



FSA RISK MANAGEMENT SERVICES



Risky Business: Updates on FHA in Senior Living


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Disclaimer


- The information being provided today is NOT legal advice
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FSA Risk Management Program

- 22 organizations
- 36 campuses
- 6 states
- CCRCs, ADS, PACE, HHC




FSA Risk Management Program

- Enterprise-wide RM services:
 - Training/education
 - Assessments
 - Mock survey participation
 - Policy/procedures/guidelines
 - Assistance: events, complaints, pre-suit settlements, litigation guidance
- Varying services to fit RM needs



FSA Risk Management Program

- Implement, train, manage & oversee event reporting software
- Database focus: senior living
- Our partner, RLDatix, largest provider of healthcare software in North America



Sample Risk Areas/Topics Covered:

<ul style="list-style-type: none"> • FHA/Movement through Continuum • Falls: residents, visitors, volunteers • Wandering/elopements • Woodshops, pools, fitness areas • Setting Realistic Expectations • Proper documentation • Fleet safety/residents driving unsafely on campus 	<ul style="list-style-type: none"> • Proper investigations • Volunteer programs • Proper handling of complaints • Disclosure/communication • Sexual predators/assaults • Abuse/neglect • PDAs/outside vendors providing services • Hostile workplace/harassment
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Objectives Today

- Understand FHA:
 - Housing types
 - Prohibitions
 - Requirements
- Reasonable Accommodations/Modifications
- Essential Requirements of Tenancy
- Senior living risk areas
- Recent case law/updated HUD guidance
- Risk reduction suggestions




Fair Housing Act (FHA)

- FHA: 1968 banned housing discrimination based on
 - Race
 - Color
 - Religion
 - National origin
 - Sex (gender, includes sexual orientation, possibly gender identity)



Fair Housing Amendments Act (FHAA)


- FHAA: 1988
 - Familial status
 - Handicap/disability
- Refer to **both** as FHA



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Fair Housing Act


- Refer to all categories as:
–**PROTECTED CLASSES**
- Protected classes act as floor not ceiling



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Housing FHA Covers


- CCRCs
- Independent/Residential Living
- Assisted Living/Personal Care Homes
- Nursing homes/LTC (not sub acute rehab)
- Adult Foster Care
- Condos/townhomes
- Multi family
- Sales
- Rentals
- Multi million penthouses to HUD housing



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FHA Prohibits Discrimination That

- Denies access
- Restricts choices
- Discourages applying
- "Steers" towards certain housing
- Discriminates toward disabled
- Treats disabled differently/worse than non-disabled
- Gives preferential treatment



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FHA

- Civil rights statute
- State/local regs. may add MORE protected classes
- Caution: are there state/local laws increasing protected classes in your jurisdiction?
- ADA/FHA overlap: construction accessibility issues



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FHA

Under FHA, our organizations viewed as housing providers



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FHA, State/Local Housing Laws, ADA

- Significant Risk Management areas senior living


✓ Ads	✓ Construction/renovations
✓ Admissions	✓ Websites
✓ Scooters/PMDs	✓ Reasonable Accommodations
✓ Service animals	
✓ Private Duty Aides	



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FHA Broadly Defines Disability


- Written to include older adults
- Broader definition than SS Administration



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FHA Broadly Defines Disability

- "A physical or mental impairment which **substantially limits** one or more of a person's **major life activities**"
 - ❖ **"Substantially limits:"** unable to perform major life activity to extent that average person can
 - ❖ **"Major life activities:"** caring for oneself, walking, learning, performing manual tasks, seeing, speaking, hearing



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FHA DEFINITION: ALMOST ANY OLDER ADULT CAN BE CONSIDERED DISABLED UNDER THE STATUTE




Examples: Disabilities

- Mobility impairments
- Dementia
- Alcoholics
- Paranoid schizophrenics
- Hoarders
- Blind/deaf
- SAD
- Those who assist disabled



FHA Requirements

- "Reasonable Accommodations" (RA)
- Disabled/someone on their behalf must request RA
- Provider need not offer RA
- UNLESS disability is mental and person may not know entitled to request RA: must then be offered



Reasonable Accommodation

- "Reasonable Accommodation:"
exception/adjustment to usual rules, policies, services enabling disabled equal opportunity to use/enjoy home & community
- "Reasonable" decided on case by case basis
- "Reasonable accommodations" sufficiently related to disability, designed to alleviate effect on disabled



Reasonable Accommodations

- Must connect requested RA & disability
 - RA: must attempt to ameliorate disability
- Example:
No pet policy; exception made for blind resident to have their service animal



Who Can Ask & When?

