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## **FAIR HOUSING ISSUES IN CONTINUING CARE RETIREMENT COMMUNITIES: CAN RESIDENTS BE TRANSFERRED WITHOUT THEIR CONSENT?**

*Lauren R. Sturm\**

Consider the following detailed hypothetical scenario: An elderly and quadriplegic resident in the independent living housing section of a continuing care retirement community (CCRC) wishes to continue to live independently in her current apartment, with the assistance of privately paid outside home health aides. In addition to housing, the CCRC provides her with meals, housekeeping and other non-skilled services. When she moved into her unit 15 years ago, she had signed a contract that stated she may be moved to the skilled nursing facility part of the CCRC if the current housing providers, who own both the independent living facility and the skilled nursing facility, determined they are no longer in a position to meet the resident's physical and/or emotional needs. Now they want to move this resident to the skilled nursing facility, citing deterioration in her physical capacity. Other than growing older, there has been no appreciable change in her condition. As someone who has lived with quadriplegia since 1948 (she was in a serious car accident), she is knowledgeable about her disability and how to live with it. The resident is intelligent and well spoken, but has disagreed with staff before, and rarely interacts with the other residents socially. If she was moved to the skilled nursing facility, she would still be paying the CCRC, and another individual could occupy the independent living unit at a higher price than the one agreed on 15 years ago when she moved in.

The resident can pursue the matter through a federal fair housing complaint, but the situation has few precedents and many legal questions. Would requesting an exception to this contract provision be a "reasonable accommodation" under the Fair Housing Act? Could the contract be declared invalid if it was shown to be against the Fair Housing Act or a comparable state statute, and what impact would that have? Should CCRCs be handled differently than other "dwellings"?

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## I. THE FAIR HOUSING ACT/AMENDMENTS OF 1988

The Fair Housing Act (FHA) authorizes individuals who believe they are being discriminated against in a housing practice to file a complaint with the department of Housing and Urban Development (HUD) and pursue that complaint through the legal system.<sup>1</sup> When the original 1968 Fair Housing Act was passed, bases of discrimination included race, color, religion and national origin.<sup>2</sup> Sex was included in 1974,<sup>3</sup> and handicap and familial status was added in the 1988 Fair Housing Amendments Act (FHAA).<sup>4</sup>

The Fair Housing Act only applies to those properties that can be designated as "dwellings," that is, "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof."<sup>5</sup> This could include houses, apartments, manufactured housing, condominiums, cooperatives, and time-sharing properties.<sup>6</sup>

According to the FHA, any aggrieved person, or HUD itself, can file a complaint up to one year after an alleged FHA violation has occurred.<sup>7</sup> Within 100 days of this filing, HUD must investigate any case not handled by a substantially similar state agency to determine whether "reasonable cause" exists to think that an FHA violation has occurred.<sup>8</sup> Simultaneously, HUD must also engage the complainant and respondent in a conciliation process, but settling a complaint through HUD conciliation is not mandatory.<sup>9</sup> If a "reasonable cause" determination is made, and no settlement has been reached, HUD will issue a formal charge on behalf of the complainant.<sup>10</sup> The case may then go to a federal district court where the U.S. Department of Justice would represent the government and the complainant to the extent that the government and

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<sup>1</sup> 42 U.S.C. § 361 *et seq.* (1994).

<sup>2</sup> Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(a), 82 Stat. 73, 85-86 (1968).

<sup>3</sup> Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109(a), 88 Stat. 633, 649 (1974) (codified as amended at 42 U.S.C. § 5301 (2003)).

<sup>4</sup> Pub. L. No. 100-430, § 6(b), 102 Stat. 1619, 1622 (1988) (codified as amended at 42 U.S.C. §§ 3604, 3606 (2003)).

<sup>5</sup> 42 U.S.C. § 3602(b) (1989).

<sup>6</sup> ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 9:2 (2001).

<sup>7</sup> 42 U.S.C. § 3610 (a)(1)(A)(i).

