

**Disability Discrimination**  
**in Long-Term Care:**  
**Using the Fair Housing Act to Prevent**  
**Illegal Screening in Admissions to**  
**Nursing Homes and**  
**Assisted Living Facilities**

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## ABSTRACT

Nursing homes and assisted living facilities routinely require applicants to disclose an extensive amount of medical information. Not infrequently, these long-term care facilities use the information to deny admission to those applicants with relatively greater care needs. These denials constitute illegal discrimination under the Americans with Disabilities Act and the Rehabilitation Act, but generally consumers are unaware of these protections or find litigation too expensive and time-consuming under their generally difficult circumstances.

These illegal denials of service could be limited by active enforcement of the Fair Housing Act's no-inquiry regulation, which prohibits a housing provider from inquiring into an applicant's medical condition. If facilities in the first place had only limited access to information about an applicant's medical conditions, the facilities would not have the means to illegally discriminate, and applicants would be protected without need of litigation.

To this point, the no-inquiry regulation has not been utilized against long-term care facilities, due to a general but superficial belief that the no-inquiry regulation is incompatible with long-term care. This Article offers the first analysis of how the no-inquiry regulation could be employed in a long-term care setting.

Courts consistently have ruled that long-term care facilities are "dwellings" and thus subject to the Fair Housing Act (FHA). The question at hand is if and how the FHA's no-inquiry regulation can be applied in a long-term care setting. The Article examines the no-inquiry regulation's exceptions and determines that none applies to a long-term care admission. A handicap (the term used by the FHA) is not required for

admission, and applicants with handicaps are not necessarily given priority. Thus, enforcement of the no-inquiry regulation would prohibit long-term care facilities from obtaining any medical information from applicants.

If enforcement of the no-inquiry regulation were to become reality, a long-term care facility in response likely would establish priority in admission for any applicant who needs the facility's services and whose care needs do not exceed the facility's capabilities. Establishing such a priority would allow a facility to obtain medical information from applicants, but that information would be limited to the information necessary to determine if the applicant were entitled to priority.

Thus, contrary to the conventional wisdom, the no-inquiry regulation would be workable in a long-term care setting and furthermore would benefit applicants. Facilities would establish appropriate admission priorities and would have access only to the medical information relevant to those priorities. Illegal discrimination based on medical condition would lessen because facilities would not have access to the irrelevant medical information that otherwise might prompt such discrimination.

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# **Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities**

## **I. INTRODUCTION**

Before making an admission decision, a nursing home<sup>2</sup> often requires an applicant to disclose a significant portion of her medical records. The applicant likely presumes that the nursing home needs this information to determine if the nursing home can meet her health care needs.

This presumption is often wrong. The information is reviewed not by nurses but by administrators, and not for care planning but instead for calculating the applicant's potential profitability to the facility. A telling advertisement for one nursing home software package brags to potential customers that “[w]ith Admission Analysis you can finally manage your bottom line one admission at a time!”<sup>3</sup>

As a result of this type of screening, facilities frequently deny admission to applicants who appear to be less profitable or are otherwise less than desirable. For example, a facility may avoid admitting applicants with severe Alzheimer's disease,

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<sup>2</sup> “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”). For ease of use, this Article uses the term “nursing home” rather than “nursing facility” or “skilled nursing facility.”

<sup>3</sup> American Healthtech, With Admission Analysis You Can Finally Manage Your Bottom Line One Admission at a Time!, [www.healthtech.net/aamodule.pdf](http://www.healthtech.net/aamodule.pdf) (viewed on August 14, 2006).

AIDS, or antibiotic-resistant infections, even though nursing homes and many assisted living facilities are required to be capable of handling such medical conditions.

A rejected applicant may have a viable claim against the nursing home for discrimination on the basis of disability,<sup>4</sup> but such cases are rarely brought. Most applicants are unaware of the relevant law, and litigation is expensive and time-consuming. For most rejected applicants it makes more sense to move on and seek residence elsewhere.

Potentially this screening could be curbed by active enforcement of the Fair Housing Act's no-inquiry regulation, which prohibits a housing provider from inquiring into a handicap<sup>5</sup> of an applicant for tenancy.<sup>6</sup> Courts have ruled consistently that the Fair Housing Act (FHA) applies to nursing homes, assisted living facilities,<sup>7</sup> and other long-

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<sup>4</sup> See 42 U.S.C. § 12182(a) (under Americans with Disabilities Act, no disability-based discrimination in "place of public accommodation"); 29 U.S.C. § 794(a) (under Section 504 of Rehabilitation Act, no disability-based discrimination in federally-funded program or activity); *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d Cir. 1995) (nursing home discriminating illegally by refusing to admit applicant with aggressive dementia); *Grubbs v. Medical Facilities of America, Inc.*, 879 F. Supp. 588 (W.D. Va. 1995) (unsuccessful suit brought under Rehabilitation Act against nursing home, alleging applicant had been refused admission due to obesity).

<sup>5</sup> As the Americans with Disabilities Act indicates, "disability" now is preferred over "handicap" as the legal term of art. See, 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](http://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.

<sup>6</sup> See 24 C.F.R. § 100.202(c).

<sup>7</sup> As discussed subsequently, assisted living differs significantly from state to state. See *infra* at 7-8. Even the name "assisted living" is not universal across states. A decreasing minority of states use other terms –

term care facilities, because each of these facilities is considered a “dwelling” under the FHA.<sup>8</sup>

Regardless of these consistent rulings regarding the applicability of the FHA, case law contains no hint that the FHA’s no-inquiry regulation ever has been asserted against a long-term facility. This inactivity presumably is due to the relatively low profile of long-term care issues amongst attorneys and the general public, and to a general but superficial sense in the legal community that the no-inquiry regulation is out of place in a long-term care setting. In a standard landlord-tenant relationship – rental of an apartment, for example – an applicant’s health care problems and needs should clearly not be subject to a landlord’s review. In a long-term care setting, however, the facility seems to have at least *some* legitimate interest in an applicant’s health conditions. Initially at least, a strict no-inquiry rule appears to be a poor fit from a public policy perspective.

On the other hand, a long-term care facility should not be discriminating on the basis of an applicant’s health care conditions, beyond making a threshold determination that the facility can meet the applicant’s needs. The FHA’s intent is contravened by a facility that cherry-picks 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. After initial litigation establishing the applicability of

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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.

<sup>8</sup> *See infra* at 22-28.

the no-inquiry regulation in long-term care, facilities as a matter of course would receive only a limited amount of medical information from applicants, and thus would have much less ability to discriminate on the basis of medical condition. Discrimination thereafter would be prevented without the need for case-by-case litigation.

This Article is the first in-depth analysis of this issue.<sup>9</sup> First, the Article briefly describes nursing homes and assisted living facilities, focusing on the types of care that can and cannot be provided in each, and on the facilities' use of applicants' medical

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<sup>9</sup> This Article's author 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. Consent Order, *United States v. Resurrection Retirement Community, Inc.*, No. 02-CV-7453 (N.D. Ill. Sept. 17, 2002), available at [www.usdoj.gov/crt/housing/documents/resurrectsettle.htm](http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm); see also [www.usdoj.gov/crt/housing/documents/resurrectcomp.htm](http://www.usdoj.gov/crt/housing/documents/resurrectcomp.htm) (complaint in same case). In any case, the consent order never discusses whether or how the no-inquiry regulation is reconciled with a long-term care facility's legitimate need for residents' health care information.

information. The Article then sets out the structure and purpose of the FHA and its no-inquiry regulation.<sup>10</sup>

The Article analyzes if and how the FHA’s no-inquiry regulation can be applied to long-term care facilities. Case law overwhelmingly demonstrates that long-term care facilities are considered “dwellings” and thus are covered by the FHA. Furthermore, the relevant exceptions to the no-inquiry regulation do not necessarily apply to long-term care facilities – a facility currently is not compelled to require a handicap as a condition of admission, or offer admissions priority to applicants with a handicap or particular type of handicap.

The Article concludes that the no-inquiry regulation will generally prohibit a long-term care facility from requiring disclosure of applicants’ medical information. Enforcement of the regulation in this way would make a positive change in long-term care facilities’ admission practices. Long-term care facilities would have a powerful incentive to create appropriate admission priorities favoring applicants with handicaps. Establishing such a priority would enable a facility to obtain medical information from an applicant, but the scope of this information would be limited: in general, the minimum information necessary to establish that the applicant needs the facility’s services, and to ensure that the applicant’s needs do not exceed the facility’s capabilities.

