receiving hospice care;
- “has physical, mental, psychiatric or social needs that are not compatible with the [facility’s] client group or with the care, treatment or services provided by the [facility]”;
- “is in need of more than 3 hours of nursing care per week,” except on a temporary basis;
- “requires 24 hour supervision by a registered nurse or licensed practical nurse”;
- “has chronic personal care needs that cannot be met by the facility or a community agency”; or

¹⁵⁸ See, e.g., *Bryant v. Indiana State Dep’t of Health*, 695 N.E.2d 975, 979 (Ind. Ct. App. 1998) (nursing facility not required to provide ventilator care); GAO, *Nursing Home Expenditures and Quality*, GAO-02-431R, at 3 (ventilator care traditionally provided by hospitals, but now being provided by nursing facilities).

- “requires a chemical or physical restraint except” under specified conditions.¹⁵⁹

Similarly, an assisted living facility in Virginia is prohibited from admitting an applicant with any of the following conditions or treatments:

- Ventilator dependency;
- Stage III and IV pressure sores (except Stage III sores determined to be healing by an independent physician);
- Intravenous therapy or injections directly into the vein (except for specified exceptions);
- Airborne infectious disease in a communicable state (e.g., tuberculosis);
- Nasogastric tube (feeding tube inserted through nasal passages into stomach);
- Need for around-the-clock nursing care; or
- Total dependence in at least four activities of daily living (e.g., bathing, dressing, transferring, toileting, and eating),¹⁶⁰ and documented need for the level of care provided by nursing facilities.¹⁶¹

¹⁵⁹ Wis. Admin. Code HFS § 83.06(1)(a).

¹⁶⁰ See, e.g., Joshua Wiener & Raymond Hanley, *Measuring the Activities of Daily Living Among the Elderly: A Guide to National Surveys*, at 9-16 (1989) (listing and measuring deficits in ability to perform activities of daily living); *available at* aspe.hhs.gov/daltcp/reports/guide.htm.

¹⁶¹ Va. Code Ann. § 63.2-1805(C). The list in the text is only a partial listing of the conditions that under Virginia law are not allowable in an assisted living facility.

Some of the listed disqualifying conditions – most notably, the disqualifications under Wisconsin law for confinement to a bed, or need for more than three hours of nursing care weekly – might be subject to serious challenge under the FHA or ADA for unlawfully restricting access to housing by individuals with disabilities. See *supra* at fn __ for examples of such challenges. Disagreement over where to draw lines,

In recent years, state assisted living laws generally have become more accepting of various health conditions in assisted living facilities.¹⁶² The advance guard of this movement is represented by those states that allow *any* condition or treatment to be accommodated at an assisted living facility, as long as the facility and a resident agree that satisfactory arrangements have been made.¹⁶³ These state laws generally apply to the retention of residents, but not initial admissions.¹⁶⁴

Applying the Regulatory Exceptions

Exception When Admission Requires Handicap or

Particular Type of Handicap

No reported case has considered whether a long-term care facility is “a dwelling available only to persons with handicaps or to persons with a particular type of handicap,” or whether in long-term care “an applicant. . . for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of

however, should not obscure the fact that in long-term care (at least as it is currently structured) some lines must be drawn. An assisted living facility is not the same as a nursing facility, which in turn is not the same as a hospital. It is appropriate that efforts be made to assure that a facility is capable of meeting an applicant’s care needs.

¹⁶² See, e.g., Eric Carlson, *Critical Issues in Assisted Living: Who’s In, Who’s Out, and Who’s Providing the Care*, at 24-35 (2005).

¹⁶³ See Alaska Stat. § 47.33.020(f); Ind. Admin. Code tit. 410, § 16.2-5-0.5(e); La. Admin. Code tit. 48, §§ 8823, 8825; Ark. Code R. & Regs., 016 06 001, § 601.4 (Level I facilities), 016 06 002, § 601.4; see also Wy. Code r. 048-20-012, § 8 (outside provider performing services that cannot legally be performed by assisted living staff).

¹⁶⁴ Alaska Stat. § 47.33.020(f); Ind. Admin. Code tit. 410, § 16.2-5-0.5(e); La. Admin. Code tit. 48, §§ 8823, 8825; Ark. Code R. & Regs., 016 06 001, § 601.4 (Level I facilities), 016 06 002, § 601.4.

handicap.”¹⁶⁵ The answer, as will be discussed, is that a long-term care facility is not limited to individuals with handicaps, although a handicap gives priority to an applicant. As a result, a long-term care facility has a limited right to make inquiries of applicants regarding handicaps.