- Applicant/resident, or someone on their behalf, must request RA
- Requests can be made any time during residency
- Can ask for as many RAs as needed



Limits on Reasonable Accommodations

- Providers **not required** to make RA that would either:
- Cause undue financial/administrative burden
- OR**
- Fundamentally alter nature of business operations



Who Pays?

- Applicant/resident pays outside services/services not provided at that level of care if it requires:
 - ✓ "fundamental alteration of the program" and/or
 - ✓ "undue financial/administrative burden" on provider
- But providers often pay costs associated with RAs



After RA Provided

- Document: did RA alleviate issue disability caused?
- Beneficial to offer multiple RAs if initial requested one fails to alleviate issue
- If requested RA is difficult, courts consider if suitable alternative offered to have same result



More on RAs


- Have RA policy (more to come)
- Create rules for common RAs (more to come)
- Rules clarify requirements/expectations for residents, provider
- DOJ and HUD Joint Statement on Reasonable Accommodations



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FHA also Requires Reasonable Modifications


- "Reasonable Modification" (RM)
 - Structural changes to afford disabled full use/enjoyment equal to non-disabled
 - Structural changes inside home and/or interior/exterior community common areas



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Reasonable Modifications


- Like RAs, requested RMs must have direct connection to disability
- Designed to alleviate effects of disability



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Reasonable Modifications: Examples

- Widen doorways for W/C accessibility
- Install grab bars in bathroom
- Lower kitchen cabinets to W/C height
- Install ramp for W/C accessibility
- Widen sidewalks, make curb cuts for W/C accessibility



Who Pays for RM?

- Resident/tenant pays
- 2 significant exceptions



Exception #1

- FHA: "covered dwelling" built after March 1991 **SHALL** be designed & constructed to certain accessibility standards
- If RM should have been included when constructed, provider responsible to pay
- Cases show continuing problem
- Architects/construction firms don't design/build to conform with accessibility standards



Exception #1

- Ensure architects familiar with FHA accessibility standards:
 - Doors wide enough for W/C
 - Accessible routes in/out/through units
 - Light switches, thermostats, outlets in accessible locations
 - Bathroom walls reinforced for grab bars
 - Doorway threshold height: ½ inch



Exception #2

- Provider receiving federal funding for housing must pay for RM UNLESS undue financial or administrative burden shown (per Section 504 Rehabilitation Act 1973)



Responsibility on Upkeep & Maintenance

- Resident: required to upkeep/maintain modifications when in their exclusive use
- Provider: required to upkeep/maintain modifications to common areas



Helpful Document

- Joint Statement from DOJ/HUD on Reasonable Modifications
- [Joint Statement on Reasonable Modifications - March 5, 2008 \(hud.gov\)](#)
 - Still most current
 - Guidance on how to interpret FHA
 - When/how RM requested
 - Rules of Verification



What can Providers do/ask??

- All must meet "Essential Requirements of Tenancy" (EROT)
- Can meet EROT **with or without assistance**
- RAs/RMs help disabled meet EROT



Essential Requirements of Tenancy

- Paying fees/rent timely
- Abiding by reasonable community rules
- Not unduly disturbing peace/tranquility of others (residents/staff)
- Keeping unit safe, clean & sanitary
- Not unduly damaging property
- Not being a Direct Threat to others health & safety (Christina's theory: or oneself)



General Information on FHA Cases

- Lawsuits against senior living rising as public more familiar with FHA
- Legal issues: complex, providers often unaware of potential liability
- Most end in Consent Decree
- Issues:
 - Ads, admissions, occupancy, transfers, service animals, scooters