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<sup>10</sup> 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.

Legal authority is less than conclusive on whether the no-inquiry regulation applies only to applicants, or to both applicants and tenants. The Article concludes that the no-inquiry regulation itself applies only to applicants, although other FHA provisions prohibit inquiries of tenants when those inquiries are made for harassment or other improper purposes.

To review the viability of the Article's legal conclusions, the Article describes two typical applicants for long-term care, and examines their hypothetical applications to two long-term care facilities that employ appropriate admission priorities. In general, based on this Article's legal analysis, nursing facilities would have limited access to an applicant's medical information; an assisted living facility would have somewhat greater access, as would long-term care facilities with formalized specializations. In some situations, enforcement of the no-inquiry regulation would prevent facilities from viewing certain prejudicial information relating to an applicant's behavior.

After admission, the facilities would have extensive access to a now-resident's medical information in order to conduct assessments and plan care. Access would be denied only in rare circumstances – if, for example, the information was irrelevant to care planning and requested only for purposes of harassment.

Overall, long-term care would benefit from the active enforcement of the FHA's no-inquiry regulation. In long-term care admissions currently, facilities assume *carte blanche* to discriminate on the basis of an applicant's medical condition. Enforcement of the no-inquiry regulation would rebalance the playing field by forcing facilities to declare appropriate admission priorities in favor of persons with handicaps. These priorities, in

turn, would authorize disclosure of medical information, but only to the extent needed to determine the facility's appropriateness for the applicant's care needs.

## **II. LONG-TERM CARE FACILITIES**

### **A. Residents and Services**

A nursing home provides housing and health care to persons with significant health care needs. In recent years, nursing home residents' average health care needs have increased.<sup>11</sup> Based on 2004 data, 45 percent of nursing home residents suffer from dementia.<sup>12</sup> 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 hours per day.<sup>13</sup> 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.<sup>14</sup>

In its bare-bones form, the definition of an assisted living facility is similar to the nursing home definition. Like a nursing home, an assisted living facility offers housing and necessary services to older persons who, in most instances, need assistance with at

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<sup>11</sup> 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](http://oig.hhs.gov/oei/reports/oei-05-01-00030.pdf).

<sup>12</sup> 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](http://www.nccnhr.org/public/245_1267_11874.cfm).

<sup>13</sup> Charlene Harrington et al., Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004, at 36 (2005).

<sup>14</sup> Charlene Harrington et al., Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1998 Through 2004, at 38, 52, 54 (2005).

least some activities of daily living.<sup>15</sup> The primary difference is that a nursing home offers much more extensive health care services.

The scope of assisted living services differs significantly from state to state, because assisted living standards are set almost exclusively by state law.<sup>16</sup> To this point, federal law is virtually silent on assisted living standards.<sup>17</sup>

The scope of available services also may vary greatly from facility to facility within the same state. 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.<sup>18</sup> Also, some states license multiple levels of assisted living; in these states, residents with greater needs reside in facilities licensed at a higher level.<sup>19</sup>

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<sup>15</sup> See, e.g., Assisted Living Federation of American, What Is Assisted Living?, available at [www.alfa.org/public/articles/details.cfm?id=126](http://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).

<sup>16</sup> 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).

<sup>17</sup> Eric Carlson, Long-Term Care Advocacy § 5.04[2] (Matthew Bender 2005).

<sup>18</sup> 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).

<sup>19</sup> 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-

Assisted living residents often have access to a significant level of health care, provided either by facility staff or by visiting nurses or health aides. As a result, living in an assisted living facility now is a viable alternative for many persons who in the past would have been forced to move into a nursing home.<sup>20</sup> As noted above, the health care needs of nursing home residents have increased in recent years. In part, this increase is attributable to the growing inclination of persons with less extensive health care needs to move into assisted living facilities rather than nursing homes.

### **B. Disqualifying Medical Conditions**

Although their residents' care needs are steadily increasing, both nursing homes and assisted living facilities have limits to the care that they can provide. Accordingly, certain medical conditions can disqualify a person for admission to either type of long-term care facility. Such disqualifications are infrequent in nursing homes but a common reality in assisted living.

Disqualification occurs infrequently in nursing homes because they are required to care for virtually any long-term care need. A nursing home has the broad obligation under the federal Nursing Home Reform Law to “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.”<sup>21</sup> The Reform Law's regulations require that a nursing home resident have access to a wide

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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).

<sup>20</sup> 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).

<sup>21</sup> 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).

variety of “special services,” including injections, tracheal suctioning, and care for a colostomy or tracheostomy.<sup>22</sup>

Nonetheless, some long-term care needs may be beyond a nursing home’s expertise. For example, the Reform Law’s regulations do not require explicitly that a nursing home provide ventilator care, and only a small but increasing minority of facilities do so.<sup>23</sup>

An inability to provide certain types of care is much more likely in assisted living. Assisted living facilities generally are not required to provide nursing care on-site, and most facilities choose not to do so. Under state assisted living law, facilities have a great deal of discretion in deciding the extent of the health care provided, and in evicting residents when a resident needs care that the facility does not wish to provide.<sup>24</sup> This discretion, however, is subject to challenge to the extent that the facility is discriminating based on disability or handicap.<sup>25</sup>

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<sup>22</sup> 42 C.F.R. § 483.25(k).

<sup>23</sup> *Bryant v. Indiana State Dep’t of Health*, 695 N.E.2d 975, 979 (Ind. Ct. App. 1998) (nursing home 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 homes).

<sup>24</sup> *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, 43-46 (2005).

<sup>25</sup> *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.

Some limits are based on state law rather than facility discretion. State licensure laws frequently prohibit an assisted living facility from admitting persons with certain medical conditions. In Wisconsin, for example, a community-based residential facility (a term used by Wisconsin for assisted living) is prohibited generally from admitting an applicant who is unable to get out of bed, is restrained physically, has psychiatric needs that are incompatible with other residents, or requires either around-the-clock nurse supervision or more than three hours of nursing home weekly.<sup>26</sup> A Virginia assisted living facility generally cannot admit any applicant who is ventilator-dependent, has significant pressure ulcers, needs around-the-clock nursing care, is dependent in at least four activities of daily living (e.g., bathing, dressing, transferring, toileting, and eating),<sup>27</sup> or is fed with a tube through the nose to the stomach.<sup>28</sup> Some state-law limits – most notably here, the disqualifications under Wisconsin law for confinement to a bed, or need for more than three hours of nursing care weekly – might also be subject to challenge under federal anti-discrimination law.

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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).

<sup>26</sup> Wis. Admin. Code HFS § 83.06(1)(a) (partial list of disqualifying conditions).

<sup>27</sup> *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](http://aspe.hhs.gov/daltcp/reports/guide.htm).

<sup>28</sup> Va. Code Ann. § 63.2-1805(C) (partial list of disqualifying conditions).

In recent years, state assisted living laws have become more accepting of certain health conditions.<sup>29</sup> 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.<sup>30</sup> These state laws generally apply to the retention of residents, but not initial admissions.<sup>31</sup>

### **C. Use of Applicants' Medical Information**

Often a long-term care facility has a legitimate need for limited access to an applicant's medical records. The need for information is tied to the issues discussed in this Article's preceding subsections. Long-term care facilities have differing capabilities, so a facility should verify that the applicant needs the facility's services and that his needs do not exceed the facility's level-of-care ceiling. Also, the applicant's care needs must not exceed any limit set by federal or state law. These determinations are particularly relevant for assisted living facilities, since their capacity to provide care is less than that of nursing homes.<sup>32</sup>

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<sup>29</sup> 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).

<sup>30</sup> 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).

<sup>31</sup> 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.

<sup>32</sup> 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

Applicants' medical information should *not* be used to deny admission to those applicants whose care needs, although within a facility's capabilities, 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 (ADA) and Section 504 of the Rehabilitation Act each prohibit discrimination based on medical condition.<sup>33</sup> The most prominent published case, *Wagner v. Fair Acres Geriatric Center*, concerns a nursing home that had refused admission to a woman due to her Alzheimer's disease.<sup>34</sup> The federal district court ruled in favor of the nursing home but the Third Circuit reversed, speaking in strong terms against disability-based discrimination in long-term care admissions:

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,

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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").

<sup>33</sup> 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").

