



**The Illegality of “Independent Living”
Requirements in Rental Housing,
Assisted Living Centers and
Continuing Care Retirement
Communities**

FACT SHEET

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The Illegality of “Independent Living” Requirements in Rental Housing, Assisted Living Facilities (ALFs) and Continuing Care Retirement Communities (CCRCs)

The Fair Housing Act (FHA) is an equal-opportunity statute; it protects people’s choice to live where they want to live. That principle is easy to understand in the context of a real estate agent who turns an African-American family away from houses in predominantly white neighborhoods, or a rental manager who will not rent to families with children. For seniors and younger people with disabilities, equal opportunity means having a broad spectrum of housing choices—including single-family homes, condominiums, and rental communities—in a variety of settings that include people of all ages and abilities living side by side. In addition, people who are older or have disabilities may need or want housing that offers support and medical services for their special needs.

Few housing providers hang up a sign that says “no people with disabilities allowed.” However, application policies may bar people with disabilities just as effectively and in ways the potential resident may not even know are illegal. Although it is clearly prohibited by the FHA, some housing providers still require applicants to demonstrate that they are “capable of living independently,” and ask questions about their medical history as part of the application process.

These types of illegal requirements are especially pernicious because both the housing provider and the applicant may believe they are “for the good” of the person with a disability. The FHA explicitly prohibits inquiries into the “nature or severity” of a disability, yet providers frequently try to justify these inquiries as an attempt to “help” the applicant. Housing providers must base their decisions on whether the applicant can meet the tenancy obligations: paying rent, complying with reasonable residential rules, not damaging the premises and not unduly disturbing others. The courts have held that tenants are free to meet the obligations of tenancy with or without assistance. Just as a tenant may hire a maid to clean the house, so may he or she rely on family members, social service workers or paid service providers.

Beginning in 1990 with *Cason v. Rochester Housing Authority*,¹ a series of cases has interpreted the FHA's ban on handicap discrimination to prohibit housing providers from imposing a requirement that their tenants be capable of "independent living."²

In *Cason*, three disabled individuals (two of them seniors) brought a §604(f)(1) claim against their local public housing authority after it had rejected them for failing to meet its "ability to live independently" eligibility requirement.³ The court ruled for the plaintiffs, concluding that this requirement and the inquiries conducted by the defendant's staff to implement it "are in clear violation of federal law."⁴

In rejecting the defendant's argument that its "ability to live independently" requirement should be upheld because the Authority had only relied on it to turn down a small fraction of handicapped applicants (17 of 276), the *Cason* opinion pointed out that this requirement still had a substantial discriminatory effect on people with disabilities because "no non-handicapped persons" were denied housing on this basis.⁵

The court also rejected the defendant's attempt to justify its requirement based on the FHA's "direct threat" provision, finding that it had "produced no evidence that the challenged practices allow the Authority to screen out potential dangerous tenants."⁶ Finally, the Authority argued that it lacked the staff and resources to provide support services to tenants, but, according to the court, plaintiffs:

require nothing of the sort from the Authority; rather, many handicapped applicants receive support from Medicaid or other assistance programs. A tenant who is able to meet the objective requirements of tenancy should not be denied housing simply because she receives medical assistance or other aid.⁷

The *Cason* defendant's "ability to live independently" requirement had apparently received HUD's approval prior to passage of the 1988 FHAA⁸ and indeed was typical of screening policies of HUD-assisted public housing authorities throughout the country.⁹ As a result of *Cason*, however, HUD revised its public housing occupancy policies to make clear that such authorities could no longer employ "independent living" eligibility criteria.¹⁰

The lessons of *Cason* and HUD's subsequent policy change, however, have not been readily absorbed by providers of senior housing, many of whom continued to impose "independent living" requirements throughout the 1990s and into the new century.¹¹ Their intransigence has prompted a series of FHA cases, all of which have been resolved by eliminating the defendant-provider's "independent living" restriction, either through judicial decisions¹² or consent decrees.¹³

One of the most important of these post-*Cason* cases is *United States v. Resurrection Retirement Community, Inc.*,¹⁴ where the Justice Department in 2002 brought a “pattern or practice” complaint against a 500-unit retirement community, alleging that the defendant’s FHA violations included discouraging prospective residents who used wheelchairs and requiring applicants to submit to medical assessments conducted by the defendant’s employees as a condition of residency.