We first examine the handicap-as-prerequisite issue in the nursing facility context. Perhaps surprisingly, a handicap does not appear to be a condition of admission to a nursing facility. Admittedly neither the Medicare program nor the Medicaid program will pay for nursing facility care in the absence of a handicap, but there is nothing in the Nursing Home Reform Law that excludes individuals without handicaps.¹⁶⁶ Although a nursing facility has the right to evict a resident who doesn’t need nursing facility care, the facility has no obligation to do so.¹⁶⁷ In short, a nursing facility is allowed to admit and retain privately-paying individuals who have no handicap whatsoever.¹⁶⁸

For the same reasons, nursing facilities by and large are not limited to individuals having “a particular type of handicap.”¹⁶⁹ As discussed immediately above, a nursing

¹⁶⁵ 24 C.F.R. § 100.202(c)(2)-(3).

¹⁶⁶ 42 U.S.C. § 1395f(2)(B) (Medicare); 42 C.F.R. §§ 409.31- 409.35 (Medicare), 440.40 (Medicaid).

¹⁶⁷ 42 U.S.C. §§ 1395i-3(c)(2)(A)(ii) (eviction authorized if “the resident’s health has improved sufficiently so the resident no longer needs the services provided by the facility”), 1396r(c)(2)(A)(ii) (same).

¹⁶⁸ Of course, as a practical matter, an individual without a handicap generally has no reason to seek admission to a nursing facility, but that practical reality does not change the fact in relevant law that a nursing facility is not prohibited from admitting or retaining such an individual.

¹⁶⁹ 24 C.F.R. § 100.202(c)(2).

facility generally can admit individuals without handicaps, so it cannot be said that admission is limited to individuals with a “particular type” of handicap.¹⁷⁰

These same conclusions hold for assisted living facilities also. Like nursing facility law, assisted living law does not require a handicap as a condition of admission. Although “assisted living” is defined in state law as including the provision or availability of services, the definitions do not require that any particular individual need or use services.¹⁷¹ On occasion, assisted living definitions recognize explicitly that an assisted living resident may not need the available services. In Kansas and Oklahoma, for example, a resident’s use of personal care may be due to “functional impairments” or “by choice.”¹⁷²

¹⁷⁰ It should be noted that some nursing facilities are licensed specifically for, or claim special expertise in, the care of residents with dementia or a similar cognitive disorder. *See, e.g.*, Ark. Code Ann. §§ 20-10-1501- 1505 (“Alzheimer’s Special Care Standards Act”); Cal. Health & Safety Code § 1422.5(a)(2)(D) (“special care unit or program for people with Alzheimer’s disease and other dementias”); W. Va. Code §§ 16-5R-1- 6 (“Alzheimer’s Special Care Standards Act”). These facilities are not discussed separately in this portion of the text because the laws pertaining to specialization do not require a handicap or a “particular type” of handicap as a condition of admission.

¹⁷¹ *See, e.g.*, Colo. Rev. Stat. Ann. § 25-27-102(1.3) (definition of “assisted living residence”); N.J. Admin. Code tit. 8, § 8:36-1.3 (same).

¹⁷² Kan. Stat. Ann. § 39-923(a)(5); Okla. Stat. tit. 63, § 1-890.2(1).

Admittedly, as a practical matter, an individual without a handicap generally is uninterested in moving into an assisted living facility. *See supra* at ____ (“handicap” defined broadly); *see also* Rosalie Kane and Keren Brown Wilson, AARP, Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?, at xiii (1993) (study finds that “[a]ssisted living tended to attract tenants more disabled than the group which operators targeted initially”). Assisted living developers have found that “the market for assisted living among people who are tired of keeping up a house and just need a little help

Also, funding sources will not require an assisted living facility to admit only individuals with handicaps, unless the facility is itself a subsidized housing project that requires a handicap as a condition of tenancy.¹⁷³ Although the Medicaid program in some states may pay for services provided in an assisted living facility, Medicaid does not set general standards for assisted living operations, and thus does not limit residence in an assisted living facility to a particular type of resident. Nothing in Medicaid law

is rather limited.” Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 116 (1993).