General information on FHA cases

- Advocacy groups/law school clinics actively challenge CCRC practices, push issues forward
- Potential violations: restrictions/denials of RAs common
- Increased attention by FHA attorneys



General information on FHA cases

- Issues often overlap with stricter state/local anti-discrimination laws, ADA
- DOJ under Obama admin actively pursued civil rights litigation, Biden admin doing same
- Although not a focus of Trump admin, settlements continued, especially for sexual harassment




General information on FHA cases

- FHA enforcement:
 1. Case by individual in state/federal court
 2. By HUD through complaint or on it's own
 3. By DOJ where pattern/practice exists (usually referred to DOJ by HUD)




General HUD information FY 2019

- Investigated 10,615 claims of FHA discrimination complaints
- HUD partner entities: also investigate complaints
- 2 million annual discrimination instances occur according to HUD estimate



FY 2019 Discrimination Claims

- Disability: 61.7% (each year, trends up)
- Race: 26%
- *Retaliation: 12.7%
- Sex: 11%
- Familial status: 10%
- National origin: 9.6%
- Color: 4%
- Religion: 2.6%
- *Retaliation not protected class, but recognized cause of action



Why are Disability Complaints so High?

- Providers openly refuse RAs/RMs for disabled
- Discrimination therefore easier to detect
- Builders/developers/architects design, construct buildings violating Accessibility Guidelines
- HUD spends millions on education



New FHA Hot Topic: Sexual Harassment

- Cases increasing and are a focus
- **Bipartisan**
- Numerous recent settlements/Consent Decrees over last several years
- **Legislative efforts by Congress to increase protections against sexual harassment in housing**



Information on Case Law

- Most settle/Consent Decree
- **Money damages often not very large**
- Require policy changes
- **Require staff education**



Information on Case Law

- **Require government monitoring**
- Similar to Corporate Integrity Agreements (CIAs)
- **Consent Decrees: not binding on other jurisdictions, but used as persuasive evidence on how to rule**



Scooters: LTC Case Law Shows

- ✓ Permit scooters in dining rooms, apartments, common areas
- ✓ Don't limit where those on scooters can sit in dining rooms
- ✓ Don't require they have MD note/prove require PMD
- ✓ Don't test beforehand to prove safe operation
- ✓ Don't require insurance
- ✓ Don't require indemnification agreements
- ✓ Have PMD/RA policies



RA Policies: Include

- ✓ Where/how requests made & processed
- ✓ Document all requests
- ✓ Acknowledge written/verbal requests within 14 days
- ✓ Decision within 30 days & if deny, explain why
- ✓ Maintain all decisions
- ✓ Indicate all RA requests considered
- ✓ Grant those that are reasonable within FHA
- ✓ No extra fees on resident




Important! Keep in Mind That

- Only those who are a "direct threat" or cause substantial physical damage to property may be restricted in use of PMDs!
- Do not wait until someone is hurt or substantial damage caused before assessing/evaluating
- Document all events, including near misses!




Service Animals: Case Law Shows

- ✓ No requirement for service animal to wear special harness or collar
- ✓ Emotional support animals (AKA companion animals) permissible under FHA
- ✓ Not permissible under ADA
- ✓ Provider cannot charge pet security deposit (it's not a pet!)
- ✓ Verification tricky, specialized animal training not needed
- ✓ Animals other than dogs should be considered
- ✓ Only request information on disability if not obvious
- ✓ Use least restrictive request for medical records




Service Animals: New HUD Guidance

Updated HUD guidance on animals as Reasonable Accommodations issued January 2020



Updated HUD Guidance on Animals


- [HUDAsstAnimalNC1-28-2020.pdf](#)
- Assessing Requests for Animals as Reasonable Accommodations
- Provides Best Practice recommendations
- Clarifies/reiterates 2 types of animals permitted by FHA:
 - Service animals (dogs only)
 - Support Animals, including emotional support



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Updated HUD Guidance on Animals


