

Fair Housing Refresher and Emerging Issues



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The work that provided the basis for this publication was supported by funding under a grant with the U.S. Department of Housing and Urban Development. The substance and finding of the work are dedicated to the public. The author and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication. Such interpretations do not necessarily reflect the views of the Federal Government.

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Fair Housing Act

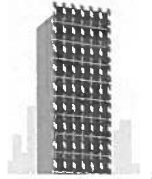


- What Type of Property is Covered?
- Who is Protected?
- What Actions are Prohibited?
- What are the Consequences?

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Types of Property Covered

- The FHA broadly applies to “dwellings,” which includes almost every residential rental unit.
 - Single and multi-family housing
 - houses, apartments & condos
 - Group homes
 - Shelters
 - Migrant housing
 - Assisted living housing
 - Long-term transient lodging



Protected Categories

The FHA prohibits discriminatory conduct against persons based on:

- race
- color
- religion
- national origin
- sex (gender)
- familial status (families with children)
- handicap (disability)
- affordable housing (NC only)

What Acts are Prohibited?



- Refusal to sell, rent, negotiate, or “otherwise make unavailable or deny” a dwelling
- Discriminate in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities

What Acts are Prohibited?

- Misrepresent unavailability
- Make, print, or publish any notice, statement, or ad indicating a preference or limitation based on protected class
- Deny Reasonable Accommodation



What Acts are Prohibited?

- Coerce, intimidate, threaten, or interfere with person who is exercising their fair housing rights
- Retaliate against a person for making a fair housing complaint

Who is covered by Fair Housing laws?



- You
- Your boss/supervisor
- Property owners
- Property management companies
- Co-workers
- Maintenance staff
- EVERYONE, no matter what your position in the apartment industry!

FRIENDLY...
but NOT Fair Housing Friendly

- “I didn’t show them because I could tell they would not qualify...why waste everyone’s time?”
- “Our community really doesn’t have a lot of things for children”

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FRIENDLY...
but NOT Fair Housing Friendly

- “This first floor apartment home by the playground would be perfect for you.”
- “You look great to me. Why are you getting SSI disability payments? ”
- “Its not a problem for me, but having disabled people in the building will scare the neighbors’ children.”

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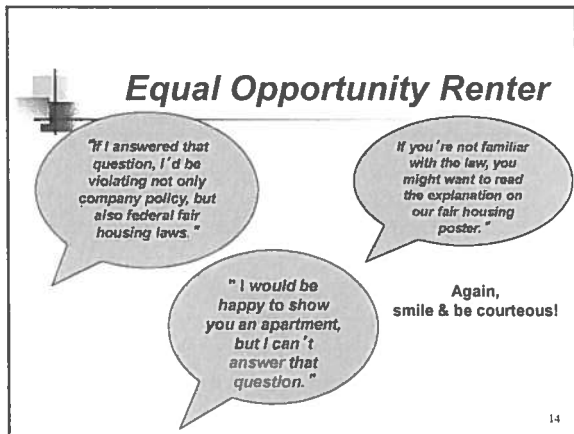
Questions about the Race, Ethnicity, etc. of Your Residents

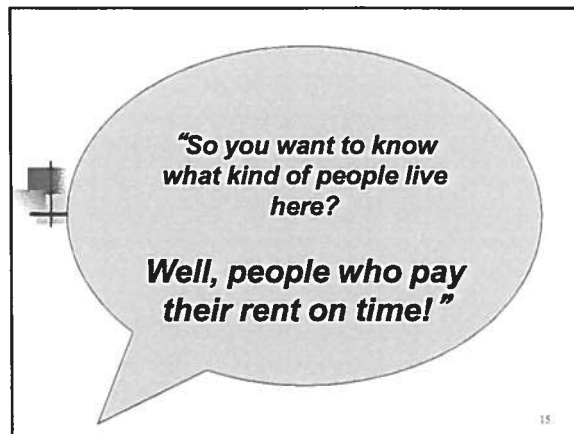
“Do you have any families on this floor?”

“How many whites (Kids, Baptist, Canadians, etc.) live here?”

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But You Don't Have to FREAK OUT!

Fair Housing:

- Makes Sense – Treat People Right!
- Evens the Playing Field
- Makes for “Good Sales & Leasing”
- Takes Away the Guess Work
- Is FAIR!

