

## Retirement Communities and Leasing: FHA Compliance, Age Verification, Reasonable Accommodations

---

TUESDAY, OCTOBER 27, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Paul A. Gordon, Partner, **Hanson Bridgett LLP**, San Francisco

Matthew J. Murer, Shareholder, **Polsinelli PC**, Chicago

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Retirement Communities and Leasing:  
FHA Compliance, Age Verification,  
Reasonable Accommodations

# Faculty

Paul Gordon

Hanson Bridgett LLP

(415) 995-5014

(415) 713-7502 (cell)

[PGordon@hansonbridgett.com](mailto:PGordon@hansonbridgett.com)

Matthew J. Murer

Polsinelli PC

312-873-3603

773-259-9381 (cell)

[MMurer@Polsinelli.com](mailto:MMurer@Polsinelli.com)



## The Fair Housing Act

The Fair Housing Act prohibits discrimination in the sale or rental of dwellings on the basis of race, color, sex, religion, national origin, familial status, and disability.



# Fair Housing Act

- Applies to all dwellings, residences
  - (not transient occupancies like hotels)
- Includes independent living, assisted living, skilled nursing
- Regulates access to facilities and services

# Americans with Disabilities Act

Prohibits discrimination on the basis of physical or mental disability (among other protected categories) in “public accommodations operated by private entities”.



Long term care facilities and nursing homes are expressly covered.



# Americans with Disabilities Act

- Applies to “public accommodations”
  - E.g., restaurants, movie theatres, doctors’ offices, offices and accommodations
- In retirement communities, apartments covered by FHA
- Common areas (e.g., dining rooms, offices) may be covered by ADA only

# Discrimination Statutes

- For senior housing communities with elements of both residential dwellings and service facilities, both the FHA and ADA apply.



# Age and Familial Status

- While the Fair Housing Act prohibits discrimination against individuals on the basis of familial status, limited exceptions were created under the Housing For Older Persons Act.
- These exceptions include housing that is:
  - Provided under a state or federal program that HUD has determined to be specifically designed to assist elderly persons;
  - Intended for, and **solely occupied by persons 62 years of age or older**; or
  - Intended and operated for occupancy with at least 80% of the units having at least one resident 55 years of age or older.
- 55 and over communities must survey their residents every 2 years to ensure that they meet the 80% requirement.

# Acceptable forms for Age Verification for HUD

- Birth Certificate
- Baptismal Certificate
- Military Discharge papers
- Valid passport
- Census document showing age
- Naturalization certificate
- Social Security Administration Benefits Print Out

# Acceptable forms for Age Verification for HUD From HOPA Q & A

- Birth Certificate
- Driver's License
- Immigration Card
- Military ID
- Valid passport
- Any other state, local, national or international documentation, provided it contains current information on the age or birth of the possessor
- Self certification in the lease