In this regard, assisted living facilities as they operate today (as opposed to the idealized visions of the early 1990’s) are not comparable to subsidized apartment buildings. Subsidized rent is attractive to renters regardless of their physical condition. Also, an apartment building’s physical environment allows for tenants to come and go with little involvement with the building’s staff. By contrast, if an individual without a handicap were to live in an assisted living facility, she likely would be required to have daily interactions with facility staff, even if she were to prefer to go her own way.

Many assisted living facilities are operated in coordination with unlicensed independent living facilities. *See, e.g.*, Appeal of City of Laconia (N.H. Bd. of Tax & Land Appeals), 781 A.2d 1012, 1013 (N.H. 2001) (complex including independent living, assisted living facility, and nursing facility); *see also, e.g.*, Cal. Health & Safety Code § 1569.45 (license required if facility offers “care and supervision” to residents). The independent living facility is designed to meet the need of the individual who does not have a handicap, but who wishes to live in a community, and who may prefer to be assisted with various household tasks. When the individual’s needs increase, he can receive additional assistance by moving into the assisted living facility. For all of these reasons, an individual without a handicap generally has little reason to seek admission to an assisted living facility.

¹⁷³ *See* Robert Mollica et al., *State Residential Care and Assisted Living Policy: 2004*, at 1-67 through 1-68 (March 2005) (HUD subsidies for assisted living facilities).

prohibits an assisted living facility from admitting an applicant without a handicap, assuming that the assisted living care will not be paid for by the Medicaid program.

Specifically, the Medicaid program can pay for services through personal care services¹⁷⁴ or, more frequently, a home and community-based services waiver.¹⁷⁵ Under neither funding option does a Medicaid program set facility-wide standards.¹⁷⁶ Although

¹⁷⁴ See 42 U.S.C. § 1396d(a)(24); see also Robert Mollica et al., State Residential Care and Assisted Living Policy: 2004, at 1-41 through 1-46 (March 2005) (Medicaid personal care services, identified as “state plan services”).

¹⁷⁵ A home and community-based services waiver (HCBS waiver) allows a state to create a package of services specifically for Medicaid recipients who are deemed to require the equivalent of nursing facility services, but who prefer to receive those services outside of a nursing facility. An HCBS waiver can provide services in the recipient’s home, or in an assisted living facility. What is waived are the otherwise-applicable requirements in Medicaid law that services are available equally throughout a state, that services are made available to all eligible recipients in equivalent amount, duration and scope, and financial eligibility standards are equivalent for all applicants. 42 U.S.C. § 1396n(c) (HCBS waiver); see also 42 U.S.C. § 1396a(a)(1), (10)(C)(i)(II), (III) (provisions subject to waiver, relating to statewideness; amount, duration, and scope; and financial eligibility)); see also Robert Mollica et al., State Residential Care and Assisted Living Policy: 2004, at 1-41 through 1-46 (March 2005) (HCBS waiver services in assisted living).

A recently-enacted amendment to Medicaid law will allow HCBS services to be provided to Medicaid recipients who do not require nursing facility services or the equivalent. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat 4, § 6086, *codified at* 42 U.S.C. § 1396n(i).

¹⁷⁶ Of course, the Medicaid program will reimburse for personal care services or HCBS waiver services only if the Medicaid recipient himself is deemed to have a medical need for such services. The point of the text is that while medical need typically is a prerequisite for Medicaid payment of services, the Medicaid program does not require assisted living facilities to impose such requirements on those residents not eligible for Medicaid.

federal law purports to require state Medicaid programs to establish “adequate standards” for providers of HCBS services,¹⁷⁷ this requirement in practice means little more than requiring a Medicaid-certified assisted living providers to obtain an assisted living license – the same license required of *all* assisted living providers, whether Medicaid certified or not.¹⁷⁸ Thus, a facility’s receipt of Medicaid reimbursement does not limit admission to applicants with handicaps.

Thus, it cannot be said that an assisted living facility is “available only to persons with handicaps.”¹⁷⁹ As discussed above, neither state licensing law nor federal Medicaid law requires an assisted living facility to limit its admissions to individuals with handicaps.

Also, as was similarly true for nursing facilities, assisted living facilities are not limited to individuals having “a particular type of handicap.”¹⁸⁰ Because an assisted living facility can admit individuals without handicaps, admission certainly is not limited to individuals with a “particular type” of handicap.¹⁸¹

¹⁷⁷ 42 U.S.C. § 441.203(a)(1)

¹⁷⁸ GAO, Federal Oversight of Growing Medicaid Home and Community-Based Waivers Should Be Strengthened, GAO-03-576 (2003); Eric Carlson, Long-Term Care Advocacy, § 5.04[2][b] (Matthew Bender & Co. 2005).