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Best Practice Tips to Reduce Risk of Future Liability

- Have written policies re RA, TSP, etc.
- Mandate training by employees/agents
- Require uniform practices/procedures
- Monitor implementation
- Have process to receive and document tenant complaints
- Respond promptly to complaints

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Discrimination Based On Disability

- Definition of “disability” –
 - A physical or mental impairment that substantially limits one or more major life activities;
 - Having a history of such an impairment; or
 - Being perceived as having such an impairment (whether person is impaired or not)
- Includes people associating/residing w/ person with disability

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Examples of Protected Disabilities

- Blindness or other visual impairments
- Deafness or other auditory impairments
- Mobility impairments
 - e.g. paraplegia, cerebral palsy
- Mental illness
 - e.g. schizophrenia, depression
- Cognitive disabilities
 - e.g. intellectual disability, learning disability
- AIDS or HIV+
- Alcoholism (current & former)
- Former drug abuse

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Disability Protections Under FHA

- Discrimination based on disability prohibited
 - Includes disability of buyer/tenant, people residing in unit, and people associated with buyer/renter
- Inquiries into nature/existence of disability also generally prohibited
 - Exception for questions asked of all applicants to determine eligibility for specific disability program (e.g. HOPWA)
 - Still cannot exclude for additional disabilities

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Disability: Protections, cont.

- Housing providers also req'd to take affirmative steps to allow persons with disabilities an equal opportunity to live in the property:
 - Reasonable Accommodations
 - Reasonable Modifications
 - Follow post-1991 Building Requirements



This is the law's way of leveling the playing field

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Reasonable Accommodations

- Definition
 - A change in rules, policies or procedures
 - Necessary because of the person's disability
 - Provides full/equal use and enjoyment of housing
- Can request at any time
 - Before tenancy/when applying
 - During tenancy
 - When facing eviction, if RA could remove basis for eviction
- Can be requested by: tenant, family member, MD, social worker, therapist, or others

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Examples of Reasonable Accommodations

- Allow service or assistance animal despite "No Pets" policy
- Allowing automatic direct deposit or a representative payee to pay rent, where tenant's disability prevents him/her from paying on time
- Change rent due date to accommodate receipt of SSI or other disability payment
- Allow live-in aide to be added to lease (if otherwise eligible)
- Allowing a tenant to terminate his lease early when based on the tenant's disability (e.g., emergency hospitalization, or conditions at unit exacerbates disability)
- Allow tenant additional time to comply with lease req'ts, such as removing excessive clutter/hoarding

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What is Required to Make an RA Request?

- Does not have to include any specific "magic words"
 - Person does not need to say "reasonable accommodation" or "reasonable modification"
- Can be oral or written
- Do not have to use specific forms of landlord or property manager
- *However...*

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Best Practices for Evaluating RA Requests

- If tenant makes an oral request, put it in writing w/ date & give tenant copy
- Respond promptly
 - Usually w/in 7-10 days or sooner
 - Unreasonable Delay = denial
- If you need add'l info to evaluate request, ask for it in writing

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What Can Provider Request When Evaluating Request?

- Proof of disability
 - But *only* if disability is not obvious or otherwise known
 - Not entitled to medical history or even diagnosis
- Description of accommodation requested
- Information of how RA will help w/ this disability (the “nexus”)
 - But only if not readily apparent or known

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Questions when Responding to an RA Request

- Is there a disability?
 - Is it obvious or not?
- What RA would benefit person?
 - Is it necessary?
 - Is the nexus obvious?
- Is RA reasonable?
 - Would it cause an undue burden?
 - Would it cause a substantial alteration?
- Is any other info needed for determination?

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When Can an RA Request be Denied?

- The person does not have a disability
- There is no disability-related need for the accommodation
- The request is not reasonable because:
 - the request would require a “fundamental alteration” in the nature of the services, program or activity, or
 - the request creates an undue financial and administrative burden.

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Exceptions

- Direct Threat. FHA does not require a tenancy by a disabled person that would be a “direct threat” to the health or safety of others or result in substantial damage to the property of others *unless* an RA could eliminate the threat
 - Determination must be based on an individualized assessment
 - Unlawful to exclude people b/c of fear, speculation or stereotypes
- Drug use. *Current* use of illegal drugs is excluded from the definition of disability.

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SERVICE & ASSISTANCE ANIMALS

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Pet Policy Restrictions

- Landlords can have any restrictions they want regarding pets, including
 - Prohibiting all pets
 - Prohibiting certain types of pets
 - Prohibiting certain breeds
 - Prohibiting certain sizes of animals
 - Extra security deposit for pets
 - Extra monthly rent charge for pets
- But...

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Person w/ Disability Can Request RA for Assistance or Service Animals

- If person needs a service or assistance animal as RA for her disability, she can have it.
- Pet rules do not apply to service/assistance animals
 - Owner of animal responsible for damage & behavior issues, but cannot be charged pet deposits, fees, etc.