# What is a “disability”

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

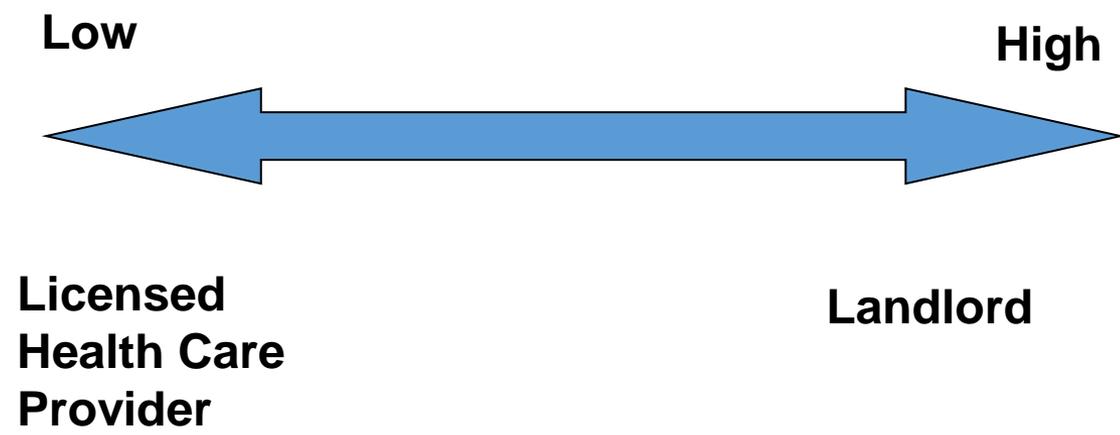
# Prohibited Inquiries

---

- These laws make it unlawful to
  - make an inquiry to determine whether an applicant for occupancy has a disability, or
  - to inquire as to the nature or severity of a disability
- Allows for inquiries into the applicant's ability to meet allowable "requirements of residency"
- So long as such inquiries are made of all applicants equally, whether or not they are disabled.



# Liability – O – Meter (FHA)



# Liability – O – Meter (Civil)



**Landlord**

**Licensed  
Health Care  
Provider**



# Conditions of Occupancy: Independent Living

- Use of the term "independent living"
  - "Independent living" is widely accepted as a description of the kind of senior living property where only hospitality types of services (such as dining and housekeeping), are provided, but health care or personal care are not offered
  - However, "independent living" criteria have been misused to illegally deny occupancy to disabled people who are unable to care for themselves but who can receive adequate care from a third party, such as a private caregiver. Such uses of "independent living" have been determined to violate the Fair Housing Act

# Conditions of Occupancy: Active, Independent

- Communities' use of words like "active" and "independent" to describe prospective or current residents are often considered code for an anti-disabled bias
  - Better to describe the activity programs available at the property rather than to describe the residents as "active"
- Some owner/operators have chosen to refer to their communities as "residential living," rather than "independent living," properties

# Conditions of Occupancy: Care Needs

- Medical screening
  - Stand-alone independent living properties (for example, not part of a continuing care retirement community) may not medically screen applicants for occupancy or require health updates to determine appropriateness for continued occupancy
- Private duty aides coming onto or living on the premises permitted if needed for a resident's disability
  - May need to waive guest fees or make other reasonable accommodations



# Emergency Call Systems

- Many operators include emergency call systems even though care services are not offered
- Important to specify limits of the service
  - Call 911 only, no other response or aid rendered
  - No monitoring of health or safety
  - Best to make it optional
  - Disclosures and disclaimers as to possible consequences of opting in or out

# HUD v. Oakmont Senior Communities of Michigan

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

# HUD v. Oakmont Senior Communities of Michigan, cont'd

- Policies **permitted** by the HUD agreement included:
  - Voluntary diet and safety programs
  - Mandated renter's insurance for the apartment and common areas
  - Informing residents that management would not provide care
  - Requiring that residents not disrupt others' quiet enjoyment of the premises
  - Limiting the number of residents in certain areas, to avoid overcrowding, for safety reasons

# 2015 US v. Applewood

- Applewood of Cross Plains, LLC owned and operated LITCH apartments.
- Laura Doty had cerebral palsy and was sight impaired.
- Brenda Doty, Laura's daughter, had Down Syndrome.
- Moved into Applewood apartments in July 2013.

# 2015 US v. Applewood

- During move in, at least 3 tenants made offensive comments and gestures to the Doty's, including stating “You don’t belong here. You belong in an institution.”
- 3 tenants complained to the owner and manager defendant, William Ranguette.
- Ranguette repeatedly stated he “didn’t get involved in tenant disputes.” Told the Doty's that their insurer would cover building because Brenda couldn’t live independently.

# 2015 US v. Applewood

- Tenants continued to harass the Doty's. Following Brenda around and making comments to her.
- The police were called on several occasions.
- Ranguette refused to renew lease. Refused to give any reason for the decision. Offered to refund deposit if they would move.

# 2015 US v. Applewood

- Settlement
  - Paid \$17,500 to Brenda and \$17,500 to Laura.
  - New policies.
  - Non-discrimination signage.
  - Training for staff.

# Admissions - Current Direct Threat

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

# Admissions - Current Direct Threat

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

# Admissions - Guidance on Direct Threat

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

# Admissions - Guidance on Direct Threat

- The assessment must consider: (1) the nature duration and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat.