- Guidance helps distinguish between:
 - People with non-obvious disabilities with legitimate needs for assistance animals
 - People without disabilities who want a pet but want to avoid fees/restrictions on pet
- Not intended to reassess RA's already granted



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Updated HUD Guidance on Animals


- Service Animal:
 - Dogs trained to work/perform tasks benefiting disabled
 - Must be direct nexus between animals' work and disability
- Other animals, **domestic or wild, trained or untrained, are NOT** Service Animals (but may be Assistance Animals)



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Updated HUD Guidance on Animals

- If disability & work of dog "readily" apparent, no further questions, grant RA
- Examples: when the dog is
 - Guiding person with low vision/blind
 - Pulling W/C
 - Assisting with stability/balance to someone with observable mobility impairment



Updated HUD Guidance on Animals

- If work/disability is not apparent, ask 2 questions:
 - Is the animal required due to disability? And
 - What work/task is animal trained to perform?




Updated HUD Guidance on Animals

- Don't ask nature/extent of disability
- Don't ask for documentation
- If answer to either question is NO/none


↓

Not a Service Animal, but may be Support Animal



Updated HUD Guidance on Animals

- Residents can make RA request before/after getting animal
- Can request RA for animal after termination of tenancy, BUT creates inference AGAINST good faith on tenant!




Updated HUD Guidance on Animals

- **Support Animal:** trained animal, domestic or not, that works, performs tasks, provides assistance, and/or provides emotional therapeutic support for disability





Updated HUD Guidance on Animals

- For Support Animals, ask:
- Does the person have an observable disability or do you already have info to believe resident has disability?
- If yes, grant RA
- *Especially relevant to us as we often have info related to resident's disability




Updated HUD Guidance on Animals

- If no, has resident provided information that reasonably supports claim of disability?
- If no, deny RA BUT provide opportunity for resident to submit necessary documentation
- Help them understand what's needed by referring them to "Guidance on Documenting an Individual's Need for Assistance Animals in Housing"




Updated HUD Guidance on Animals

- If they provided info on their disability →
- Step 2: have they also provided information reasonably supporting animal's work/tasks/assistance with respect to disability?
- **If yes, then grant RA**
- If no, can deny BUT must still give them opportunity to provide information; see prior slide




Updated HUD Guidance on animals

- Internet documentation is suspect!
- Ask for "reliable documentation" under FHA
- Internet documentation is NOT, by itself, sufficient to reliably establish a non-observable disability or a disability related need for assistance animal!



Providers to Confirm Disability


- Licensed HC professional can include:
 - MD
 - Optometrist
 - Psychiatrist
 - Psychologist
 - PA
 - NP
 - Nurse



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Information Confirming Disability


- Connection between disability & service animal must be provided, especially when disability is non-observable
- Be circumspect, request only:
 - Name
 - Whether HC professional has relationship with them involving HC/disability related services
 - Type of animal sought



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Information Confirming Disability

- Ask if:
 - There's a physical/mental impairment?
 - Impairment substantially limits 1 or more major ADL or body function?
 - They need animal to do work/tasks OR
 - If animal provides assistance/therapeutic emotional support AND
 - Is animal not merely a pet?



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Information Confirming Disability

- Unusual animals, defined as animals other than:
 - Dogs
 - Cats
 - Small birds
 - Rabbits
 - Hamsters, gerbils, other rodents
 - Fish
 - Turtles
 - Other small, domesticated animals traditionally kept in the home



Information Confirming Disability

- Unusual animals trigger ability to ask more questions of HC provider:
 - Date of their last consult with patient
 - Unique circumstances justifying need for **that** specific animal
 - Whether professional has reliable information about this animal if they specifically recommend this animal



Updated Guidance

- Helpful
- Contains FAQs
- Replaces prior guidance from HUD on service/support animals



FHA Retaliation Claims

Beware!

- Unlawful under FHA to
 - Coerce, intimidate, threaten or interfere with any person in the exercise/enjoyment of their rights under FHA and associated statutes



Retaliation Claims

- To claim retaliation under FHA, plaintiff must show:
 1. They were engaged in protected activity;
 2. They suffered an adverse action like coercion, intimidation, threats, or interference; and
 3. There's a causal link between the protected activity and the intimidation



Retaliation Claims

What does that mean?