¹⁷⁹ 24 C.F.R. § 100.202(c)(2).

¹⁸⁰ 24 C.F.R. § 100.202(c)(2); *see* Beckert v. Our Lady of Angels Apts., Inc., 192 F.3d 601, 606-607 (6th Cir. 1999) (National Housing Act allowing landlord to serve residents with physical disabilities, but reject applicants with chronic mental illness).

¹⁸¹ Assisted living facilities also are similar to nursing facilities in that some assisted living facilities are licensed specifically for, or claim special expertise in, the care of residents with dementia or a similar cognitive disorder. *See, e.g.*, Ala. Admin. Code r. 420-5-20-.01(2)(q) (specialty care assisted living facility,

It should be noted that a long-term care provider might choose to require a handicap or “particular type of handicap” as a condition of admission, even in the absence of any legal requirement to do so.¹⁸² That possibility is not analyzed here because, as a practical matter, long-term care operators do not bother to adopt a policy requiring a handicap as a condition of admission. The broader issue— that long -term care facilities are designed for occupancy by individuals with handicaps – is encompassed below in the discussion of the exception for handicap as a priority.

Exception When Priority Given for Handicap or Particular Type of Handicap

Although long-term care facilities are not reserved for individuals with handicaps or particular types of handicaps, a long-term care facility does give priority to individuals with handicaps or (in limited circumstances) a particular type of handicap. The *raison d’etre* of long-term care is to provide necessary services for individuals with handicaps.¹⁸³ Proper operation of a long-term care facility requires the admission of

“specially licensed and staffed to permit it to care for residents with a degree of cognitive impairment that would ordinarily make them ineligible for admission or continued stay in an assisted living facility”); N.Y. Pub. Health Law § 4655(5) (additional certification required for any assisted living facility “that advertises or markets itself as serving individuals with special needs, including, but not limited to, individuals with dementia or cognitive impairments”); Cal. Health & Safety Code § 1569.627 (claimed specialization); Del. Regs. § 40-300-005, § 63.6 (same); *see supra* at ____ (nursing facilities specializing in dementia care). As was true in the case of nursing facilities, the specialization laws pertaining to assisted living do not require a handicap or a “particular type” of handicap as a condition of admission.

¹⁸² *See* 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989) (even without legal requirement, landlord may choose to restrict occupancy to individuals with handicaps).

¹⁸³ *See supra* at ____.

individuals with handicaps and, for that reason, it can be said that individuals with handicaps have priority for admission.¹⁸⁴

For possession of a handicap to be considered a “priority” under the regulation, it is enough that the facility is designed specifically to provide needed care for individuals with handicaps, and that thus the facility has programmatic incentives to admit individuals with handicaps. As HUD stated in the release of the final no-inquiry regulation, a landlord may employ a priority even if the priority is not required by law.¹⁸⁵ Also, nothing in the no-inquiry regulation requires that the priority be formal – for example, that the facility maintain an admission system awarding bonus points to individuals with handicaps.

Given the absence of case authority, however, it is possible to articulate a straight-face argument that long-term care facilities do not offer priority to individuals with handicaps. A long-term care facility certainly might have a financial incentive to prefer admission of an individual without a handicap, in order to limit expenses, or to maintain an image of a facility for “active” seniors.¹⁸⁶

¹⁸⁴ In most situations, this priority is a moot point on a practical level. As discussed above (*see supra* at ___), admission to a long-term care facility is appealing only to individuals with handicaps or -- to a limited extent in the assisted living context -- to individuals without handicaps who can anticipate having a handicap within the foreseeable future. Long-term care facilities generally are not required to apply a priority system in practice, because the nature of long-term care creates an applicant pool that is comprised overwhelmingly of individuals with handicaps.