<sup>34</sup> 49 F.3d 1002 (3<sup>rd</sup> Cir. 1995).

leaving the more challenging and demanding patients with no place to turn for care.<sup>35</sup>

After admission, long-term care facilities routinely – and appropriately – use the medical information of the now-residents to assess the resident and prepare care 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.<sup>36</sup>

### **III. FAIR HOUSING ACT (FHA)**

#### **A. FHA Overview**

The original Fair Housing Act (FHA) was enacted as part of the Civil Rights Act of 1968, prohibiting discrimination in housing on the basis of race, color, religion, and

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<sup>35</sup> 49 F.3d at 1015.

<sup>36</sup> *See, e.g.*, 42 U.S.C. §§ 1395i-3(b)(2)-(3), 1396r(b)(2)-(3) (assessments and care plans in nursing homes); 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 2<sup>nd</sup> 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 service plans); N.J. Admin. Code tit. 8, § 8:36-7.1 (same); Utah Admin. Code §§ 432-270-12, 432-270-13 (same).

national origin.<sup>37</sup> In 1974, “sex” was added as a prohibited factor of discrimination,<sup>38</sup> in 1988, the Fair Housing Amendments Act added “familial status” and “handicap.”<sup>39</sup>

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

Prohibiting discrimination against persons 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.<sup>40</sup>

Consistent with these sentiments, the FHA defines “handicap” broadly as “a physical or mental impairment which substantially limits one or more of such person’s major life activities,” including instances in which a person has “a record of having such an impairment” or is “regarded as having such an impairment.”<sup>41</sup> The regulations set out a lengthy but non-exclusive list of examples of a physical or mental impairment.<sup>42</sup> The 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.”<sup>43</sup> Notably, the definition of “handicap” under the FHA is

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<sup>37</sup> Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968).

<sup>38</sup> Pub. L. No. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729 (1974).

<sup>39</sup> Pub. L. No. 100-430, § 6(a)-(b)(2), (e), 102 Stat. 1622 (1988).

<sup>40</sup> H.R. Rep. No. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

<sup>41</sup> 42 U.S.C. § 3602(h).

<sup>42</sup> See 24 C.F.R. § 100.201(a).

<sup>43</sup> 24 C.F.R. § 100.201(b).

substantially equivalent to the definition of “disability” used by the Section 504 of the Rehabilitation Act<sup>44</sup> and by the ADA.<sup>45</sup>

The FHA is enforceable either through private litigation or by the Department of Housing and Urban Development (HUD).<sup>46</sup> Actions brought by HUD may be adjudicated in front of an administrative law judge or a federal court.<sup>47</sup>

## **B. FHA’s No-Inquiry Regulation**

### **1. Regulatory Language and Administrative Commentary**

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 prohibit discrimination in the sale or rental of a dwelling, or in the terms of sale or rental.<sup>48</sup> The corresponding regulatory language is virtually word-for-word identical.<sup>49</sup>

In an exception to this mirror-image pattern, the FHA’s no-inquiry regulation prohibits an owner or landlord from inquiring into whether an applicant has a handicap,

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<sup>44</sup> 29 U.S.C. § 705(9)(B) (“a physical or mental impairment that substantially limits one or more major life activities”).

<sup>45</sup> 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”).

<sup>46</sup> 42 U.S.C. §§ 3610 (enforcement through HUD), 3613 (private litigation).

<sup>47</sup> 42 U.S.C. § 3612.

<sup>48</sup> See 42 U.S.C. § 3604(f)(1)-(2).

<sup>49</sup> Compare 42 U.S.C. § 3604(f)(1)-(2) with 24 C.F.R. § 100.202(a)-(b).

or into a handicap's nature or severity.<sup>50</sup> Certain exceptions will be discussed subsequently in this Article.<sup>51</sup>

In the release of the FHA's disability-related regulations, HUD based the no-inquiry regulation on legislative intent – specifically, the House Report accompanying the Fair Housing Amendments Act.<sup>52</sup> The House Report raises the no-inquiry issue in the context of the FHA's statement that none of its provisions require making a dwelling available to a person who would be a “direct threat” or cause “substantial physical damage” to others' property.<sup>53</sup> 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,”<sup>54</sup> 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

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<sup>50</sup> 24 C.F.R. § 100.202(c).

<sup>51</sup> See 24 C.F.R. § 100.202(c)(1)-(5); *infra* at 31-41.

<sup>52</sup> 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988).

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).

<sup>53</sup> 42 U.S.C. § 3604(f)(9); see also 24 C.F.R. § 100.202(d) (corresponding provision in regulation).

<sup>54</sup> H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

Section 504 of the Rehabilitation Act,<sup>55</sup> 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.<sup>56</sup>

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. 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."<sup>57</sup> Presumably this was meant to be consistent with the House Report's narrow concession that a landlord or owner

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<sup>55</sup> The Rehabilitation Act's Section 504, codified at 29 U.S.C. § 794(a), prohibits disability-based discrimination by an entity receiving federal funding; *see also* 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989) (no-inquiry regulation as "adaptation of the 'pre-employment inquiries' provision in the section 504 regulations")

<sup>56</sup> H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

<sup>57</sup> 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).

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.”<sup>58</sup>

In recognition that an owner or landlord 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.<sup>59</sup> Another exception permits inquiry if the handicap relates to “an applicant’s ability to meet the requirements of ownership or tenancy.” Two of the exceptions are particularly relevant to long-term care facilities and will be examined in depth subsequently.<sup>60</sup> These exceptions together permit inquiry if a dwelling or priority for a dwelling is available only to persons with handicaps or persons with a particular type of handicap.<sup>61</sup> To this point, the “priority” exceptions have come into play most frequently in federally-funded housing developments that require or prefer tenants with handicaps.<sup>62</sup>

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<sup>58</sup> H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

<sup>59</sup> 24 C.F.R. § 100.202(c)(4)-(5).

<sup>60</sup> *See infra* at 31-41.

<sup>61</sup> 24 C.F.R. § 100.202(c)(1)-(3).

<sup>62</sup> *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).

## 2. Case Authority

In interpreting the no-inquiry regulation, the most-commonly cited case is *Cason v. Rochester Housing Authority*.<sup>63</sup> *Cason* concerns a public housing authority that screened applicants for an “ability to live independently, or to live independently with minimal aid.”<sup>64</sup> Applicants were required to list their medical conditions and submit to an in-home evaluation conducted by a housing authority employee.<sup>65</sup> If deemed necessary by the housing authority, these procedures were supplemented by a nursing evaluation “during which a variety of specific questions concerning the applicant’s disability, personal hygiene and ability to live independently [were] asked.”<sup>66</sup>

The court found, as the housing authority had conceded, that the housing authority’s practices were “clearly at odds” with the regulation.<sup>67</sup> The exception related to “the requirements of ownership or tenancy” did not apply: federal regulations set forth twelve tenant obligations, and none of those obligations was related to a person’s ability to live independently.<sup>68</sup> Ultimately, the court enjoined the public housing authority from making inquiries into an applicant’s ability to live independently.<sup>69</sup>

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<sup>63</sup> 748 F. Supp. 1002 (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).

<sup>64</sup> 748 F. Supp. 1002, 1004 (W.D.N.Y. 1990).

<sup>65</sup> 748 F. Supp. at 1005.

<sup>66</sup> 748 F. Supp. at 1005.

<sup>67</sup> 748 F. Supp. at 1008-1009.

<sup>68</sup> 748 F. Supp. at 1008-1009; *see* 24 C.F.R. § 966.4(f) (twelve obligations of public housing tenants).

<sup>69</sup> 748 F. Supp. at 1011.

In subsequent cases, courts have clarified how the no-inquiry regulation coexists with publicly-funded housing. The no-inquiry regulation does not invalidate federal funding laws that allow a landlord to prefer applicants with certain types of disabilities,<sup>70</sup> although the right to prefer certain disabilities does not justify screening for an applicant's ability to live independently.<sup>71</sup>

Exceptions to the no-inquiry regulation are construed narrowly. 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.<sup>72</sup>

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<sup>70</sup> 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).

<sup>71</sup> 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).

<sup>72</sup> 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 persons 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.

In a case involving a similar fact pattern – a housing 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:

[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.<sup>73</sup>

#### **IV. FHA PROTECTS LONG-TERM CARE RESIDENTS**

##### **A. Case Law**

The case law is clear: the FHA applies to long-term care facilities. 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.<sup>74</sup>

Specifically, the FHA applies only if the building in question is a “dwelling,”<sup>75</sup> which is defined in pertinent part as “any building, structure, or portion thereof which is

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<sup>73</sup> *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998).

<sup>74</sup> *See, e.g., Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 132 (D. Conn. 2001).