The case is significant not only because it demonstrates the ongoing resistance of senior housing providers—including large, market-rate retirement communities—to abandoning their “independent living” requirements, but also as a demonstration of the federal government’s commitment to challenging such requirements as part of its FHA enforcement responsibilities.¹⁵ The *Resurrection* case ultimately resulted in a consent decree under which the defendant, in addition to paying \$220,000 in monetary damages and penalties, agreed to rescind its “independent living” and medical-exam policies.¹⁶

Accordingly, it would seem that admission to all traditional senior rental housing is governed by *Cason* and its progeny. But would an “independent living” requirement also be illegal if imposed by an ALF, CCRC or other facility that provides significant medical and other supportive services along with its residential units?

As an initial matter, one has to note the irony of these types of housing providers’ employing such a policy, because, by their very nature, they market themselves to that subset of seniors whose age-related impairments may make them incapable of meeting an “independent living” requirement.¹⁷ And yet such providers who “bundle” together their housing-and-services charges would naturally be concerned about having to absorb potentially open-ended health care costs and might therefore seek to limit these costs by screening out applicants who cannot demonstrate an ability to “live independently.” Certainly, such self-interested pricing strategies and “bottom line” concerns would not be adequate to justify an otherwise clear violation of the FHA, any more than would a housing facility’s desire to foster an “active seniors” or “nonhandicapped” atmosphere.

A more appealing defense, however, might be the need of some ALFs and CCRCs to comply with state regulations establishing “level of care” protections for their residents (i.e., barring such a facility from accepting people incapable of “independent living” if it is not licensed to serve such persons).¹⁸ This is a harder issue, and the case law is not yet well developed on this point.¹⁹ A good part of the answer, though, may lie in the degree to which the FHA allows ALFs and other housing-plus-medical-service facilities to inquire about their residents’

health and disability status to ensure compliance with state licensing requirements.

Overall, the persistence of “independent living” requirements in all types of senior housing, despite substantial FHA case law to the contrary, amounts to a gathering storm of potential litigation. That many senior housing and long-term care providers have not conformed their practices to the mandates of *Cason* and its progeny suggests that these providers do not believe the FHA applies to their operations—clearly a misguided assumption. Furthermore, in light of the growing willingness of the senior housing industry’s disabled clientele to challenge “independent living” and similar requirements,²⁰ the pressure feeding this litigation storm seems unlikely to abate.

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Endnotes

¹748 F. Supp. 1002 (W.D.N.Y. 1990).

² Cf. *Armstrong v. Senior Citizens Housing of Ann Arbor, Inc.*, 317 N.W.2d 255 (Mich.App. 1982) (retirement complex’s rejection of applicant based on her inability to satisfy complex’s “live independently” requirement held to violate state law’s prohibition of disability discrimination in housing).

³748 F. Supp. at 1003-07. The *Cason* defendant’s “ability to live independently” requirement provided for screening out any applicant who was not able “to perform those functions of adult living for and by him/her self. These activities include . . . [the] ability to perform basic housekeeping and personal care.” *Id.* at 1004. In addition to their FHA claim, the *Cason* plaintiffs also sued under § 504 of the Rehabilitation Act because the defendant-Authority received federal financial assistance, but the court decided the case based solely on the FHA. 748 F. Supp. at 1007-09.

⁴*Id.* at 1003.

⁵748 F. Supp. at 1007. Indeed, the defendant simply “never questioned” the non-handicapped applicants’ “ability to live independently.” *Id.* at 1008.

⁶*Id.* at 1008. According to *Cason*, there was “no evidence in the record . . . to indicate that an inability to live independently creates the type of threat contemplated by [§ 3604(f)(9)].” *Id.* at 1009.

⁷748 F. Supp. at 1009 n.1.

⁸*Id.* at 1009.