¹⁸⁵ *See* 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

¹⁸⁶ *See, e.g.,* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002 (3d Cir. 1995) (nursing facility denying admission based on applicant’s Alzheimer’s disease); Weinstein v. Cherry Oaks Retirement Community, 917 P.2d 336, 339 (Colo. Ct. App. 1996) (ALJ concludes that no-wheelchair-in-dining-room policy was

Such an argument is refuted by consideration of the purposes of the no-inquiry regulation. The underlying statute proscribes discrimination on the basis of handicap.¹⁸⁷ The no-inquiry regulation promotes the intent of the statute by prophylactically prohibiting housing providers from inquiring into an applicant's handicap, under the rationale that the housing provider would use this information to discriminate illegally on the basis of handicap. The exceptions identify those situations in which information related to a handicap might be used *not* to bar or restrict admission, but instead to facilitate the applicant's admission.¹⁸⁸

The no-inquiry regulation's subsection (c)(2) grants an exception when a handicap can be a prerequisite for admission. Subsection (c)(3) is a catch-all provision

intended to maintain “‘disability-free’ atmosphere”); Rosalie Kane and Keren Brown Wilson, AARP, *Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?*, at 25 (1993) (some facility operators preferring “health and fairly independent elderly” but, overall, operators generally attracting a frailer-than-anticipated clientele).

¹⁸⁷ 42 U.S.C. § 3604(f)(1)-(2).

¹⁸⁸ The force of this argument is not eroded by the fact that information related to an applicant's handicap may lead on occasion to admission being denied – for example, if an applicant's care needs exceed the level of care offered by an assisted living facility. In appropriate circumstances, the FHA allows for one type of handicap to be preferred over another. *See, e.g., Beckert v. Our Lady of Angels Apts., Inc.*, 192 F.3d 601 (6th Cir. 1999) (FHA not overriding National Housing Act provision that allows landlord to admit applicants with physical disabilities but not with chronic mental illness); *Jaininey v. Maximum Independent Living*, Memorandum of Opinion, No. CV 0879 (N.D. Ohio Feb. 9, 2001) (FHA not overriding provisions of Cranston-Gonzalez National Affordable Housing Act that allows landlord to prefer applicants with “similar disabilities”). The no-inquiry regulation itself recognizes that the housing provider may have a legitimate interest as to whether an applicant has “a particular type of handicap.” 24 C.F.R. § 100.202(c)(2), (3).

that covers those situations in which a handicap is not a prerequisite, but nonetheless creates a priority for admission. Subsection (c)(3) should be read broadly, consistent with Congressional intent, to include those situations in which housing is designed for, or intended for use by, individuals with handicaps.¹⁸⁹ Individuals with handicaps should be considered to have priority admission for such housing, whether or not the priority is formalized.

The priority for a “particular type” of handicap comes into play for long-term care facilities that maintain a particular specialization.¹⁹⁰ As cited earlier, some long-term care facilities follow state standards for specialization in the care of residents with dementia or a similar cognitive disorder.¹⁹¹ Recognized facility specializations generally vary from state to state, and may include such specializations as mental health services or ventilator care.¹⁹² Any Medicare-certified nursing facility (or “distinct part” of a nursing

¹⁸⁹ *See, e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (“FHA’s ‘broad and inclusive’ compass”); *Havens Realty Corp v. Coleman*, 455 U.S. 363, 380 (1982) (“broad remedial intent of Congress” in FHA).

¹⁹⁰ 24 C.F.R. § 100.202(c)(3).

¹⁹¹ *See supra* at fn __ & __.

¹⁹² *See, e.g.*, Cal. Code Regs. tit. 22 , § 72447 (“A special treatment program service distinct part means an identifiable and physically separate unit of a skilled nursing facility or an entire skilled nursing facility which provides therapeutic programs to an identified mentally disordered population group.”); N.H. Code Admin. R. Ann. He-E 802.05(c), (d) (special needs units, both behavioral, and non-behavioral, for nursing facilities; non-behavioral unit includes care for ventilator-dependent residents); N.J. Admin. Code tit. 8, 8:33H-1.6(a) (specialized care beds for ventilator-dependent adult residents, and for “residents with severe behavior management problems, such as combative, aggressive, and disruptive behaviors”), 8:85-2.21

facility) has a specialization in providing the skilled nursing or rehabilitation services that can be reimbursed through Medicare Part A.¹⁹³

(“special care nursing facility” for residents requiring “extended rehabilitation and/or complex care”); *see also* Cal. Code Regs. tit. 22, §§ 72443-75 (standards for special treatment program).