<sup>75</sup> *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”).

occupied as, or designed or intended for occupancy as, a *residence* by one or more families.”<sup>76</sup> The term “family” explicitly is defined to include “a single individual.”<sup>77</sup>

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) describes “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.”<sup>78</sup> Numerous courts have used this same definition.<sup>79</sup>

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.<sup>80</sup> Nonetheless,

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<sup>76</sup> 42 U.S.C. § 3602(b) (emphasis added).

<sup>77</sup> 42 U.S.C. § 3602(c).

<sup>78</sup> *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”).

<sup>79</sup> *See, e.g., United States v. Columbus Country Club*, 915 F.2d 877, 881 (3<sup>rd</sup> Cir. 1990); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 (1<sup>st</sup> Cir. 1993); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3<sup>rd</sup> Cir. 1996); *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*”).

<sup>80</sup> *Patel v. Holley House Motels*, 483 F. Supp. 374, 375, 381 (S.D. Ala. 1979) (citing dictionary definition from *Hughes Mem’l Home*).

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.*

temporary housing is liberally recognized as a “dwelling” if the person has nowhere else to live or, more generally, that the 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 persons on the margins of the housing market.<sup>81</sup>

Homeless shelters are generally considered dwellings,<sup>82</sup> as are farmworker camps.<sup>83</sup> In reference to homeless shelters, a federal district court pointed out that

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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).

<sup>81</sup> 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).

<sup>82</sup> See, e.g., Turning Point v. City of Caldwell, 74 F.3d 941 (9<sup>th</sup> 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 persons 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.”).

<sup>83</sup> 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).

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 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,<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

Many cases concern claims by group homes, which are small residential facilities for non-elderly adults.<sup>87</sup> Courts routinely conclude that a group home is a “dwelling” under the FHA; more often than not, courts reach this conclusion

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<sup>84</sup> “Hughes” is *United States v. Hughes Mem’l Home*, the case which first employed the dictionary definition of “residence.” “Baxter” is the subsequently-cited 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 26 n.90.

<sup>85</sup> *Woods v. Foster*, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995).

<sup>86</sup> *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).

<sup>87</sup> A resident of a group home is likely to have a developmental disability, mental illness, or brain injury, or for some other reason to need a supervised living environment.

implicitly, accepting the application of the FHA as a given.<sup>88</sup> In one case in which the issue was addressed explicitly, a court noted the perversity of any interpretation in which the provision of services would negate the FHA's applicability:

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 arrangement that facilitated recovery of a handicapped person would lose the protections of the FHA.<sup>89</sup>

Following such reasoning, both explicit and implicit, courts routinely have applied the FHA to hospices<sup>90</sup> and nursing homes.<sup>91</sup> In affirming the FHA's

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<sup>88</sup> See, e.g., *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).

<sup>89</sup> *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 132 (D. Conn. 2001) (group housing for persons undergoing outpatient treatment or substance abuse).

<sup>90</sup> *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (denial of special use permit for hospice for persons with AIDS); *Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95 (D.P.R. 1990) (same).

<sup>91</sup> *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 home); *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 home); *Caron v. City of Pawtucket*, 307 F. Supp. 2d 364 (D.R.I. 2004) (longtime retirement home denied licensure to operate as nursing home); *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037 (N.D. Ohio 1998) (U.S. Justice

applicability to a nursing home, the Third Circuit noted that “[t]o the handicapped elderly persons who would reside there, [the nursing home] would be their home, very often for the rest of their lives.”<sup>92</sup>

In accord with this line of reasoning, courts without exception have found assisted living facilities subject to the FHA. In each case, the FHA was invoked to challenge a zoning decision; in none of these cases did the defendants challenge the facility’s status as a “dwelling” under the FHA.<sup>93</sup> Like a nursing home, the assisted living facility was accepted by the parties and the court as “home” for its residents.

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Department alleging racial discrimination by nursing home operator). The *Lorantffy* opinion never classifies the Lorantffy Care Center, but it is identified as a nursing home 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](http://www.usdoj.gov/opa/pr/1997/February97/054cr.htm) (press release); [www.medicare.gov/NHCompare/home.asp](http://www.medicare.gov/NHCompare/home.asp) (Nursing Home Compare website).

<sup>92</sup> *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) (refusal to grant zoning variance for nursing home).

<sup>93</sup> 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); *Akridge v. City of Moultrie*, \_\_ F.Supp. 2d \_\_,

Notably, virtually all of the cases discussed in this section 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 property.<sup>94</sup>

## **B. Administrative Commentary**

The case law's consensus – the FHA applies to long-term care facilities -- is supported by two federal administrative pronouncements. In the 1991 release of ADA regulations, the Justice Department addressed the relationship between the ADA and the FHA.<sup>95</sup> The ADA applies to “public accommodations,” including a “service establishment” such as a hospital, or a “social service center establishment” such as a

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2006 WL 292179, 2006 U.S. Dist. LEXIS 7428 (M.D. Ga. 2006) (alleged zoning violation in operation of 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 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).

<sup>94</sup> *See, e.g.*, *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) (nursing home); *Assisted Living Assocs. L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 414-416 (D.N.J. 1998) (assisted living facility); *Turning Point v. City of Caldwell*, 74 F.3d 941 (9<sup>th</sup> Cir. 1996) (homeless shelter).

<sup>95</sup> 28 C.F.R. Part 36, App'x B.

senior citizen center or a homeless shelter.<sup>96</sup> Furthermore, unlike the FHA, the ADA’s “public accommodations” classification applies to hotels, motels, and other short-term “places of lodging.”<sup>97</sup>

The Justice Department explained that a residential facility with services, such as a nursing home or an assisted living facility, might be covered under both the ADA and the FHA.<sup>98</sup> 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 establishment.”<sup>99</sup> The FHA inquiry is to be independent, based on the FHA standards.<sup>100</sup> 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.

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<sup>96</sup> 42 U.S.C. § 12181(7)(F), (K).

<sup>97</sup> 42 U.S.C. § 12181(7)(A).

<sup>98</sup> 28 C.F.R. Part 36, App’x B. at 679 (reference to “nursing homes [and] residential care facilities”).

<sup>99</sup> 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) (viable claim against nursing home under ADA); 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).

<sup>100</sup> 28 C.F.R. Part 36, App’x B. at 679 (reference to “nursing homes [and] residential care facilities”).

Three years later, HUD issued supplementary guidelines to address the FHA's accessibility requirements for new construction.<sup>101</sup> 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 that 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.”<sup>102</sup> Three factors were to be considered:

- (1) the length of time persons stay in the project;
- (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.<sup>103</sup>

These factors are consistent with case law in focusing on the length and nature of the stay in determining whether a particular facility is subject to the FHA.<sup>104</sup> Provision of services is only relevant, per factor #3, to the extent that the service sheds light on whether a 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

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<sup>101</sup> 59 Fed. Reg. 33,362 (June 28, 1994); *see* 42 U.S.C. § 3604(f)(3)(C) (FHA's new construction requirements).

<sup>102</sup> 59 Fed. Reg. at 33,364 (June 28, 1994).

<sup>103</sup> 59 Fed. Reg. at 33,364 (June 28, 1994).

<sup>104</sup> *See supra* at 22-28.

services or facilities in connection with such dwelling.”<sup>105</sup> 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.”<sup>106</sup> 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 amenities as lawnmowing and laundry rooms. On the other hand, nothing in the statute or the regulations compels such a limited reading of either word.<sup>107</sup>

**V. REGULATORY EXCEPTIONS DO NOT ALLOW LONG-TERM CARE FACILITY TO OBTAIN APPLICANTS’ MEDICAL INFORMATION, UNLESS FACILITY GIVES ADMISSION PRIORITY TO APPLICANTS WITH HANDICAPS**

**A. Relevant Exceptions**

**1. Handicap as Prerequisite**

As discussed above, the no-inquiry regulation contains five exceptions.<sup>108</sup> Of these five exceptions, two related exceptions are particularly relevant to the types of inquiries typically made by long-term care facilities.<sup>109</sup> One exception applies when a

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<sup>105</sup> 42 U.S.C. § 3604(f)(2).

<sup>106</sup> 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

<sup>107</sup> See 24 C.F.R. § 100.65 (b)(4) (referring without elaboration to “privileges, services or facilities”).

<sup>108</sup> See *supra* at 19.

<sup>109</sup> 24 C.F.R. § 100.202(c)(2).