<sup>8</sup> *Id.* § 3610(a)(1)(B)(iv), (g)(1).

<sup>9</sup> *Id.* § 3610(b).

<sup>10</sup> *Id.* § 3610(g)(2)(A).

complainant's interests are the same, or be tried before a HUD-appointed administrative law judge (ALJ) no later than 120 days after the charge is filed.<sup>11</sup> The complainant may also choose to engage in a private lawsuit.<sup>12</sup> The ALJ is required to decide the case within 60 days after the hearing and may award actual damages, injunctive relief, civil penalties of up to \$50,000, and attorney's fees.<sup>13</sup> ALJ decisions are subject to review by the secretary of HUD and the courts.<sup>14</sup>

Recognizing the need for special housing to accommodate the older U.S. population, Congress exempted housing for older persons from the FHA's prohibition from discrimination based on familial status only.<sup>15</sup> Any other type of discrimination or any other practice that would facilitate discrimination that is not based on familial status, such as inaccessible dwellings, would be actionable under the FHA.

Additionally, the 1988 FHAA description of a "handicap" as being a "physical or mental impairment, which substantially limits one or more of a person's major life activities" also describes many of the physical problems associated with old age.<sup>16</sup> Being elderly does not in and of itself constitute a handicap. However, it is important to realize that many elderly individuals fall into a protected class, and therefore have certain rights under the FHA that will be discussed subsequently in this article as they relate to transfer policies in CCRCs. For example, this designation is important when one considers the issue of what inquiries a housing provider can make regarding a housing applicant or resident.

Section 504 of the Rehabilitation Act of 1973<sup>17</sup> provided the definition of a disability that is used in the Fair Housing Act. This Act applied the same antidiscrimination precepts to any "program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."<sup>18</sup> This Act provided fair housing protection to federally assisted housing before the Fair Housing Act absorbed that function. Additionally, the Americans with Disabilities Act (ADA) extended this protection to any programs, activities

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<sup>11</sup> *Id.* § 3610(a), (b), (d), § 3612(g), (o).

<sup>12</sup> *Id.* § 3613.

<sup>13</sup> *Id.* § 3612(g), (p).

<sup>14</sup> *Id.* § 3612(h)-(i).

<sup>15</sup> *Id.* § 3607(b)(2)-(3).

<sup>16</sup> *Id.* § 3602(h).

<sup>17</sup> 29 U.S.C. § 794 (2003).

<sup>18</sup> *Id.*

and services of state and local government entities.<sup>19</sup> Although the FHA and ADA overlap, the ADA fills a gap in the FHA by covering “public accommodations” such as sales or home rental offices.<sup>20</sup>

Court decisions have extended FHA protection to assisted living facilities and skilled nursing homes.<sup>21</sup> Furthermore, in a supplemental discussion on accessibility regulations by HUD, CCRCs can be protected as dwellings under the FHA, as long as the facility includes at least one building consisting of four or more dwelling units.<sup>22</sup> The Act defines “dwelling” as a facility used as a residence for more than a brief period of time.<sup>23</sup> Because of the subjectivity of this criteria, each continuing care facility must be examined on a case-by-case basis using the factors set by HUD, including, but not limited to: “(1) the length of time persons stay in the project; (2) whether policies are in effect at the project that are designed and intended to encourage or discourage occupants from forming an expectation and intent to continue to occupy space at the project; and (3) the nature of the services provided by or at the project.”<sup>24</sup>

## II. CONTINUING CARE RETIREMENT COMMUNITIES (CCRCs)

The American Association of Homes and Services for the Aging (AAHSA) defines a CCRC as “an organization that offers a full range of housing, residential services, and health care in order to service its older residents as their needs change over time.”<sup>25</sup> The three main stages of care provided in a CCRC are independent living units (modified apartments or homes), assisted living facilities (assistance to residents short of 24-hour skilled nursing care), and skilled nursing care facilities (nursing homes).<sup>26</sup> It is possible for residents to make temporary or permanent movements within these levels depending on their medical needs.<sup>27</sup> CCRCs can be owned and operated by for-profit or not-for-profit organizations,

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<sup>19</sup> 42 U.S.C. § 12132 (2000).