Status as a specialized facility or unit should be limited to those specializations approved by the state under state law specific to that specialization. Otherwise – for example, if a specialization could be based merely on a facility’s claim of specialization – a facility might purport to have a multitude of specializations, and a facility’s inquiry relative to those purported specializations could require an applicant to turn over a substantial portion of his or her medical history. In point of fact, nursing facilities not infrequently claim to be specialists in a plethora of different care procedures. *See, e.g.*, Fair View Nursing Home, *available at* www.milebluff.com/fair_view_nursing_home.htm (physical therapy, occupational therapy, and speech therapy identified as “specialty services” (these services actually are mandatory under the Nursing Home Reform Law)); Golden State West Valley Convalescent Hospital, *available at* www.goldenstatehealth.com/facilities/goldenstatewv.html (nursing facility “specializ[ing] in caring for residents recovering from illness or injury and for those needing continuous, long-term care”); Lorien Riverside Nursing and Rehabilitation Center, *available at* www.lorienhealth.com/riverside (nursing facility “specializing in skilled nursing and rehabilitation”); *see also* 42 U.S.C. §§ 1395i-3(b)(4)(A)(i), 1396r(b)(4)(A)(i); 42 C.F.R. § 483.45(a) (under Nursing Home Reform Law, required therapies include physical therapy, speech therapy, occupational therapy, and mental health rehabilitative services).

¹⁹³ A Medicare-certified nursing facility “is primarily engaged in providing to residents --

“(A) skilled nursing care and related services for residents who require medical or nursing care, or

“(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons.”

See 42 U.S.C. § 1395i-3(a)(1); *see also* 42 C.F.R. §§ 409.31- 409.35 (medical conditions qualifying for reimbursement under Medicare Part A); Eric Carlson, Long-Term Care Advocacy § 8.05[3] (Matthew Bender 2005) (same).

It is consistent with the FHA and with the no-inquiry regulation for facilities with government-recognized specializations to be allowed to inquire into an applicant's condition to the extent necessary to determine whether the applicant has the type of handicap that fits within the facility's specialization. If, for example, a facility specializes in the care of residents with dementia, the facility should be allowed to inquire as to whether the resident has been diagnosed with Alzheimer's disease or a comparable dementia. If an applicant is otherwise eligible for reimbursement through Medicare Part A, the facility should be allowed to inquire as to whether he or she has a medical need for the skilled nursing or rehabilitation services that could support Medicare Part A reimbursement.¹⁹⁴

It should be emphasized that neither of these priority-related exceptions – for possession of a handicap or a particular type of handicap -- gives a long-term care facility carte blanche to inquire into any and all aspects of an applicant's medical condition. Relevant here are the previously-discussed rulings that allow a federally subsidized housing program to require verification of an applicant's age or disability, but prohibit

Admission to a Medicare-certified nursing facility is not limited by law to those individuals eligible for payment through Medicare Part A. The facility also may accept private payment or payment through private insurance. If the facility also is Medicaid-certified, it may accept Medicaid reimbursement.

¹⁹⁴ Medicare Part A reimbursement requires that the resident enter the nursing facility within 30 days after a hospital stay of at least three nights. 42 U.S.C. § 1395x(i); 42 C.F.R. § 409.30(a)(1). The skilled nursing or rehabilitation services must be provided for the same condition that required the prior hospitalization. 42 C.F.R. § 409.31(b)(2). Part A reimbursement for nursing facility is limited to 100 days per benefit period. 42 U.S.C. § 1395d(a)(2)(A), (b)(2); 42 C.F.R. § 409.61(b). A benefit period renews itself after the resident has not received Medicare-reimbursed hospital care or nursing facility care for a period of at least 60 days. 42 U.S.C. § 1395x(a)(2); 42 C.F.R. § 409.60(b).

the program from requiring a more detailed physician’s statement.¹⁹⁵ Consistent with the letter and spirit of the FHA, an inquiry into an applicant’s handicap should be as restricted as is practicable. As noted by a federal district court, “the legislative history of the [Fair Housing Act Amendments Act of 1988] and the HUD regulations show that an applicant’s privacy rights are to be preserved to the extent possible and that a landlord should use the least invasive means necessary to verify an applicant’s qualifications.”¹⁹⁶

In accord, a long-term care facility at admission should be allowed to inquire into an applicant’s medical condition only to the extent that the knowledge is needed to determine if the applicant has a handicap, and if the resident has a medical condition that cannot be accommodated in the facility.¹⁹⁷ Also, if a facility has a formalized specialization for all or some of its rooms, the facility should have the right to inquire into the resident’s medical condition to the extent necessary to determine if the resident could benefit from the specialized care. Collectively, the information obtained through such inquiries is the information that the facility needs in order to determine if the resident is entitled to priority, and to assure that the resident’s admission is not prohibited.