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.<sup>110</sup>

The “handicap as prerequisite” exception allows 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.”<sup>111</sup> In interpreting this provision, the little available legal authority is focused generally on situations in which subsidized housing has been reserved for persons with handicaps. In the proposed regulations’ release, HUD explained:

For example, some Federal and State housing programs are designed for, and occupied by, persons with handicaps. Only persons with handicaps 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.<sup>112</sup>

In the release of final regulations, HUD again emphasized subsidized housing but, in response to various public comments, also addressed inquiries made to determine eligibility for non-subsidized housing:

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

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<sup>110</sup> 24 C.F.R. § 100.202(c)(2)-(3).

<sup>111</sup> 24 C.F.R. § 100.202(c)(2).

<sup>112</sup> 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988).

determine whether they have a handicap for the purpose of determining eligibility.<sup>113</sup>

Case authority is slight. As discussed previously, a housing provider is permitted to admit only applicants with certain types of handicaps -- rejecting applicants with other types of handicaps -- if a government subsidy has authorized such criteria.<sup>114</sup>

## **2. Handicap as Priority**

Administrative and case authority are equally limited for the second exception: when “a priority [is] available to persons with handicaps or to persons with a particular type of handicap.”<sup>115</sup> In the proposed regulation’s release, HUD offered an unsurprising example of how a handicap might qualify an applicant for priority:

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.<sup>116</sup>

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<sup>113</sup> 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

<sup>114</sup> *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); *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”); *see supra* at 21.

<sup>115</sup> 24 C.F.R. § 100.202(c)(3).

<sup>116</sup> 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988).

HUD's discussion in the final regulations' release is almost identical, but with one additional instruction. The discussion again offers the example of a priority for mobility impairments, then adds the admonition that a housing provider "may not in such circumstances ask applicants whether they have other types of impairments."<sup>117</sup>

## **B. Regulatory Exceptions Do Not Apply to Long-Term Care Admissions**

### **1. Handicap Not Required**

Perhaps surprisingly, a handicap is not required for admission to a nursing home. As a practical matter, a nursing home resident without a handicap likely would not qualify for coverage from either the Medicare or Medicaid<sup>118</sup> programs -- because the nursing home care would be considered unnecessary -- but a person without a handicap could pay privately for nursing home care.<sup>119</sup> Although a nursing home has the right to evict a resident who does not need nursing home care, the facility has no obligation to do so.<sup>120</sup> In short, a nursing home is allowed to admit and retain privately-paying persons who have no handicap whatsoever.<sup>121</sup>

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<sup>117</sup> 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

<sup>118</sup> The Medicare program pays for certain health care expenses of persons who are at least age 65 or disabled. In general, Medicare coverage requires that the person, or the person's spouse, has worked an adequate number of calendar quarters in employment subject to federal payroll deductions. See 42 U.S.C. §§ 1395- 1395hhh (Medicare Act).

As relevant to this Article, the Medicaid program also pays for certain health care expenses of persons who are at least 65 years old or disabled. Medicaid eligibility is based not on work history but on financial need. See 42 U.S.C. §§ 1396- 1396v (Medicaid Act).

<sup>119</sup> 42 U.S.C. § 1395f(2)(B) (Medicare); 42 C.F.R. §§ 409.31- 409.35 (Medicare), 440.40 (Medicaid).

<sup>120</sup> 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).

For the same reasons, nursing homes by and large are not limited to persons having “a particular type of handicap.”<sup>122</sup> Since a nursing home generally can admit persons without handicaps, it cannot be said that admission requires a “particular type” of handicap.<sup>123</sup>

These same conclusions hold for assisted living facilities also. Like nursing home 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, residents are not required to need or use services.<sup>124</sup> On occasion, in fact, assisted living definitions state explicitly that an assisted living resident may not need the available services. In Kansas and Oklahoma, for example, a resident’s desire for personal care may be due to “functional impairments” or “by choice.”<sup>125</sup>

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<sup>121</sup> As a practical matter, of course, a person without a handicap has no reason to live in a nursing home, but this practical reality does not alter the fact that a nursing home is not prohibited from admitting or retaining persons without handicaps.

<sup>122</sup> 24 C.F.R. § 100.202(c)(2).

<sup>123</sup> Some nursing homes 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”). This specialization does not alter this Article’s analysis, because the specialization laws do not require a handicap or “particular type” of handicap as a condition of admission.

<sup>124</sup> *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).

<sup>125</sup> Kan. Stat. Ann. § 39-923(a)(5); Okla. Stat. tit. 63, § 1-890.2(1).

Again, public funding sources generally will not require that residents have handicaps, unless the assisted living facility itself is a subsidized housing project that requires a handicap as a condition of tenancy.<sup>126</sup> The Medicaid program in some states may pay for services provided in an assisted living facility -- through either a personal care services program or, more frequently, a home and community-based services (HCBS) waiver -- but these programs do not set assisted living standards.<sup>127</sup> Although federal law purports to require state Medicaid programs to establish “adequate standards” for providers of HCBS services, this requirement in practice means little more than requiring Medicaid-certified assisted living facilities to obtain an assisted living license – the same license required of *all* assisted living providers.<sup>128</sup> Nothing in Medicaid law

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As a practical matter, a person without a handicap generally does not move into assisted living. *See supra* at 15-16 (“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 is rather limited.” *Id.* at 116.

<sup>126</sup> *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).

<sup>127</sup> *See* 42 U.S.C. §§ 1396d(a)(24) (personal care services), 1396n(c) (HCBS waiver); Robert Mollica et al., *State Residential Care and Assisted Living Policy: 2004*, at 1-41 through 1-46 (March 2005) (personal care services and waiver services; personal care services identified as “state plan services”); GAO, *Federal Oversight of Growing Medicaid Home and Community-Based Waivers Should Be Strengthened*, GAO-03-576 (2003).

<sup>128</sup> 42 U.S.C. § 441.203(a)(1)

prohibits an assisted living facility from admitting an applicant without a handicap, assuming that the assisted living costs are covered by a non-Medicaid source.

As is similarly true for nursing homes, assisted living facilities are not limited to persons having “a particular type of handicap.”<sup>129</sup> Because an assisted living facility can admit persons without handicaps, admission certainly is not limited to persons with a “particular type” of handicap.<sup>130</sup>

## 2. No Priority for Handicap

Although long-term care facilities are not reserved for persons with handicaps or particular types of handicaps, there is a colorable – but ultimately unsatisfactory -- argument that a facility necessarily gives priority to persons with handicaps or (in limited circumstances) a particular type of handicap. The *raison d’etre* of long-term care is

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<sup>129</sup> 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).

<sup>130</sup> Assisted living facilities also are similar to nursing homes 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, “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 35 n.123 (nursing homes specializing in dementia care). As was true in the case of nursing homes, the specialization laws pertaining to assisted living do not require a handicap or a “particular type” of handicap as a condition of admission.

providing necessary services for persons with handicaps.<sup>131</sup> Proper operation of a long-term care facility requires the admission of persons with handicaps and, for that reason, it might be said that persons with handicaps have priority for admission.<sup>132</sup>

This interpretation appears compatible with the policy underlying the FHA and the no-inquiry regulation. The FHA broadly prohibits discrimination on the basis of handicap.<sup>133</sup> To limit opportunities for discrimination, the no-inquiry regulation prophylactically prohibits housing providers from inquiring into an applicant's handicap. In short, the FHA and the no-inquiry regulation are meant to benefit persons with handicaps. Consistent with this intent, the regulation's exceptions identify situations in which a handicap might be a benefit – used *not* to bar or restrict admission, but instead to facilitate an applicant's admission.

The no-inquiry regulation's subsection (c)(2) grants an exception when a handicap is required for admission. Subsection (c)(3) arguably is a catch-all provision that covers those situations in which a handicap is not required but nonetheless creates a priority. Subsection (c)(3) could be read broadly, consistent with Congressional intent, to include those situations in which housing is designed for, or intended for use by, persons

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<sup>131</sup> See *supra* at 7-9.

<sup>132</sup> In most situations, this priority is moot on a practical level. As discussed above (*see supra* at 35-36 n.125), admission to a long-term care facility is of interest only to persons with handicaps or -- to a limited extent in the assisted living context -- to persons 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; the nature of long-term care creates an applicant pool comprised overwhelmingly of persons with handicaps.

<sup>133</sup> 42 U.S.C. § 3604(f)(1)-(2).

with handicaps.<sup>134</sup> Persons with handicaps thus could be considered to have priority for admission to long-term care facilities, whether or not a particular facility has formally adopted such a priority.