⁹Prior to 1990, HUD “had actively encouraged exclusion of applicants deemed not capable of independent living.” Barbara Sard, *The Massachusetts Experience with Targeted Tenant-based Rental Assistance for the Homeless: Lessons on Housing Policy for Socially Disfavored Groups, Part II*, 1 GEORGETOWN JOURNAL ON FIGHTING POVERTY 182 (1994); see also U.S. DEP’T. OF HOUS. AND URBAN DEV., MULTIFAMILY HANDBOOK 4350.3, HUD Transmittal CHG-24 (Jan. 19,

1993) (HUD guidance to private owners of federally subsidized housing concerning their obligations to comply with *Cason*).

¹⁰U.S. DEP'T. OF HOUS. AND URBAN DEV., PUBLIC HOUSING OCCUPANCY: ADMISSION HANDBOOK 7465.1, HUD Transmittal REV-2-CHG-2 (July 12, 1991) (rescinding pre-*Cason* Handbook provisions and announcing HUD policy that public housing authorities should not “judge whether handicapped applicants are capable of living independently [and not] require a physical examination as a condition of admission”); *see also* HUD Memorandum from Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, and Joseph G. Schiff, Assistant Secretary for Public Housing and Indian Housing, to All Regional Administrators re: *PHA Determination of “Ability to Live Independently” As a Criterion for Admission to Public Housing* (Dec. 31, 1990) (HUD memorandum advising public housing authorities, in light of *Cason*, to “rescind policies which may treat handicapped applicants different from others” and to not require proof of the ability to live independently).

¹¹*See, e.g., The 2003 Senior Class Charts: Retirement Communities*, NORTH SHORE, August 2003, at 62-67 (11 of 44 Chicago-area retirement communities surveyed in 2003 included disability-related restrictions, such as “must be able to live independently,” “ambulatory residents only,” “active adults,” and “no mentally ill residents”); Erin Ziaja, *Do Independent and Assisted Living Communities Violate the Fair Housing Amendments Act and the Americans with Disabilities Act?* 9 ELDER L.J. 313, 319 (many senior housing facilities still “restrict residency to seniors that are ambulatory and require only assistance with housekeeping efforts”); AARP, *Fighting Back: Active Bike Riding Tenant Resists City’s Eviction Notice*, AARP BULLETIN 12 (Nov. 2003).

¹²*See, e.g., Niederhauser v. Independence Square Housing*, 4 Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 16,305, at 16,305.2, 16,305.6 (N.D. Cal. 1998) (FHA prohibits landlord from requiring tenants to “be capable of tending to their needs independently” and to “have a successful history of living independently”); *Jainniney v. Maximum Independent Living*, Case No. 00CV0879 (N.D. Ohio Feb. 9, 2001) (slip op), available at http://www.bazelon.org/issues/housing/cases/jainniney_v_maxindliv.pdf. (landlord’s rejection of disabled applicant on the ground that he was “not ready to live independently” violates FHA). *Niederhauser* involved an apartment complex that received federal assistance under the § 202 program, and the opinion specifically rejected the defendant’s argument that this program justified its “independent living” requirement. *Niederhauser, supra*, at 16,305.4-.5. The *Jainniney* decision is even more dramatic on this point, for that case involved a housing complex subsidized under an offshoot of the § 202 program – § 811 of the 1990 Cranston-Gonzales Affordable Housing Act – specifically designed for certain categories of disabled tenants, but the court held that, although § 811 authorized the defendant to favor persons with physical disabilities over others, that program could not be used as a tool for owners to exclude people with physical disabilities who may also suffer from additional disabilities or to discriminate on the basis of the ability to live independently. . . . The exclusion of Mr. Jainniney and other people with mobility disabilities who have been deemed by [defendant] to be incapable of independent living can be viewed at best as a paternalistic attempt to direct these individuals to more suitable housing and at worst, as prejudicial discrimination. Either way, the exclusion of those who do in fact suffer from a mobility disability but who are not able to live independently is violative of the FHAA and is not condoned by § 811. As such, “independent living” is not a proper admissions criteria for § 811 housing. *Jainniney, supra*, at 11.