<sup>20</sup> *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 8-11 (D.D.C. 1999).

<sup>21</sup> See generally *United States v. Lorantffy Care Center*, 999 F. Supp. 1037 (N.D. Ohio 1998); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R. 1991).

<sup>22</sup> *Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines*, 59 Fed. Reg. 33364 (June 28, 1994) (to be codified at 24 C.F.R. ch. 1).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Jacquelyn Sanders, *Continuing Care Retirement Communities: A Background and Summary of Current Issues*, U.S. Dept. of Health and Human Services (Feb. 24, 1997), available at <http://aspe.os.dhhs.gov/daltcp/Reports/ccrcrpt.htm>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

and payment to a CCRC depends on the type of contract a resident chooses.

In 2003, it was estimated that there were approximately 2,150 CCRCs with about 613,625 beds.<sup>28</sup> The broader category of “seniors housing with relatively generous wellness and support services” attracts people over age 75.<sup>29</sup> Before allowing a senior citizen to reside in a CCRC, admission criteria often are assessed, which mainly revolve around financial capability and medical health.<sup>30</sup> A study from 1988 found that CCRCs rejected 50% of applicants for health reasons and 39% for financial reasons.<sup>31</sup> CCRCs assess a potential resident’s physical and mental capacity, both in the initial application process and as the resident continues to live in the independent living unit, to determine his or her ability to live independently.<sup>32</sup>

Twenty-five states have some form of regulation for CCRCs.<sup>33</sup> These regulations tend to focus on the financial solvency of the CCRC, and rules for disclosures and contracts for the consumer.<sup>34</sup> A few states have gone further in creating CCRC regulations that more comprehensively protect consumers; one such statutory scheme will be discussed later in this article.

More commonly, states will license and regulate the skilled nursing facility and the assisted living facility within a CCRC, but not the independent living units. The Omnibus Budget Reconciliation Act of 1987 (OBRA) federally regulates nursing homes.<sup>35</sup>

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<sup>28</sup> EVELYN HOWARD ET. AL., HDR AFFORDABLE SENIORS HOUSING HANDBOOK § 2:10 (2003).

<sup>29</sup> *Id.* at § 2:30.

<sup>30</sup> AARP, *Continuing Care Retirement Communities (CCRCs)* (2004), at <http://www.aarp.org/confacts/housing/ccrc.html> (on file with the New York City Law Review).

<sup>31</sup> Frank A. Sloan et. al., *Continuous Care Retirement Communities: Prospects for Reducing Institutional Long-Term Care*, 20 J. HEALTH POL. POL’Y & LAW 75, 86 (1995).

<sup>32</sup> AARP, *supra* note 30.

<sup>33</sup> ARK. CODE ANN. § 23-93-101 (Michie 2001); CAL. HEALTH & SAFETY CODE § 1770 (West 2003); CONN. GEN. STAT. ANN § 17b-520 (West 2003); DEL. CODE ANN. 18 § 4601 (2003); FLA. STAT. ANN. § 651.011 (2003); GA. CODE ANN. § 33-45-1 (2002); IDAHO CODE § 67-2750 (Michie 2003); IND. CODE ANN. § 23-2-4-1 (Michie 2003); IOWA CODE ANN. § 523D.1 (West 2003); LA. REV. STAT. ANN. § 51:2171 (West 2003); ME. REV. STAT. ANN. 24-A § 6201 (West 2003); MASS. GEN. LAWS ANN. 93 § 76 (West 2003); MINN. STAT. ANN. § 80D.01.20 (West 2003); N.H. REV. STAT. ANN. § 420-D:1 (2002); N.J. STAT. ANN. § 52:27D (West 2003); N.M. STAT. ANN. § 24-17-1 (Michie 2003); N.Y. PUB. HEALTH LAW § 4601 (McKinney 2003); N.C. GEN. STAT. § 58-64-1 (2003); OKLA. STAT. ANN. 63 § 1-1921 (West 2003); 40 PA. CONS. STAT. ANN. § 3201 (West 2003); R.I. GEN. LAWS § 23-59-1 (2003); S.C. CODE ANN. § 37-11-10 (2002); TEX. HEALTH & SAFETY CODE ANN. § 246.001 (Vernon 2004); VA. CODE ANN. § 38.2-4900 (Michie 2003); WIS. STAT. ANN. § 647.01 (West 2003).