- Even if you tried to violate their FHA rights but were unsuccessful, and you then threatened/coerced them because they claimed discrimination



You can be liable for retaliation!



Sexual Harassment

- US v. Woodcock
- Tenant sexually harassed by owner
- Touching without consent, forcibly tried to kiss her
- Tenant evicted after she reported harassment
- Claim brought by DOJ



Sexual Harassment

- CA: sexual harassment of tenants by landlord over 2 decades
- Alleged:
 - Unwelcome sexual touching
 - Reduction of monthly rent in exchange for sex
 - Unwelcome sexual comments/advances
 - Intrusive, unannounced visits to further sexual advances
 - Eviction/threatened eviction of those who objected/refused advances



Sexual Harassment: Settlement Terms

- Consent decree: \$255,000 settlement
- \$25,000 CMP to US
- \$230,000 to tenants



Disability Discrimination

- HUD findings of discrimination against a disabled tenant
- Failed to transfer to ground-floor unit, forcing her to leave W/C and crawl up/down stairs to apartment
- Failure to provide RA and then sought eviction when she complained



Disability Discrimination

- VA: NH discriminated against deaf applicant because she required sign language interpreting services
- ADA prohibits "covered entities" (i.e. public accommodations, where private property, but public invited in) from excluding disabled from services because they require auxiliary aid/services, like sign language interpreter



Disability Discrimination: Settlement Terms

- New policy: services accessible to those with communication disabilities, including sign language interpreters
- Designate ADA Admin responsible to ensure compliance
- Agreements with SLI services
- Train on ADA's effective communication requirements



Disability Discrimination: Settlement Terms

- Damages: \$90,000
 - \$40,000 to resident denied admission
 - \$50,000 CMP to US



Denial of Service Animal

- HUD claim against owner due to "no-pet" policy
- Prospective tenant called to ask about renting, owner asked if she had a pet
- When told she had assistance animal, owner advised no pets/animals, terminated call, refused to rent



Denial of Service Animal

- NY: HUD claim against owner for failure to allow assistance animal
- Lease: No pets
- After move in, tenant asked for assistance animal to help with disability
- Owner reasserted "no pets" and told him to wait to get animal after lease expired



Denial of Service Animal

- HUD claim against owner who told tenant to use her daughter's dog for his therapeutic needs
- Owner stated if she knew he needed assistance animal, she would have told him to find other housing
- Owner also demanded certifications and training documentation, rejected various medical verifications



Denial of Service Animal

- Owner asked his roommates to help her find someone else to move in and directed tenant to leave upon expiration of lease
- Takeaway: No pets does not pertain to assistance animals!



Racial Discrimination

- NY: Agent/rental agency treating African Americans asking about rentals less favorably than similarly-situated whites
- Based on testing conducted by the FHA Testing Program
- Testers pose as renters to gather information about possible discriminatory practices



Racial Discrimination

- Told black testers about fewer rentals than white testers
- Offered whites discounts, chances to inspect units not offered to blacks
- Only offered blacks racially mixed neighborhoods, offered whites units in both overwhelmingly white and racially mixed neighborhoods
- Encouraging comments to whites but not blacks



Racial Discrimination: Settlement Terms

- \$15,000 to victims
- \$2,500 CMP to US
- Prohibits defendants from engaging in discriminatory acts
- Requires implementing nondiscriminatory standards/procedures
- Undergo FHA training
- Provide periodic reports to DOJ



Racial Discrimination

- AL: Owners/managing agents discriminating based on race
- Black applicants denied opportunity to live in overwhelmingly white housing complexes
- Steered whites away from properties whose residents were predominantly black



Racial Discrimination

- Since 2012, maintained segregated housing, denying blacks opportunities to live in 3 overwhelmingly white housing complexes
- Gave whites opportunity to live at 2 overwhelmingly black housing complexes
- Unclear if Testers were used