¹⁹⁵ Robards v. Cotton Mill Assocs., 713 A.2d 952, 954 (Me. 1998); Niederhauser v. Independence Square Hous., 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998); *see supra* at ____.

¹⁹⁶ Niederhauser v. Independence Square Hous., 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998).

¹⁹⁷ *See supra* at ____, for discussion of state law provisions that prohibit certain conditions from being accommodated in an assisted living setting.

Following this procedure, a long-term care facility would have a right only to a limited amount of information. In most cases, an applicant could demonstrate a handicap or type of handicap with the release of only a handful of documents or, possibly, with no more than the certification by the applicant or the applicant's physician of a handicap or type of handicap. Certification by the applicant or physician also could be used to establish the absence of a disqualifying medical condition.

Conclusion

The purpose of long-term care is to combine housing with necessary services. But, as discussed in this article, this combination raises questions as to the application of the Fair Housing Act. At least initially, the FHA's no-inquiry regulation appears to be a poor fit with long-term care procedures and practices.

Ultimately, the no-inquiry regulation proves to be compatible with long-term care. Because long-term care is designed for individuals with handicaps, they are considered to have priority for admission, and thus a facility is allowed to make limited inquiries regarding any handicaps possessed by an applicant. After admission, the no-inquiry regulation does not inhibit a facility's care planning in any way, since the regulation does not apply once an applicant is admitted and becomes a resident.¹⁹⁸

¹⁹⁸ See, e.g., Assisted Living Quality Coalition, *Assisted Living Quality Initiative: Building a Structure that Promotes Quality*, at 68 (1998) (initial screening "to determine the setting's ability to meet the resident's anticipated health and service needs and preferences"; after admission, "a more complete assessment of the resident by an appropriately qualified person," including a "review of physical health, psychosocial status and cognitive status and determination of services necessary to meet those needs[, and] information from professionals with responsibility for the resident's physical or emotional health").

This analysis should not be seen as merely reconciling extant long-term care procedures with the Fair Housing Act. The no-inquiry regulation, in fact, does not condone business as usual in long-term care. Currently, many long-term care facilities at admission require extensive medical information – far more than is needed to determine if the applicant has a handicap or particular type of handicap, and does not possess a disqualifying medical condition. Application of the no-inquiry regulation properly limits a facility’s ability to discriminate on the basis of medical condition.

The FHA not only *can* be applied to long-term care, it *should* be applied.¹⁹⁹ To this point, long-term care facilities generally have not been held accountable under the FHA, and the result has been an acceptance of medical-condition discrimination as

This progression – an initial light screen to determine appropriateness, followed after admission by a more extensive assessment – is comparable to the legally-approved process used in employment decisions. Under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (including their implementing regulations), an employer cannot inquire into an applicant’s handicaps, but is allowed to ask whether the applicant is able to perform job-related functions. A hiring decision can be made conditional on successful completion of a medical examination, as long as the medical examination is required across-the-board. *See* 42 U.S.C.A. § 12112(d) (ADA); 14 C.F.R § 1251.203 (NASA regulations implementing Section 504); 24 C.F.R. § 8.13 (HUD regulations implementing Section 504); 29 CFR 1630.14 (ADA regulations); 45 C.F.R. § 84.14 (HHS regulations implementing Section 504); *see also* 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988) (FHA no-inquiry regulation drawn from Section 504 regulations on pre-employment inquiries); 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989) (same).

¹⁹⁹ *But see* Lauren Sturm, *Fair Housing Issues in Continuing Care Retirement Communities (CCRCs): Can Residents be Transferred Without Their Consent?*, 6 N.Y. City L. Rev. 119, 127 (2004) (suggesting that application of the no-inquiry regulation might be unworkable in the context of continuing care retirement communities).

simply the way that business is done. But from legal and public policy perspectives, long-term care facilities in fact should not be screening applicants' medical conditions beyond the limited screening allowed under the FHA.

Applicants for long-term care are acutely vulnerable to discrimination, and would benefit greatly from active enforcement of the no-inquiry regulation against long-term care facilities. Applicants' attorneys and HUD each should take steps to investigate and then initiate enforcement actions against offending long-term care providers. The status quo – in which long-term care facilities have de facto immunity from the no-inquiry regulation – is without legal or moral justification.