<sup>34</sup> *See id.*

<sup>35</sup> *See* 42 U.S.C.A. § 1395i-3 (2003).

Each skilled nursing facility is licensed in the state in which it operates. Facilities that receive federal funds through Medicare and Medicaid must comply with OBRA through audits and yearly inspections.<sup>36</sup> OBRA is a minimal standard, and not intended to limit other state and federal laws or regulations.<sup>37</sup> As of 1998, 22 states regulated assisted living facilities.<sup>38</sup> Because independent living facilities are not allowed to provide skilled nursing care, they are more likely to be regulated as any multifamily dwelling would be in that state. In the hypothetical, the State of Iowa clarified that only providing skilled nursing care in the independent living units could cause the CCRC to lose its state license for the skilled nursing facility.<sup>39</sup>

Some self-regulation of CCRCs does exist. The Continuing Care Accreditation Commission (CCAC) is a private entity that accredits and evaluates CCRCs on a voluntary basis.<sup>40</sup> According to the CCAC Handbook, “[t]he CCAC standards have three major purposes, which are to assist a CCRC in developing, interpreting, improving and evaluating all components of its operation, to provide the basis for accreditation decisions and to assure consumers that the CCRC has met pre-determined standards.”<sup>41</sup> In the most recent edition of the CCAC accreditation standards, the organization promulgated guidelines on care coordination within the continuum.<sup>42</sup> The organization has written guidelines for the transfer decision-making process and the consideration used in admission to each level of care.<sup>43</sup> The decision to transfer a resident within the continuum is made through a clearly defined process involving the resident, appropriate staff members and, as necessary, the resident’s representative.<sup>44</sup> The guidelines are reviewed regularly with

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Jeremy Citro & Sharon Hermanson, *Assisted Living in the United States*, AARP Public Policy Institute (Mar. 1999), available at [http://research.aarp.org/il/fs62r\\_assisted.html](http://research.aarp.org/il/fs62r_assisted.html).

<sup>39</sup> Interview with Debi Myers, Ombudsman, State of Iowa Office of Elder Affairs (July 9, 2002).

<sup>40</sup> See generally THE CONTINUING CARE ACCREDITATION COMMISSION, at <http://www.ccaconline.org>.

<sup>41</sup> Sanders, *supra* note 25 (citing CONTINUING CARE ACCREDITATION COMMISSION, HANDBOOK FOR CANDIDATE CCRCs, at <http://www.ccaconline.org/Downloads/document/handbook.pdf> (on file with the New York City Law Review)).

<sup>42</sup> THE CONTINUING CARE ACCREDITATION COMMISSION, STANDARDS OF EXCELLENCE REQUIRED DOCUMENTS SELF-ASSESSMENT QUESTIONS, 25 (2002), at <http://www.ccaconline.org/Downloads/StandardsAugust2002.htm> (on file with the New York City Law Review).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

residents.<sup>45</sup> Unfortunately, no example of an appropriate process was listed in the CCAC.<sup>46</sup> As of 1997, only 207 CCRCs have maintained CCAC accreditation.<sup>47</sup> The CCRC in the hypothetical was not accredited by the CCAC.