Sexual Orientation Discrimination

- Federal sex discrimination lawsuit brought against Friendship Village in Missouri now settled for large, undisclosed amount
- Walsh and Nance v. Friendship Village
- Non-profit, faith-based CCRC
- Lesbian married couple sued CCRC in 2018 when denied admission
- Community had policy against same sex couples




Sexual Orientation Discrimination

- Sued under FHA and Missouri Human Rights Act
- 8th Circuit: had held sexual orientation NOT protected class under Title VII of the Civil Rights Act, dismissed case
- Supreme Court then determined sexual orientation was covered in Bostick v Clayton County June 2020



Sexual Orientation Discrimination

- After Bostick 8th Circuit remanded, found sexual orientation is a protected class under FHA
- Takeaway: senior housing on notice that protected class of sex contained in FHA will protect against discrimination based on sexual orientation
- Sexual orientation is a protected class



Disability Discrimination

- PA, NJ, VA, CT: DOJ lawsuit against architects/ owners of 15 senior living facilities
- Failed to design/construct housing accessible to disabled



Disability Discrimination

- Relief requested:
 - Bring properties into FHA/ADA compliance
 - Pay money damages to those harmed by lack of accessibility and CMPs to US
 - Prohibit defendants from designing/constructing housing that discriminates against the disabled



Disability Discrimination

- Significant accessibility barriers include:
 - Inaccessible routes
 - Inaccessible parking
 - Doors too narrow for W/C
 - Environmental controls too high/low for W/C users
 - Inaccessible bathrooms/kitchens



Disability Discrimination

- National Fair Housing Alliance v. Leisure Care
- Alleged violations FHA and ADA



Disability Discrimination

- Discriminated against those who are deaf/HOH by:
 - Not providing ASL interpreters;
 - Not paying for interpreter services;
 - Steering prospective deaf residents to other senior living communities



Disability Discrimination: Settlement Terms

- \$162,500 in damages, attorneys' fees/other costs
- Expand staff training
- Create updated policies on RAs and auxiliary aids




Disability Discrimination: Settlement Terms

- **Policy must include:**
 - No discrimination against current/prospective residents based on auditory or other disabilities under FHA
 - Incorporate into onboarding documents
 - Create Reasonable Accommodation request form




Disability Discrimination: Settlement Terms

- All costs associated with RAs borne by facilities
- Accommodations shall be provided to residents, companions, guests
- When resident makes RA request, create Communication Plan in resident's file
- If using models for ads/media, depict protected classes under FHA



Disability Discrimination: Settlement Terms

- **Website changes:**
 - Include FHA logo and international symbol for SLI
 - Add information on accessibility, including deaf/HOH
 - Add statements that facilities comply with all federal, state, local laws, FHA, ADA



Disability Discrimination: Settlement Terms

- **Brochure changes:**
 - Create materials for services provided to deaf/HOH
 - Include FHA logo, international symbol for SLI and mobility accessibility
 - Put signs in lobby areas on disability accommodations



Disability Discrimination: Settlement Terms

- **Training requirements for 5 years**
 - New employees:
 - within 90 days of hire
 - Current employees:
 - within 120 days



Disability Discrimination: Settlement Terms

- Include:
 - Legal issues regarding deaf/HOH and other protected classes
 - Cultural competency of deaf culture/other protected classes
 - Types of services/assistance provided to deaf/HOH
 - Seek input from plaintiff on materials



HUD Funding

- More than \$20 Million for housing discrimination
- May, 2021 HUD provided funding to organizations to:
 - Enforce FHA
 - Educate public, housing providers, local governments about rights/responsibilities under FHA



Distribution of Funds

- \$7.2 million to develop/ implement **tester training/education**, outreach programs
- \$2.3 million to non-profit FHA orgs to build capacity for enforcement related activities
- \$10.7 million to help non-profit FHA enforcement orgs do investigations/enforcement activities to prevent/eliminate discriminatory housing practices



Changes to Disparate Impact Rule

- 2020: HUD issued proposed Rule making it more difficult to prove disparate impact case
- Proposed Rule widely criticized by consumer advocates and Democratic lawmakers
- Result: 2020 Rule will likely face an uphill battle to remain intact when reviewed by new HUD leadership



Fair Housing Testing is out There!