# Admissions - Guidance on Direct Threat

- Must consider whether the individual has received intervening treatment or medication that has eliminated the direct threat.
- If there is a measure that may mitigate the threat, you may be required to allow it as a reasonable accommodation.

# Religion

- While this has not been a significant area of recent litigation, HUD recently initiated a complaint against two affordable senior housing complexes in Oklahoma for violating the Fair Housing Act for discriminating against individuals on the basis of religion on October 8, 2020.
- HUD initiated the complaint after receiving a letter from a resident who complained that management “demanded the removal of religious reading material from the common area and the removal of angel ornaments from the complex’s Christmas tree.”

# Religion

- The complaint was filed against the manager as well as the property owner.
- HUD's press release indicated that HUD complaints can be filed in cases "involving significant issues that are national in scope" or when the Department is aware of violations of the Fair Housing Act and broad public interest relief is warranted."



# What is a reasonable accommodation?

- Not required to provide an accommodation that will result in an undue financial or administrative burden.
- Not required to provide an accommodation that will result in a fundamental alteration in the nature of the program.



# What is a Fundamental Alteration?

- A modification that alters the essential nature of a provider's operations.
- Example – Tenant has a severe mobility impairment that limits his ability to walk. He asks housing provider to transport him to the grocery store and assist with shopping. Provider does provide transportation so this would be a fundamental alteration and would not be necessary.

# Advertising

- No statements that show a preference
- Individuals in photos represent population (race, disability, etc.)
- Best practice is to use house logo and state “we are an equal opportunity housing provider”
- No longer a regulatory requirement, but definitely a best practice.



# Motorized Carts

- No deposits.
- Cannot require insurance.
- Can test for safety.
- Can have guidelines.
- Cannot completely bar them from a community without a legitimate reason.
- Can require that they sign an indemnity agreement for damages.



# Dining Rooms

- Cannot bar residents with walkers or wheelchairs.
- Can require that wheelchairs and motorized carts be kept in a designated area.
- Cannot require that a resident transfer from a wheelchair or scooter to a chair.
- Cannot have a different dining room for disabled residents.

# Assistance Animals

- An independent living property must make exceptions to its "pet policy" for certain animals used by disabled people
- There are two types of Assistance Animals: Service animals and Emotional Support / Therapy animals
- Assistance animals are not "pets."



# Assistance Animals: Service Animals

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



# Assistance Animals: Emotional Support/Therapy

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

# Assistance Animals: Inquiries

- If the person's disability is “readily apparent” or known (for example, blindness), management should not ask about the disability or the need for the assistance animal
- There is a presumption that the disabled person knows what he or she needs to alleviate the disability
- Management can ask for a letter from a practitioner or therapist attesting to the person's disability and need for the assistance animal to alleviate symptoms of the disability

# Assistance Animals: Conditions

- Weight and breed limitations, deposit and fee requirements, may not be imposed on assistance animals
- Service animals and Emotional Support/Therapy animals may be required to conform to hygiene and conduct standards, as would be specified by most pet policies, such as not being aggressive toward other residents, excessive noise, or having a foul odor
- Animal owners are responsible for waste clean-up, feeding and other typical owner functions

# Resident Access: Private Aides



- Residents presumed to be entitled to bring private aides into other common areas as needed to provide full access to facilities and services
- Private duty aides providing eating assistance in the dining room may be limited where it is so disruptive that it interferes with the ability of other diners to peaceably enjoy their meals
- Private aides may accompany disabled residents on recreational outings

# Who brings these actions/ enforces the rules ?

- Advocacy groups – testers
- Attorneys – on behalf of a resident and family
- HUD
- Department of Justice
- State Civil Rights Agencies

# Why Attorneys Like These

- They get paid their attorney's fees

# Recommendations

- Review policies and contracts for “independent requirement”
- Do not use health assessments
- Train your marketing staff – everyone goes through the application process
- Review advertising
  - “Independent”
  - Photos

# Recommendations

- Review your diversity / disability statistics
- Review your caregiver policies
  - Limits on hours?
  - Prohibition?
- Separate dining?
- Required deposit or insurance for scooters?
- Mystery shop your community.