CCRC contracts fall into three categories: extensive, modified, and fee-for-service agreements.<sup>48</sup> An extensive agreement, sometimes referred to as a “life care” agreement, includes housing, residential services and amenities, pre-payment of medical expenses and unlimited long-term care without substantial increases in periodic payments. This type of agreement carries the greatest financial risk for CCRCs.<sup>49</sup> The modified agreement also covers housing, residential services and amenities and limited nursing care without any substantial increases in periodic payments. The main difference between this and the extensive agreement is that here, care is paid for a specific number of days each year, and any care beyond this is paid by the resident through a daily charge. In this way, the CCRC’s financial risk is mitigated.<sup>50</sup> The fee-for-service agreement includes housing, residential services, and amenities. Health care is guaranteed on-site, but payment is out-of-pocket, with the resident bearing responsibility for obtaining third-party (Medicare/Medicaid) reimbursement. Here, the CCRC bears no financial risk, and therefore, fees are generally lower.<sup>51</sup>

What sets CCRCs apart from other housing arrangements for older Americans is that they have more than one housing type available to a resident based on their medical needs.<sup>52</sup> This allows the resident to “age in place,” rather than being uprooted from a community due to an increased need for skilled care. Consequently, the CCRC must work with the resident, his or her family, or other parties to determine the criteria that govern the resident’s move among the different housing models to accommodate the needs of the resident. With this type of arrangement, the CCRC management avoids dictating such a change, which could alienate

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Sanders, *supra* note 25 (citations omitted).

<sup>48</sup> *Id.* (citing UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, HEALTH CARE SERVICES: HOW CONTINUING CARE RETIREMENT COMMUNITIES MANAGE SERVICES FOR THE ELDERLY, GAO/HEHS-97-36 (Jan. 1997), available at <http://www.gao.gov/archive/1997/he90736.pdf> (citing letter from William J. Scanlon)).

<sup>49</sup> *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Sanders, *supra* note 25.

residents and their families and friends, infringe upon the spirit of the CCRC model, and potentially, violate federal law.

### III. FAIR HOUSING ISSUES PRESENT IN THIS HYPOTHETICAL

The CCRC's actions in the hypothetical may violate two provisions of the Fair Housing Act: § 3604(f)(2)(A), which states, "discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of that person;" and § 3604(f)(3)(B), which states, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."<sup>53</sup> A possible affirmative defense for respondents would be § 3604(f)(9), which states that, "[n]othing . . . requires that a dwelling be made available to an individual whose 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."<sup>54</sup>

#### A. Applicant Selection Inquiries in CCRCs

Correlating with the Fair Housing Act's prohibition on discriminating against the handicapped, § 100.202(c) of the accompanying HUD regulations states that:

[i]t shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person.<sup>55</sup>

Case law shows this includes questions regarding a person's ability to live unassisted or what assistance may be required regarding hygiene or other personal needs.<sup>56</sup> One might argue that by logical extension, any determination by a housing provider that the person cannot live independently based on these illegal inquiries is also illegal. One case that supports this position is *Cason v. Roches-*

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<sup>53</sup> 42 U.S.C. § 3604 (f)(2)(A), (f)(3)(B) (2001).

<sup>54</sup> *Id.* § 3604 (f)(9).

<sup>55</sup> 24 C.F.R. § 100.202(c) (2003).

<sup>56</sup> See *Niederhauser v. Independence Square Housing*, [1998 Transfer Binder] Fair Housing-Fair Lending Rep. ¶16,305, at 16,305.7 (N.D. Cal. Aug. 27, 1998); *Campbell v. Minneapolis Pub. Hous. Auth.*, 168 F.3d 1069, 1074-75 (8th Cir. 1999).

ter Housing Authority.<sup>57</sup> There, the defendants required that housing applicants demonstrate the ability to live independently before a unit was granted.<sup>58</sup> The plaintiff in this case was denied a housing unit because she needed a wheelchair and walker, used aide services, and relied on adult diapers.<sup>59</sup> The court ruled that even though having an independent living requirement for the housing unit did not substantially cause discrimination against the disabled (it only affected 17 out of 276 disabled applicants), the policy negatively impacts only the disabled, and therefore is illegal under the Fair Housing Act.<sup>60</sup> Questions that could be asked to all applicants on a nondiscriminatory basis might include income, references, and rental history, as well as questions regarding age or handicap when you have to be a certain age or have a handicap to qualify for the housing. But discriminatory questions are not permitted.<sup>61</sup>