- Civil Rights Division of DOJ started fair housing testing program 1993
- Very active under Obama admin
- Biden admin reactivating program
- Many private FHA groups also use testers
- Testers are out there!



Avoiding Risk

- Create RA/RM forms: ensures consistency
- Train all staff on FHA at orientation/annually
- Ensure residents made aware of FHA rights, including right to RAs and freedom from harassment
- Provide written documentation with resident's Bill of Rights



Avoiding Risk

- Place FHA logo/non discrimination wording on all marketing
- Ensure policies in place on harassment, including all protected classes
- Train all staff regularly on anti-harassment
- If you use models, show mobility aids, diversity in materials



Avoiding Risk

- Be consistent in treatment of all applicants/residents
- Includes:
 - Application process/criteria
 - Access to facilities, programs, privileges
 - Enforcement of rules



Avoiding Risk

- Ensure same questions are asked of everyone, disabled or not
- Asking more detailed questions regarding care needs can be done after accepted for admission



Avoiding Risk


- Create written Community Rules regarding specific behaviors/conduct
- Clarify behavioral expectations with residents/staff
- They assist when issues arise



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Avoiding Risk


- Rules should include:
 - Cleanliness
 - Safety
 - Comfort
 - Treatment of others
 - Noise levels
 - Understand you may still have to make an RA if requested



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Avoiding Risk


- FHA often conflicts with regs. from CMS/DOH/DHS
- FHA: federal civil rights statute with supremacy over state law



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Avoiding Risk


- Conflicts:
 - Safety vs. resident autonomy
 - Right to be treated as the nondisabled are (example: evacuation requirements)
- HOWEVER, this issue has not yet been addressed by courts



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Avoiding Risk


- Best Practice Recommendation:
- Follow regulations in licensed setting until potential conflict is resolved
- Do not exceed level of care you are licensed to provide



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Avoiding Risk


- How long to keep documentation?
- At least 2 years (statute of limitations for FHA)
- What to keep?
 - Admission applications
 - Current policies
 - Documentation regarding RA/RM requests/offers
 - Documentation on whether they are meeting EROT
 - Inspections of units



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Avoiding Risk


- What medical information can we ask for when applying?
- Depends on contract type
- Type A: more flexibility due to guarantee of movement through continuum
- Like insurance policy
- Med info/history, physical exam likely defensible



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Avoiding Risk


- Type C: more difficult
- No guarantee through continuum
- Be careful about what's asked, documentation
- Request med info if applying to higher level care
- If they share med info with you, offer choices based on that



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RA Rules for Private Duty Aides

- ✓ Requiring criminal background checks
- ✓ Requiring PPD checks
- ✓ Requiring bonding
- ✓ Wearing name badges
- ✓ Signing in & out
- ✓ Designating parking
- ✓ Creating list of "favored agencies" that ensure all criteria is met
- ✓ Instead of live-in, those needing 24/7 care use 8 or 12 hr. shifts so resident receives care required



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Rules for Service Animals

- ✓ Residents are responsible to clean up (indoors & outside)
- ✓ Annual vaccinations/ licensing
- ✓ Resident must be in control of animal at all times
- ✓ Animal may not disturb peace & tranquility of others (ex: excessive barking)
- ✓ Animal must not exhibit vicious propensities
- ✓ Animal must be clean without excessive odor



More on Service Animals

- ✓ Don't set weight limit for service/companion animals
- ✓ Don't require liability insurance
- ✓ Don't reject unusual animal because you haven't seen it used as a service/companion animal before
- ✓ Don't require pet deposit, even if refundable
- ✓ Be careful about requiring special training documentation/verification regarding the animal
- ✓ Follow the new HUD guidance



Rules for Scooters/PMDs

- ✓ Set a slow speed limit
- ✓ Require that scooters always yield to pedestrians
- ✓ Require exercising extreme caution around turn/corners
- ✓ Consider requiring them to back into elevators
- ✓ When driving outside: require flag, lights, mirrors, obey all traffic rules & drive on right side of road
- ✓ Specifics on parking: no blocking fire exits, fire alarms, doorways, hallways, mailboxes



