

# FAIR HOUSING OF THE DAKOTAS

*(The Fair Housing of the Dakotas serves North and South Dakota and works to eliminate housing discrimination and to ensure equal housing opportunities for all.)*

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## Testimony before the House Human Services Committee on House Bill 1263 by the Fair Housing of the Dakotas January 21, 2009

Mr. Chairman, and members of the Committee, my name is Amy S. Nelson and I am the Executive Director of the Fair Housing of the Dakotas (FHD). The FHD is a non-profit agency which serves North and South Dakota. We work to eliminate housing discrimination and to ensure equal housing opportunities for all. The FHD educates the public on Fair Housing Laws and also investigates allegations of housing discrimination. When discrimination is found, we assist complainants in filing complaints of housing discrimination with the North Dakota Department of Labor (NDDOL) and/or in state or federal court. The Federal Fair Housing Act prohibits discrimination in the rental, sale or financing of housing due to race, color, religion, national origin, gender (sex), presence of children (familial status) and disability (handicap). North Dakota state law also provides these protections as well as due to age (40 and over) and status with respect to marriage and public assistance.

The FHD requests clarification on this bill regarding Section 1, Lines 9-10 noting, "Before a facility unit is rented, the facility or landlord shall evaluate the tenant's ability to meet the facility's tenancy criteria." This line is not clear to us as to what may be used in this evaluation. We are concerned about possible fair housing violations by housing providers requesting information on whether tenants are capable of independent living which may discriminate due to age and disability. ***We encourage an amendment following this line which states "Such criteria will not discriminate in violation of state or federal fair housing laws."***

We do not assume that any possible discrimination was the bill's intent; however, we want to make sure there are not future problems. For rental, applicants should not be asked about their disability except to determine whether an applicant is qualified for a dwelling available only to persons with disabilities or to persons with a particular type of disability or is qualified for a priority available to persons with disabilities. Applicants also should not be asked about their ability to care for themselves, but may be asked about their ability to be lease compliant. If a tenant can be lease compliant, either on their own or with the care of others, they should be allowed to live there. In addition, it would not be a violation of fair housing laws to inquire whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance; whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance or if an individual's tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. More information on possible fair housing violations is included in the attached.

With this amendment, the Fair Housing of the Dakotas would support passage of House Bill 1263. I thank you for the opportunity to provide testimony today and please let me know if you have any questions or need any additional information. Thank you.



# **Disability Discrimination in Senior Housing**

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This brief outline provides guidance on how to apply the Fair Housing Act (FHA) to senior housing. Courts are still developing this area of law. The FHA can apply to all kinds of senior housing, including “independent living,” housing with services, assisted living, and nursing homes. *See* 42 U.S.C. § 3602(b) (2000). This outline provides examples of potentially discriminatory actions and how they might be analyzed under the FHA.

## **I. Discriminatory Admissions**

- **It is illegal to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter” because of her disability. 42 U.S.C. § 3604(f)(1). This mandate applies to admissions.**
- **Potential examples of discriminatory admissions (must look at case-specific facts):**
  - “You can’t move into this seniors’ apartment complex because you can’t live independently.”
  - “You can’t move into this assisted living facility because we can’t meet your needs.”
  - “You can’t move into this nursing home because of your mental illness / other disabilities.”
- **Bottom line to consider:**
  - If the applicant is applying to independent living, can she keep up her apartment, with or without assistance, and otherwise comply with nondiscriminatory lease terms? The applicant should not be rejected merely because of her disability or disability-related needs, even if she applies to “seniors’ independent living.”
  - If the applicant is applying to a nursing home or housing with services, is she asking the housing or service provider to offer services beyond those it normally provides? If not, the applicant should not be rejected because of her disability-related needs. The applicant should also not be rejected because a facility does not want to offer the services it is required to offer under its contract, its advertised services, or applicable law (e.g. the Nursing Home Reform Law). For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

## II. Discriminatory Questioning During Admissions

- **With limited exceptions, a housing provider cannot ask disability-based questions of a prospective tenant/resident. 24 C.F.R. § 100.202(c) (2007).**
- **Potential examples of discriminatory questioning:**
  - “I applied to an apartment, and I was given a questionnaire about my disabilities to see if I could live independently.”
  - “I applied to an assisted living facility / nursing home, and the housing provider asked me for details about my mental health / other disabilities.”
- **Bottom line to consider:**
  - In independent living, with limited exceptions, housing providers should not ask questions about applicants’ disabilities.
  - In some states (e.g. Minnesota), there is a strong argument that the housing provider should not ask questions about applicants’ disabilities. These questions should be left to the service provider and should not be shared with the housing provider.
  - In nursing homes, and possibly in other types of housing with services, questions should be limited to determining the services the applicant will require from the provider. Other questions about disabilities are likely to violate the FHA. For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