Following this reasoning, priority for a “particular type” of handicap would be considered to be offered by long-term care facilities with formalized specializations.<sup>135</sup> As cited earlier, some long-term care facilities follow state standards for specialization in the care of residents with dementia or similar cognitive disorders.<sup>136</sup> Formalized facility specializations generally vary from state to state, and may include such specializations as mental health services or ventilator care.<sup>137</sup>

Ultimately, however, these “presumed priority” arguments are not tenable. The arguments are premised on the presumption that long-term care facilities will prefer

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<sup>134</sup> *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).

<sup>135</sup> 24 C.F.R. § 100.202(c)(3).

<sup>136</sup> *See supra* at 35 n.123 & 37 n.130.

<sup>137</sup> *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 home or an entire skilled nursing home 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 homes; 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 (“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).

applicants with handicaps but, on at least some occasions, the opposite is true. A facility may have a financial incentive to prefer admission of a person without a handicap, in order to limit expenses, or to maintain an image of a facility for “active” seniors.<sup>138</sup> For similar reasons, a facility with a specialization may see a financial or operational advantage in admitting an applicant who does not need the specialized services.

Also, presuming a priority for handicaps could be counterproductive for persons with handicaps. In advancing the “presumed priority” argument, this Article has pointed out that it would be consistent with the FHA and the no-inquiry regulation for a provider to grant priority to applicants with handicaps. Significantly, however, this reasoning does not change the fact that a facility is not required to offer such a priority. A facility could obtain an applicant’s medical information based on the presumption that a handicap would give priority, but could use the information to discriminate against applicants with handicaps.

In relevant part, the no-inquiry regulation refers to “a priority *available* to persons with handicaps or to persons with a particular type of handicap.”<sup>139</sup> It is insufficient that the long-term care system generally would benefit if facilities were to give priority to

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<sup>138</sup> See, e.g., *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d Cir. 1995) (nursing home 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 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).

<sup>139</sup> 24 C.F.R. § 100.202(c)(3) (emphasis added).

persons with handicaps, or that in practice most facilities do offer such priority. The FHA was enacted because housing providers do not always act consistently with good public policy, and some discriminate against persons with handicaps. If a priority does not exist in practice – in large part because it is not legally required – then the priority-based exceptions do not apply.

**VI. TO OBTAIN ACCESS TO APPLICANTS' MEDICAL INFORMATION, FACILITIES WOULD ESTABLISH ADMISSION PRIORITY FOR APPLICANTS WITH HANDICAPS**

The preceding discussion suggests how long-term care facilities likely would feel forced by circumstances to develop exceptions to the no-inquiry regulation, if HUD or private parties were to begin enforcing the regulation against facilities. This Article has demonstrated that a facility generally does not have a right to demand medical information from applicants, because long-term care facilities are not limited to persons with handicaps, and do not necessarily give admission priority based on handicaps.

The key word in the preceding sentence is “necessarily.” A long-term care facility may not be required to grant a handicap-based priority but, as cited earlier, it nonetheless may choose to offer such a priority.<sup>140</sup>

An exception to the no-inquiry regulation is made in the case of “a priority *available* to persons with handicaps or to persons with a particular type of handicap.”<sup>141</sup> Taking the initiative, a facility could claim this exception by establishing a priority for applicants with handicaps or a particular type of handicap.

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<sup>140</sup> 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988); 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

<sup>141</sup> 24 C.F.R. § 100.202(c)(3) (emphasis added).

If the no-inquiry regulation actively were to be enforced against long-term care facilities, a facility would have great incentives to establish such a priority. Without a priority, a facility would have no right to inquire into an applicant's medical condition, and would be flying blind when making admission decisions. Given facilities' intense interest in applicants' medical conditions, the facilities would waste little time in declaring the necessary priorities.

One unsettling scenario immediately suggests itself: the declared priorities would be shams, relevant only in justifying the facilities' intrusions into applicants' medical conditions. Specifically, facilities would declare a pro forma priority for persons with handicaps, and would use the priority to demand extensive disclosure of applicants' medical conditions and histories.

This scenario is unduly pessimistic. In fact, a declared priority would benefit individuals with handicaps. Currently, long-term care facilities generally have no obligation to prefer persons with handicaps, and on occasion may choose an applicant without a handicap over one with a handicap. In such a fact pattern, a person with a handicap would benefit if the facility previously had adopted a priority for applicants with handicaps.

A more wide-reaching benefit to applicants would be the limits placed on the medical information requested. Currently – without enforcement of the no-inquiry regulation – long-term care facilities assume carte blanche access and routinely request voluminous documentation of applicants' medical conditions. Although some of the requested information is necessary to determine whether the facility is appropriate for an applicant, much of it is used less admirably to discriminate against applicants with greater

care needs. In making admission decisions, facilities routinely use preadmission software that projects each applicant's cost and revenue.<sup>142</sup>

Under the no-inquiry regulation, however, a facility should be able to inquire into an applicant's medical information only to the extent necessary. The FHA's letter and spirit counsel that any inquiry into a handicap should be as restricted as is practicable. As noted by a federal district court, and quoted earlier in this Article, "an applicant's privacy rights are to be preserved to the extent possible and ... a landlord should use the least invasive means necessary to verify an applicant's qualifications."<sup>143</sup>

The relevant statutory and regulatory authority is buttressed by the previously-discussed rulings that allow a federally subsidized housing program to require verification of an applicant's age or disability, but prohibit the program from requiring a more detailed physician's statement.<sup>144</sup> Similarly, HUD has emphasized that the right to inquire into one priority-creating handicap does not authorize a housing provider to make inquiries regarding other medical issues.<sup>145</sup>

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<sup>142</sup> See, e.g., American Healthtech, With Admission Analysis You Can Finally Manage Your Bottom Line One Admission at a Time!, [www.healthtech.net/aamodule.pdf](http://www.healthtech.net/aamodule.pdf) (viewed on August 14, 2006); ADL Data Systems, Inc., Pre-Admission, [www.adldata.com/Software/Registration/PreAdmit.html](http://www.adldata.com/Software/Registration/PreAdmit.html) (viewed on August 14, 2006).

<sup>143</sup> *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998).

<sup>144</sup> *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 21-22.

<sup>145</sup> 54 Fed. Reg. 3,232, 3,246 (Jan. 23, 1989).

## VII. FHA ALLOWS FACILITY TO OBTAIN MOST MEDICAL RECORDS OF CURRENT RESIDENTS

### A. No-Inquiry Regulation Applies Explicitly to “Applicant”

A remaining issue is the no-inquiry regulation’s applicability to a current resident of a long-term care facility. The analysis of this issue is straightforward, dictated by the regulation’s consistent use of the term “applicant.” The regulation refers 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.”<sup>146</sup> Furthermore, each of the regulation’s five exceptions refers explicitly and exclusively to “an applicant,” and introductory language specifies that the exceptions apply only if the “inquiries are made of all applicants.”<sup>147</sup>

Notably, the term “applicant” is used only in the regulation’s “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.”<sup>148</sup>

Also, as previously discussed, the no-inquiry regulation is based on analogous Section 504 regulations relating to *pre-employment* inquiries by an employer.<sup>149</sup> If, as is

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<sup>146</sup> 24 C.F.R. § 100.202(c) (emphasis added).

<sup>147</sup> 24 C.F.R. § 100.202(c)(1)-(5).

<sup>148</sup> 24 C.F.R. § 100.202(a), (b) (subsection formatting omitted).

<sup>149</sup> *See supra* at 18 n.55; 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);

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 persons) but not to existing tenants.

### **B. FHA Statutory Language Prohibits Inappropriate Inquiries**

Although the no-inquiry regulation does not apply to existing tenants, a landlord cannot inquire with impunity into an existing tenant's handicap. The FHA broadly prohibits handicap-based discrimination "in the sale or rental [of] ... a dwelling," or "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."<sup>150</sup> In some circumstances, an inquiry into a tenant's handicap is unlawful under these standards.<sup>151</sup>

A finding of discrimination is most likely when a landlord crosses the line from inquiry to harassment. A landlord pushed past this line in the administrative case of *HUD v. Williams*.<sup>152</sup> 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.<sup>153</sup> The administrative law judge concluded appropriately that the no-inquiry regulation did not apply – because the tenant was a "sitting tenant" rather than an

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*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).

<sup>150</sup> 42 U.S.C. § 3604(f)(1)-(2); *see* 24 C.F.R. § 100.202(a)-(b) (corresponding language in regulations).

<sup>151</sup> *See Cason v. Rochester Housing Authority*, 748 F. Supp. 1002, 1007-1008 (W.D.N.Y. 1990) (inquiry into applicants' handicaps improper under both no-inquiry regulation and statutory prohibition against discrimination).