More Scooter/PMD Guidance


- ✓ Don't require liability insurance
- ✓ Don't mandate assessment/eval for screening
- ✓ Recommend screening with OT for most appropriate PMD based on mobility disability
- ✓ Document all events/near misses with PMDs
- ✓ Once event/near miss occurs, take steps to test/eval for safety
- ✓ Use interim steps, least restrictive necessary to ensure safety
- ✓ Document "direct threats"
- ✓ Must be concrete, not speculative
- ✓ Review Rules of the Road, sign/acknowledge receipt/compliance



FSA RISK MANAGEMENT SERVICES

Marketing and Admissions Don'ts


- ✓ **Don't deny access** to housing
- Example: "We don't allow people who use scooters or wheelchairs to become residents in our independent living units because our residents don't like it."



FSA RISK MANAGEMENT SERVICES

Marketing and Admissions Don'ts


- ✓ **Don't restrict choices**
- Example: "We only allow people who use scooters to live on the first floor, and to use the main dining room between the hours of 5:30 and 6:00"
- "You can only live in Neighborhood A because all of the others are too far from the community center"



FSA RISK MANAGEMENT SERVICES

Marketing and Admissions Don'ts

- ✓ **Don't discourage applicants from applying to the community**
- Example: "We don't have very many residents in our apartments who use wheelchairs, so you may not fit in here at ABC Community"



Marketing and Admissions Don'ts

- ✓ *Don't steer applicants towards one level of care/housing*
- *Steering is a more subtle form of discrimination than the other examples*
 - Example: "Since you look a little frail, use a wheelchair and need some assistance with ADLs, you would probably feel a lot more comfortable in Assisted Living with others who are more like you than you would in Independent Living here at ABC..."



Marketing and Admissions Don'ts

- ✓ *Don't inquire into the nature of an applicant's disability if they request a reasonable accommodation UNLESS the disability is not apparent*
- Example: blind person requests reasonable accommodation for guide dog, despite no pet policy. Disability is obvious and reasonable accommodation will clearly assist in alleviating disability, so inquiring into medical condition impermissible



Marketing and Admissions Don'ts

- ✓ *Don't ask questions about how the applicant intends to take care of themselves or the unit because they appear to be frail or disabled*
- Example: "I see that you seem to have quite a bit of difficulty getting around and with transferring. How are you planning to keep the apartment clean, cook for yourself and maintain your own hygiene?"



Marketing and Admissions Don'ts

- Don't ask if they are able to live independently or without help
- Don't ask if they can get in and out of bed by themselves
- Don't ask if they can use the toilet by themselves



Marketing and Admissions Dos

- Ask same kinds of questions of all, not just to disabled
- Focus on facilities, clubs, associations, activities, campus atmosphere to convey your kind of community
- Avoid "active adult," implies disabled are unwelcome
- Ask if they can meet "Essential Requirements of Tenancy"



REMEMBER....

THE FHA ALLOWS A RESIDENT TO MEET THE ESSENTIAL REQUIREMENTS OF TENANCY WITH OR WITHOUT ASSISTANCE/RA

THEREFORE
BE AWARE OF WHAT YOUR POLICIES ON PDAS & OTHER COMMON RA's ARE!



Marketing and Admissions

- When discussing EROT explain:
 - Services provided/included in fees
 - Services not provided
 - Services provided on fee for service basis
- If applicable, discuss assistance provided to facilitate/ coordinate outside service providers



Avoid Steering

- When applying to IL/RL, if asked which level of care they should be in, don't steer
- Explain/describe what services are/aren't provided in each level of care
- Let them make own informed decision
- Use Service Level Grid for what is included/not included at each level of care, what's available on fee for service basis



Danger!

- Ensure all involved with Marketing/Admissions are aware of FHA and its implications!
- Numerous private FHA groups, law clinics send out testers to find discrimination
- Appropriately train/educated all staff!



FSA RISK MANAGEMENT SERVICES

Thank you!

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