*Niederhauser v. Independence Square Housing* extended the regulation to cover existing tenants, even when the policy is expressly spelled out in the rental agreement.<sup>62</sup> Plaintiffs were an elderly and disabled married couple who had lived in a housing unit owned by defendants (“ISH”) since 1979.<sup>63</sup> In 1985, ISH issued new “Qualifications for Tenancy” with the renewal of plaintiff’s lease, which required that all tenants be capable of living independently.<sup>64</sup> In 1996, ISH questioned plaintiffs’ ability to meet the new tenancy requirements after Mr. Niederhauser was released from the hospital.<sup>65</sup> ISH then stated that Mr. Niederhauser would not be accepted back and that the couple should seek another residence.<sup>66</sup> The court ruled that ISH’s policy and actions were illegal, stating that any policy that asks an applicant or a current tenant a question beyond what would be asked to determine housing eligibility in terms of their disability or their ability to live independently, is illegal, and any policy that would evict a tenant based on such inquiries is also illegal.<sup>67</sup>

More recently, a consent order was issued against a retirement

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<sup>57</sup> 748 F. Supp. 1002, 1008-09 (W.D.N.Y. 1990).

<sup>58</sup> *Id.* at 1004.

<sup>59</sup> *Id.* at 1005.

<sup>60</sup> *Id.* at 1009.

<sup>61</sup> 24 C.F.R. § 100.202(c) (2003).

<sup>62</sup> *Niederhauser*, [1998 Transfer Binder] Fair Housing-Fair Lending Rep. at ¶ 16,305.7.

<sup>63</sup> *Id.* at ¶ 16,305.1.

<sup>64</sup> *Id.* at ¶ 16,305.2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

community because of inquiries it made into the medical condition of individuals seeking admission.<sup>68</sup> In that case, the defendant retirement community was ordered, among other things, to pay civil penalties and to provide documentation of its admission practices.<sup>69</sup> The case does not indicate whether or not the defendant was organized in the manner of a CCRC.

As shown above, the illegal inquiry provision could be problematic for senior citizen housing that provides health and other services, such as CCRCs. Questions about applicants' ability to live independently, beyond just their age, are asked by administrators at these facilities so as to better meet residents' needs, which, in the case of CCRCs, might mean possible transfer to a different housing model on the CCRC campus. However, such questions in the initial application process would not be allowed, as these facilities are subject to the Fair Housing Act.<sup>70</sup> In the hypothetical, the complainant was asked numerous questions about her health and independent living status throughout her residency in the CCRC, including questions about the severity of her disability, her ability to go to the bathroom unassisted and her mental fitness. These questions, the staff's subsequent records about the complainant and the final determination to transfer her would be illegal under *Niederhauser* and *Resurrection*.

If a court were to adopt the theory in *Niederhauser* and *Resurrection*, the whole CCRC model might be called into question. CCRCs provide a "continuum of care," that is, a range of services, skilled caregivers, and housing options packaged in discrete categories of living arrangements on one campus. In order to do this effectively, the CCRC needs information about how a resident functions or whether there has been any change in his or her status. If a CCRC cannot pursue inquiries and make determinations about a person's ability to live independently, then it cannot effectively provide a continuum of care.

#### B. Reasonable Accommodations Under the Fair Housing Act

Alternatively, the complainant can invoke a theory pursuant to § 804(f)(3)(B), whereby a reasonable accommodation must be made so that the person could remain in the unit and argue that

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<sup>68</sup> *United States v. Resurrection Retirement Community, Inc., et al.*, (N.D. Ill. Oct. 22, 2002), available at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm>.