<sup>152</sup> 1991 WL 442796, at \*6, 18 (H.U.D.A.L.J. 1991).

<sup>153</sup> *HUD v. Williams*, 1991 WL 442796, at \*6, 18 (H.U.D.A.L.J. 1991).

“applicant” – but found that the landlord’s inquiry had violated the FHA.<sup>154</sup>

The administrative law judge cited the House of Representatives Report accompanying the FHA, as well as the preamble to the FHA regulations.<sup>155</sup> In the section cited by the administrative law judge, the House Report notes that the FHA’s “direct threat” provision – that nothing in the FHA requires that tenancy be offered to a person who would be a threat to others’ health, safety, or personal property -- does not authorize a landlord to ask “questions which would require the applicant *or tenant* to waive his right to confidentiality concerning his medical condition or history.”<sup>156</sup> The preamble, as cited by the administrative law judge, “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 applicants or *tenants* less favorably than other applicants or *tenants*.’”<sup>157</sup>

The administrative law judge concluded 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

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<sup>154</sup> HUD v. Williams, 1991 WL 442796, at \*13-18 (H.U.D.A.L.J. 1991).

<sup>155</sup> HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991).

<sup>156</sup> H.R. Rep. No. 100-711, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191 (emphasis added); *see* HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991).

<sup>157</sup> HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991) (emphasis added); *quoting from* 24 C.F.R. Ch. I, Subch. A, App. I at 577 (1990).

inquiries.”<sup>158</sup> 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 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.<sup>159</sup>

An exception was noted: “However, although blanket questioning of sitting and prospective tenants as to their disabilities is not permissible, certain inquiries of

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<sup>158</sup> 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).

<sup>159</sup> HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991).

individual tenants may be permissible,<sup>160</sup> 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.”<sup>161</sup> Absent such a nexus, according to the administrative law judge, “such an inquiry is impermissible under the [FHA].”<sup>162</sup>

This issue has been addressed on one other occasion. With much more limited analysis, a federal district court in *Niederhauser v. Independence Square Hous.* reached a similar conclusion regarding a federally-subsidized housing project that had inquired into tenants’ ability to live independently:

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.<sup>163</sup>

The court did not specify whether it was relying on the no-inquiry regulation itself or on the broader statutory prohibitions. Unlike the administrative opinion in *Williams*, the federal court decision never addresses the fact that the no-inquiry regulation by its terms

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<sup>160</sup> HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991).

<sup>161</sup> 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.

<sup>162</sup> HUD v. Williams, 1991 WL 442796, at \*14 (H.U.D.A.L.J. 1991).

<sup>163</sup> *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).

applies only to an “applicant.”<sup>164</sup>

Under this authority – the FHA, along with the decisions in *Williams* and *Niederhauser* -- a long-term care facility should be allowed to inquire into a current resident’s medical conditions to an appropriate extent. “Blanket” inquiries are not allowed – inquiries must be relevant to the care provided or coordinated by the facility.

Because a long-term care facility is obligated to provide personal and health care services, however, an “appropriate” inquiry may often be virtually equivalent to a blanket inquiry.<sup>165</sup> A nursing home has a legitimate need for extensive information, given residents’ significant health care needs, and the facilities’ legal obligation to provide comprehensive care.<sup>166</sup> Increasingly the same is true in assisted living facilities, as they admit and retain residents who need personal and health care on a daily basis.<sup>167</sup>

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 facility seeking information for the purposes of care planning. In *Williams* and *Niederhauser*, the landlords at best were

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<sup>164</sup> *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.5 (N.D. Cal. 1998); *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”).

<sup>165</sup> *See, e.g.*, 42 U.S.C. §§ 1395i-3(b)(2)-(3), 1396r(b)(2)-(3) (assessments and care plans in nursing homes); 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”).

<sup>166</sup> 42 U.S.C. §§ 1395i-3(b), 1396r(b) (quality of care requirements in Nursing Home Reform Law).

<sup>167</sup> *See supra* at 9.

meddling in their tenants' affairs, and at worst were harassing them. By contrast, a long-term care facility has legal obligations to provide care, based on federal and state quality of care standards, and on contracts with residents. A facility's request for medical information likely might be driven not by animus or prejudice, but by a legitimate desire – indeed, an obligation -- to provide appropriate care.

The administrative law judge in *Williams* acknowledged that a post-admission inquiry might be appropriate given the proper “nexus” between a tenant's handicap and the others' safety – in other words, if the tenant's handicap was a matter of the landlord's legitimate interest.<sup>168</sup> In the long-term care context, the facility operator has a legitimate interest in a resident's care needs, with an obvious nexus between the resident's handicaps and the operator's obligations to provide necessary care services. Also, an operator's access to a resident's medical information is not likely to lead to the resident's eviction, because a facility generally cannot evict a resident except under certain situations specified in state or federal law.<sup>169</sup>

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<sup>168</sup> 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 18-19.

<sup>169</sup> Nursing homes have relatively little discretion in evictions. *See* 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A) (limited reasons for eviction in federal Nursing Home Reform Law); 42 C.F.R. § 483.12(a)(2) (same). Assisted living facilities have considerably more discretion, depending on state law. *See generally* Eric Carlson, Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care, at 43-48 (2005)

Admittedly, the case authority here is limited and ambiguous. Although this Article's resolution of this issue is not self-evident, the resolution is based on analysis that best reconciles the FHA's statutory language with the realities of long-term care. The no-inquiry regulation does not apply to current facility residents, and the FHA's general provisions do not bar a facility from making good faith inquiries for purposes of assessment or care planning.

**VIII. EACH FACILITY SHOULD ESTABLISH ADMISSION PRIORITY FOR APPLICANTS WITH CARE NEEDS WITHIN FACILITY'S CAPABILITIES**

**A. Priority Needed to Allow Facility to Obtain Corresponding Access to Applicants' Medical Records**

In order to obtain access to applicants' medical records, a long-term care facility would be well-advised to establish priority admission for applicants who need the level of care provided by the facility, and whose needs do not exceed the facility's maximum level of care. Such a priority could be used to justify medical record access under the exception for "a priority available to persons ... with a particular type of handicap."<sup>170</sup>

Notably, such a priority generally could not be used to discriminate against applicants with relatively greater care needs, unless those care needs exceeded the limits of the facility's license.<sup>171</sup> For example, a nursing home could not establish an admission priority that disfavored incontinent applicants, since incontinence is among the conditions

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<sup>170</sup> 24 C.F.R. § 100.202(c)(3).

<sup>171</sup> See *supra* at 10-12 for discussion of state law provisions that prohibit residents with certain conditions from living in an assisted living setting.

for which a nursing facility must be prepared.<sup>172</sup> If a policy purported to disfavor applicants whose care needs were within the facility’s level of care but were relatively complicated or expensive, the policy would violate federal antidiscrimination law including the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.<sup>173</sup>

If a facility had a formalized specialization, however, it could give priority to applicants in need of the specialized service. “Formalized” refers only to those specializations recognized by federal or state law. Without this limitation – for example, if a specialization could be based merely on a facility’s claim – a facility might purport to have a multitude of specializations, and claim a right thereby to obtain a substantial portion of an applicant’s medical records. In point of fact, nursing homes frequently claim to be specialists in a plethora of different care procedures.<sup>174</sup>

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<sup>172</sup> 42 U.S.C. §§ 1395i-3(b)(4)(A)(i), 1396r(b)(4)(A)(i); 42 C.F.R. § 483.25(a)(1).

<sup>173</sup> *See supra* at 13-14.

<sup>174</sup> *See, e.g.*, Fair View Nursing Home, available at [www.milebluff.com/fair\\_view\\_nursing\\_home.htm](http://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](http://www.goldenstatehealth.com/facilities/goldenstatewv.html) (nursing home “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](http://www.lorienhealth.com/riverside) (nursing home “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).

Thus, if a facility specializes in the care of residents with dementia, the facility should give priority to applicants with dementia. Using this priority, the facility will have the right to inquire if an applicant has been diagnosed with Alzheimer's disease or a comparable dementia.<sup>175</sup>

After an admission, a facility will not be subject to the no-inquiry rule in its dealings with the now-resident. The facility will have wide-ranging access to medical information in order to assess the resident and then plan and provide care, provided that the information is not sought or used for harassment or another improper purpose.<sup>176</sup>

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

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<sup>175</sup> See *supra* at 35 n.123 & 37 n.130 for discussion of dementia specializations.