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Assistance Animals Under FHA

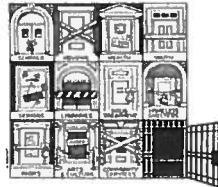
- Any type of animal (dog, cat, bird, etc.)
- Does not need to be individually trained
- Must be for PwD
- Must be related to disability
- Must be reasonable
 - No undue burden; no fundamental alteration
- Permissible inquiries (by LL/Prop. Mgr.)
 - Does person have a disability?
 - If not obvious
 - Does person have a disability-related need for the animal?
 - If not obvious
 - Interactive process



Responsibilities of Assistance Animal Owners

- Maintain control of animal
 - No aggression
 - Keep animal on leash/harness/tether
 - Sometimes OK w/o if voice/hand/other control
 - No excessive noise (barking, etc.)
 - No damage to unit
- Pick up after animal
 - Waste
 - Smells

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CRIMINAL HISTORY POLICIES

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“But Criminal Background Isn’t a Protected Class”

- *Fortune Society Inc. v. Sandcastle Towers Housing Dev. Fund Corp., et al.*, Case No.: 1:14-cv-06410-VMS (E.D.N.Y.)
- *Alexander v. Edgewood Management Corp., et al.*, Case No.: 1:15-cv-01140-RCL (D.D.C.)
- *Sams v American Apt. Management Co.*, Case No.: 4:15-cv-00282 (SD Ga. 2017) (\$357K settlement, plus fees & costs)

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HUD Office of General Counsel
"Guidance on Use of Criminal Records
Criminal Records/ Background" (2016)

- Criminal background screening *may* constitute discriminatory effect/FHA violation
- Fact-specific & case-specific inquiry
- To justify policy, housing provider must show "substantial, legitimate, nondiscriminatory interest" supporting challenged policy
 - Resident safety?
 - Protecting property?
- Applies to all covered dwellings
 - Public and private

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**HUD Guidance:
Exclusions Based on *Arrest***

- Arrest records not proof of past misconduct
 - Only shows that someone probably suspected person of an offense
 - Possible exception: pending charges
- Arrest records often incomplete
- Not reliable basis to assess potential risk to safety or property
- Therefore, a provider "cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest"

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**HUD Guidance:
Exclusions Based on *Conviction***

- No "blanket prohibition" based on *any* conviction.
- Tailored policy based on certain types of convictions may be OK if it "accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not"
- Unlikely to meet standard unless it considers
 - Nature of offense (violent vs. nonviolent)
 - Severity of offense (misd. vs felony)
 - Amount of time that has passed since conduct

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HUD Guidance:
Exclusions Based on *Conviction*

- **Exemption:**
 - OK to exclude person convicted of “illegal manufacture or distribution of controlled substance as defined in section 201 of the Controlled Substances Act (21 U.S.C. 802)”
 - Requires actual conviction
 - For manufacture or distribution (not just possession)

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Criminal History & Reasonable Accommodations

- *May* have to provide reasonable accommodation & waive criminal conviction if
 - Applicant/tenant has disability
 - Criminal conviction is related to disability
 - *Evans* and *Simmons* decisions
- Follow normal RA procedures & req'ts

NC Housing Finance Agency Criminal Background Guidance

- Owners/managers of LIHTC properties **in NC** must follow NCHFA's model policy that considers:
 - Nature of offense (violent vs. nonviolent)
 - Severity of offense (misd. vs felony)
 - Amount of time that has passed since conduct and other mitigating facts
 - Individualized assessment may be req'd

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HARASSMENT: HUD'S 2016 GUIDANCE

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Harassment

- Can be based on any protected class
 - race, color, religion, national origin, sex, familial status, disability
- Can involve any part of housing transaction, including
 - Conditioning availability or causing person to vacate or abandon efforts to secure dwelling
 - Conditioning terms, privileges, services
 - Representing unit unavailable

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Harassment

- Types
 - Can be written, verbal, or other conduct
 - Does not require physical contact
- Single incident may be enough where
 - Incident is sufficiently severe to create a hostile environment or
 - Incident shows a quid pro quo

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Quid Pro Quo Harassment

- “Unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to”
 - sale, rental or availability of a dwelling;
 - terms, conditions, or privileges of the sale or rental; or
 - availability, terms, or conditions of a residential real estate-related transaction.
- Does not matter if person submits to unwelcome request or demand

- 24 CFR 100.600(a)(1)

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Hostile Environment Harassment

- “Unwelcome conduct that is sufficiently severe or pervasive as to interfere” with
 - availability, sale, rental or use or enjoyment of a dwelling;
 - terms, conditions, or privileges of the sale or rental; or
 - availability, terms, or conditions or a residential real estate-related transaction.”

- 24 CFR 100.600(a)(2)

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Who Can Be Liable?

- Owner, Property Manager, Employee
- Person’s own conduct or failing to take prompt action to correct & end a discriminatory housing practice by
 - Employee/agent
 - Other third party

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Questions?



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This seminar provides general information. For legal advice, please consult an attorney.

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