<sup>69</sup> *Id.*

<sup>70</sup> *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1043-44 (N.D. Ohio 1998).

“reasonable accommodations” must be made in “rules, policies or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling.”<sup>71</sup> The accommodation must be made unless it imposes an undue financial or administrative burden on a defendant or requires a fundamental alteration in the nature of its program.<sup>72</sup> “Reasonableness” is the first element of a prima facie reasonable accommodation case, and although some cases put the burden of proving the reasonableness requirement on the plaintiff,<sup>73</sup> others put the burden on the defendant.<sup>74</sup> A plaintiff should also show that he or she suffers from a handicap as defined in § 3602(h), that the defendant knew or should have known about this handicap, that the accommodation of the handicap may be necessary to afford the plaintiff an equal opportunity to use and enjoy the housing involved, and that the defendant refused to make such an accommodation.<sup>75</sup> Absent federal law, many of these reasonable accommodations would violate the housing policies that are spelled out in the rental contract. Examples include allowing a blind tenant to have a seeing eye dog, despite a “no pets” policy,<sup>76</sup> reserving more accessible parking spaces for mobility-impaired tenants, despite a “first-come, first-served” parking policy,<sup>77</sup> letting nontenants help tenants by using housing facilities when they otherwise would not be allowed to do so,<sup>78</sup> and allowing the tenant to pay for accessibility ramps when other such alterations would not be permitted.<sup>79</sup>

Are the prima facie elements of a good reasonable accommodation case satisfied in the hypothetical? The complainant has a handicap as defined by the FHA and applicable case law. The respondent knew of the disability and it kept medical records on the complainant’s condition. While the respondent had provided ac-

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<sup>71</sup> 42 U.S.C. § 3604(f)(3)(B) (2001).

<sup>72</sup> See generally *HUD v. Ocean Sands, Inc.*, [1994-2003 Transfer Binder] Fair Housing-Fair Lending Rep. ¶ 25,056 (HUD Secretary Oct. 4, 1993).

<sup>73</sup> See, e.g., *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996).

<sup>74</sup> See, e.g., *Keys Youth Servs. v. City of Olathe*, 52 F. Supp. 2d 1284, 1304 (D. Kan. 1999) (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)).

<sup>75</sup> See generally *Ocean Sands* [1994-2003 Transfer Binder] Fair Housing-Fair Lending Rep. at ¶ 25,550.

<sup>76</sup> 24 C.F.R. § 100.204(b): Example (1); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

<sup>77</sup> 24 C.F.R. § 100.204(b): Example (2); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333-336 (2d Cir. 1995).

<sup>78</sup> Implementation of the Fair Housing Authority Act, 54 Fed. Reg. 3232, 3248 (Jan. 23, 1989).

<sup>79</sup> *Hunter v. Trenton Hous. Auth.*, 698 A.2d 25, 26 (N.J. Super. Ct. App. Div. 1997).

commodations for her disability in the past, it refused to provide the most recently requested accommodation. The latter accommodation is necessary to afford the complainant an equal opportunity to use and enjoy the housing involved, as the alternative would be to live in a skilled nursing facility that would not furnish her with the privacy or accoutrements of an independent living unit. Additionally, the institutional environment would give her little control over her living environment, and might affect her overall health due to the nature of her quadriplegia. Because of her disability, the complainant has a weakened immune system that causes her condition to be aggravated by small changes in the temperature, or by use of the wrong supplies.

The final question concerns the reasonableness of the accommodation. The complainant is asking for more than just an assist-and-comfort animal or a closer parking space. Rather, she is asking for an exception to the contract she signed, so that she can remain in her unit even though the CCRC would otherwise have the right to ask her to leave or to transfer her to the skilled nursing facility. The respondent could argue that in exchange for life-long care, certain rights have to be handed over to the facility. In this jurisdiction, however, the state does not require the CCRC to offer an intermediate living choice like assisted-living. Because the CCRC does not have such an intermediate option, the transfer would cause a harsher change in lifestyle.