## III. Discriminatory Evictions

- **It is illegal to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter” because of her disability. 42 U.S.C. § 3604(f)(1). This mandate applies to evictions.**
- **Potential examples of discriminatory evictions:**
  - “You need to move out of our apartment building because we have seen your health decline and we think it’s time for you to move into a nursing home.”
  - “My mom is being evicted from an assisted living Alzheimer’s community because she wanders and can be aggressive.”
  - “You are being evicted/discharged from this nursing home because of your difficult behaviors.”

- **Bottom line to consider:**
  - This analysis is similar to that applicable to admissions. *See supra* Section I.
  - If the tenant is in independent living, can she keep up her apartment, with or without assistance, and otherwise comply with nondiscriminatory lease terms? The tenant should not be evicted merely because of her disability or disability-related needs, even in “seniors’ independent living.”
  - If the tenant/resident is living in a nursing home or housing with services, is she asking the housing or service provider to offer services beyond those it normally provides? If not, she should not be evicted/discharged because of her disability-related needs. She should also not be evicted/discharged because a facility does not want to offer the services it is required to offer under its contract, its advertised services, or applicable law (e.g. the Nursing Home Reform Law). For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

#### **IV. Discriminatory Terms and Conditions**

- **It is illegal to have different terms, conditions, or privileges in rental property for individuals with disabilities. 42 U.S.C. § 3604(f)(2).**
- **Potential examples of discriminatory terms and conditions:**
  - Restrictions on wheelchairs or motorized mobility devices, such as requiring:
    - Permits for use
    - Doctors’ notes for use
    - Liability insurance
    - Waivers releasing the provider of any liability for use of the device
    - Operating tests
    - Transfers into dining chairs during meals
  - “My landlord says I can’t eat in the dining room because my disability makes others uncomfortable.”
  - “I applied for housing, and the housing provider only does background checks for applicants with mental illnesses.”
- **Bottom line to consider:**
  - Is this person being treated differently by a housing provider because of her disability or her disability-related needs? If so, the housing provider may have violated the FHA by imposing discriminatory terms and conditions.

## V. Discriminatory Failures to Provide Reasonable Accommodations or Modifications

- **It is illegal for a housing provider to refuse to provide requested reasonable accommodations or modifications. 42 U.S.C. § 3604(f).**
  - A reasonable accommodation is a reasonable change or “accommodation” in rules, policies, practices, or services that may be necessary to afford a tenant/resident/applicant equal opportunity to use and enjoy a dwelling.
  - A reasonable modification is a reasonable physical/structural change that may be necessary for a tenant/resident/applicant to have full enjoyment of the premises.
  
- **Potential examples of a failure to provide reasonable accommodations:**
  - A housing provider will not allow a tenant/resident with a disability to have a service or companion animal that may be necessary for her use or enjoyment of the dwelling.
  - A housing provider will not admit an applicant because of difficult behaviors related to her disability, even though the applicant has proposed a reasonable plan to eliminate or reduce those behaviors. See attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.
  - A nursing home evicts/discharges a resident for her disability-related care needs, even though she requested and needed only reasonable adjustments in services.
  - A housing provider takes away a tenant/resident’s wheelchair, even though the tenant/resident proposed a reasonable plan to eliminate threats she formerly posed when using the chair.
  
- **Potential example of a failure to provide a reasonable modification:**
  - A housing provider will not allow a tenant/resident to install grab bars in the shower or an automatic shut-off for the faucet, even though such changes may be necessary for the tenant/resident’s full enjoyment of the premises.
  
- **Bottom line to consider:**
  - Did the housing provider fail to provide a requested reasonable accommodation or modification? If so, the provider violated the FHA. For help defining reasonable accommodations and modifications, see the HUD/DOJ Guides at:
    - [http://www.usdoj.gov/crt/housing/jointstatement\\_ra.htm](http://www.usdoj.gov/crt/housing/jointstatement_ra.htm)
    - [http://www.usdoj.gov/crt/housing/fairhousing/reasonable\\_modifications\\_mar08.pdf](http://www.usdoj.gov/crt/housing/fairhousing/reasonable_modifications_mar08.pdf)