<sup>176</sup> See *supra* at 44-51; see also 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”).

conditional on successful completion of a medical examination, as long as the medical examination is required across the board.<sup>177</sup>

**B. Testing the Proposal: Admission Priorities and Access to Medical Records in Sample Situations**

Under these procedures, a long-term care facility generally will have a right only to a limited amount of medical information from an applicant. In most cases, an applicant should be able to demonstrate priority status with the release of only a handful of documents or, possibly, with no more than a certification by the applicant's physician.

Compared to nursing homes, assisted living facilities in general will be able to require more extensive disclosure, due to the greater risk that an assisted living facility will be incapable of meeting an applicant's needs.<sup>178</sup> Nursing homes almost always will be equipped to meet an applicant's long-term care needs, except in the relatively rare instances in which an applicant requires ventilator care or a similar non-mandatory service, or suffers from a mental illness that requires placement in a locked psychiatric facility.<sup>179</sup>

To explore these issues, this Article imagines two potential long-term care residents: Arthur Applicant and Sally Seeker. Each is 85 years-old and has lived alone at

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<sup>177</sup> 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).

<sup>178</sup> See *supra* at 10-12.

<sup>179</sup> See *supra* at 10.

home until now, receiving extensive in-home assistance. Mr. Applicant now needs long-term care primarily due to his weakness and his weight. He requires assistance to walk, or to transfer to or from a bed or chair. He weighs close to 250 pounds, and his in-home aides are having great difficulty in providing the necessary assistance. Mr. Applicant has insulin-dependent diabetes, requiring regular injections of insulin. He has shown some signs of forgetfulness, but overall his memory and reasoning are intact.

Ms. Seeker's problems are more cognitive than physical. She has dementia, and its effects are becoming more and more pronounced as years go by. Her short-term memory is extremely limited, and last year she almost started a fire when she completely forgot that she had dinner heating up on the stove.

In a drastic contrast from Ms. Seeker's previous demeanor, she is suspicious towards everyone but immediate family. In the last six months, she has driven away eight different personal care aides, either by firing them outright or by wearing them down with repetitive accusations of theft and disloyalty. Two months ago, after hurling a vase at a frightened aide, Ms. Seeker was held for observation in the local hospital's psychiatric ward.

Mr. Applicant and Ms. Seeker each are applying for residence at two long-term care facilities: Nirvana Meadows Nursing Home and Amiable Estates Assisted Living Manor. Nirvana Meadows has no formalized specialization. It has established an admission priority for applicants who have handicaps but whose care needs do not exceed the level of care provided for under the nursing home's license.

Amiable Estates has received certification from the state for a dementia specialization. Accordingly, its priorities include a preference for applicants with

dementia, as well as a more general preference for applicants with handicaps. Based on prohibitions in state law, the facility refuses to admit any person who needs around-the-clock nursing care or who requires assistance from two or more persons in order to transfer to or from a bed or chair.

First consider Mr. Applicant and his communication with Nirvana Meadows Nursing Home. He easily can establish a need for nursing home services, by submitting a limited number of medical records that demonstrate his need for assistance in transferring and injecting insulin. He may choose instead to submit a short physician statement, if his physician is willing to write one.

A physician's statement should be sufficient to show that Mr. Applicant's care needs do not exceed a nursing home's maximum level of care. A record of a recent physical examination or assessment also should suffice. Nirvana Meadows should not be allowed to use the level-of-care ceiling to justify a broad request for medical records pertaining to Mr. Applicant.

More information could be required from Mr. Applicant if he were to seek residence at Amiable Estates. Proof of needing the facility's care should be similar – submission of a physician statement or a limited number of medical records. The need for additional documentation would arise from Amiable Estate's right to inquire about dementia and a possible need for two-person assistance. Given its dementia care specialization, the facility should be entitled to review records documenting Mr. Applicant's memory problems. Also, because even limited review of Mr. Applicant's records would demonstrate a potential conflict with the two-person-assist prohibition, the facility should be within its rights to demand more than a physician's statement on the

topic. On the other hand, a physician's statement should suffice for establishing that Mr. Applicant does not require around-the-clock nursing care, since the nursing home would have no indication that this prohibition would affect Mr. Applicant.

Like Mr. Applicant, Ms. Seeker should be required to submit only limited information to support an application to Nirvana Meadows. A need for nursing home care could be demonstrated with a record of a recent physical examination or assessment, or with a short physician statement. Her physician could certify that her care needs do not exceed a nursing home's level-of-care ceiling.

Ms. Seeker should not be required to submit information regarding her disputes with and suspicions about personal care aides. While this information will be relevant after admission to develop a care plan, it does not affect the appropriateness of Ms. Seeker's residence in Nirvana Meadows or any other nursing home.

As was true in Mr. Applicant's case, Ms. Seeker can be required to disclose additional information to Amiable Estates. Because the facility has a recognized specialization in dementia care, it likely is within its rights to request records documenting Ms. Seeker's cognitive problems. Ms. Seeker would not be required to disclose the vase-throwing incident or her suspicions towards personal care aides. The facility should be entitled to only the disclosure necessary to establish that Ms. Seeker has dementia.

Other relevant issues – needing assisted living facility care, and not exceeding the level-of-care ceiling – should be addressed with a limited release of records or a physician's statement. Nothing about Ms. Seeker's profile indicates that her care needs

exceed what can be provided in an assisted living facility. Specifically, she does not require around-the-clock nursing care or two-person assistance in transferring.

## **IX. RESPONDING TO POSSIBLE OBJECTIONS**

This Article’s analysis is well-grounded in the FHA and other relevant legal authority. Admittedly, however, its conclusions are largely theoretical, owing to the absence of evidence that the FHA ever has been applied in a long-term care admission. As a matter of course, long-term care facilities assume broad access to an applicant’s medical records and, indeed, access generally is provided without question.

Long-term care facilities likely will resist this Article’s reasoning, based on a general belief that the FHA’s no-inquiry doctrine is incompatible with long-term care realities.<sup>180</sup> One possible argument may be directed at the cases holding that long-term care facilities are subject to the FHA. A facility might point out that the vast majority of these cases pertain to zoning and none of them involve a facility’s admission decisions.<sup>181</sup>

Another argument might point out that health care providers routinely have wide access to patients’ medical information. Why, this argument asks, should a health care provider have its hands tied behind its back just because it couples health care with housing?

The response to these arguments is based both on law and policy. The legal response is simple: if a long-term care facility is considered a “dwelling” under the FHA,

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<sup>180</sup> See, e.g., 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).

<sup>181</sup> See *supra* at 28.

it is governed by the FHA in all aspects of its operation. The FHA's definition of "dwelling" is not conditional in any way.<sup>182</sup>

This legal argument is buttressed by fairness considerations. If a facility can invoke the FHA in order to protect its own interests in a zoning dispute, it should not be allowed to disavow the FHA when an applicant seeks to invoke it in an admission dispute. The FHA was enacted primarily to protect persons with handicaps, not the facilities that house them.

As to the supposed prejudice to long-term care facilities, as compared to other health care providers, consider that other health care providers generally do not pick and choose their patients in the way that long-term care facilities accept or reject applicants. Many health care providers do not see medical records until after a person has become a patient. Furthermore, in one situation in which screening had become a problem, Congress enacted federal law specifically to prevent hospitals from "dumping" patients who were perceived as undesirable.<sup>183</sup>

Furthermore and finally, long-term care facilities legitimately face greater obligations because they provide housing along with health care. A nursing home or assisted living facility is home to its residents, and an applicant's choice of home should not be denied due to irrelevant medical conditions.

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<sup>182</sup> See 42 U.S.C. §§ 3601- 3619.

<sup>183</sup> See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(b)(1)(A).

## **X. CONCLUSION**

The FHA's no-inquiry regulation should be enforced against long-term care facilities. Active enforcement would present facilities with a choice – do nothing and be barred from obtaining any medical information from applicants, or establish appropriate admission priorities and be given reasonable access to applicants' relevant medical information.

Most facilities undoubtedly would choose to establish appropriate priorities. In turn, consumers would benefit both from the priorities and from the limits placed on the facilities' information-gathering.

This analysis should not be seen as merely reconciling extant long-term care procedures with the Fair Housing Act. The no-inquiry regulation 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 an applicant is appropriate for a facility. Enforcement of the no-inquiry regulation would properly limit a facility's ability to discriminate on the basis of medical condition.

Applicants for long-term care are acutely vulnerable to discrimination, and would benefit greatly from active enforcement of the no-inquiry regulation. 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.