¹³*See, e.g., Symons v. City of Sanibel* (M.D. Fla. 2003), settlement reported at 1 Fair Hous.–Fair Lending (Aspen L. & Bus.), Report Bulletin ¶ 1.8 (Jan. 1, 2004) (FHA-based challenge to senior housing complex’s attempt to evict 82-year-old resident for allegedly not being “capable of living independently” results in settlement providing for resident to remain in place and for defendants to “eliminate any reference to the ability to live independently from their tenancy criteria”). Author Allen was counsel for the plaintiff in the *Symons* case.

¹⁴No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), consent decree reported at 1 Fair Hous.–Fair Lending (Aspen L. & Bus.), Report Bulletin ¶ 12.12 (Dec. 1, 2002), available at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm>.

¹⁵See also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954 (N.D. Tex. 1993) (described *supra* note —); *United States v. Savannah Pines, LLC*, No. 401CV3303 (D. Neb. April 30, 2003), consent decree available at http://www.usdoj.gov/crt/housing/documents/sa_annahsettle.htm (senior housing development agrees to abandon rental agreement that Justice Department alleged violated the FHA by requiring residents to move out if they “can no longer care for [their] personal needs”); *HUD v. Strawberry Point Lutheran Home for the Aging*, 2003 WL 1311336 (HUD ALJ March 5, 2003) (settlement of HUD’s FHA charge based on retirement complex’s attempt to require long-term resident to move to nursing home because of her need for assistance in transferring from bed to wheelchair, with center agreeing to cease all eviction efforts and to consult with complainant-resident and her physician before proposing any future move); *HUD v. Wilmette Real Estate*, 2000 WL 1478457 (HUD ALJ Oct. 3, 2000) (settlement of HUD’s FHA charge based in part on apartment complex’s inquiring about rejected complainant-applicants’ “ability to live independently”).

¹⁶See *Resurrection* consent decree, *supra* note 14.

¹⁷*Cf. Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1010 (3d Cir. 1995): Obviously, everyone who applies for admission to a nursing home does so because of his or her disabilities. Indeed, no one would be able to meet a nursing home’s admissions requirements in the absence of some handicapping condition necessitating nursing home care.

¹⁸See, e.g., Marie-Therese Connolly, *Federal Law Enforcement in Long-Term Care*, 4 J. HEALTH CARE L. & POL’Y 230 (2001). Many states have asserted an interest in regulating ALFs, in large part because of concerns that their residents will be subjected to the same types of abuses that have historically plagued nursing home residents. See, e.g., Christine V. Williams, *The Nursing Home Dilemma in America Today: The Suffering Must Be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867 (2001). In order to forestall such abuses, states generally certify ALFs for a particular “level of care” and prohibit the admission or retention of residents who need care above that level. also Jeremy Citro and Sharon Hermanson, *Assisted Living in the United States*, AARP PUBLIC POLICY INSTITUTE (March 1999), available at http://research.aarp.org/il/fs62r_assisted.html (providing overview of U.S. assisted living options and residents’ needs and characteristics).

¹⁹*Compare Weinstein v. Cherry Oaks Retirement Community*, 917 P.2d 336, 337-38 (Colo.App. 1996) (noting that, to the extent such requirements “are consistent with the federal Fair Housing Amendments Act,” licensed “mid-care” retirement facilities must comply with state and local regulations that require, *inter alia*, denial of admission to and discharge of residents who “have physical limitations that prevent ambulation unless such limitations are adequately compensated by artificial means”) with *Baggett v. Baird*, 1997 WL 151544 (N.D. Ga. Feb. 18, 1997) (invalidating state regulation barring wheelchair users from residing in personal-care home on the ground that that regulation facially discriminates against non-ambulatory people with disabilities) and *Buckhannon Bd. & Care Home v. W. Va. Dept. of Health*, 19 F. Supp.2d 567, 570-72 (N.D. W.Va. 1998), *subsequent decision*, 532 U.S. 598 (2001) (state law and regulations requiring residents of convalescent group homes to “possess the ability to remove themselves, physically, from situations involving imminent danger” single out the handicapped for special treatment and should therefore be analyzed as intentionally discriminatory under the FHA).

²⁰See, e.g., Michael Allen and Susan Silverstein, *Preserving Elders’ Housing Rights*, 39 TRIAL 32, 39 (October 2003).