Nonetheless, considering the damage that would be done to complainant's quality of life, to her ability to care for herself with the assistance of privately paid aides, and to the stable condition she maintained during her prior residency, it is doubtful that the CCRC's decision was based on sound medical principles. Although the language in the contract would indicate that the respondent has a right to disagree with medical opinion, doing so in the face of complainant's request for an exception seems unreasonable without some other explanation.

While precedents are few, case law indicates that the complainant asked for a reasonable accommodation.<sup>80</sup> In *Janniney v. Maximum Independent Living*, the magistrate judge ruled that evicting a mobility-disabled person who provided his own services to

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<sup>80</sup> In *O'Neal v. Ala. Dept. of Pub. Health*, 826 F. Supp. 1368 (M.D. Ala. 1993), an assisted-living facility was allowed to refuse to allow residents with Alzheimer's disease to remain in its facility because doing so would cause it to lose its state license. This case is distinguishable on its facts because in the hypothetical, any care that is beyond the facility's mandate is provided by privately paid aides, not the facility's staff. Therefore, the skilled nursing care center's license would not be in jeopardy.

support his independent living was a violation of the FHAA, and called the respondent's policy, "at best a paternalistic attempt to direct these individuals to more suitable housing and at worst, prejudicial discrimination."<sup>81</sup> The precedents of this case and the *Niederhauser* case, indicate that allowing the complainant to remain would be a reasonable accommodation of her disability, unless the respondent demonstrated that a severe financial cost would result from the accommodation.

It might be difficult to perceive the difference between the two theories that are cited here as a basis for the complainant's case because they both result from the same basic facts. Nevertheless, from the CCRC's point of view, the complainant's success under a reasonable accommodation theory is preferable, as the lesser of two evils, to success under an illegal inquiry theory. If the complainant wins under a reasonable accommodation theory, the CCRC can continue to gather information about a resident and to evaluate his or her ability to live independently. Transfers can be viewed on a case-by-case basis, giving the CCRC the opportunity to communicate with the resident, with her doctor, or with any other appropriate party in a way that maintains a good relationship between the facility and its residents.

If the illegal inquiry theory were to be adopted by the court, CCRCs would have to completely reevaluate their entire residency policy, which could lead to negative financial results, or could tempt them to use other legal residency requirements as a pretext for excluding the "nonyouthful elderly." This unintended consequence is especially troubling because it would create additional fair housing litigation, while withholding appropriate housing from those who need it the most. HUD needs to provide more regulatory guidance on applying fair housing regulations to facilities that furnish housing and services to senior citizens, including CCRCs, independent living facilities, assisted living facilities and skilled nursing facilities.

### C. *The Health and Safety Exception*

As an affirmative defense, the respondents could argue that under § 3604(f)(9), the tenancy would constitute a direct threat to the health or safety of other individuals or that it would result in substantial physical damage to the property of others.<sup>82</sup> Because of the immobility of the complainant, and the fact that the facility

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<sup>81</sup> No. 00-0879, slip op. at \*15-16 (N.D. Ohio filed Feb. 9, 2001).

<sup>82</sup> 42 U.S.C. § 3604(f)(9) (2001); 24 C.F.R. § 100.202(d) (2003).

does not provide 24-hour skilled-nursing care, egress in the event of an emergency could be very difficult, endangering the complainant, other residents, staff, and rescue personnel. The Fair Housing Act permits reasonable restrictions on the terms and conditions of housing, even the denial of housing, if justified by public safety concerns.<sup>83</sup> It also permits any state or local safety ordinance that appears to impose standards that are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by unique and specific needs and abilities of those handicapped persons.<sup>84</sup> However, in this case, no state or local ordinance was a factor in the decision to transfer the complainant, and there was no evidence that the person presented an egress risk because no records were kept from any fire or emergency drills on how long it took the individual to exit the facility.

In the House Report on the Fair Housing Amendments Act of 1988, the following was stated regarding this exception: “[a]ny claim that an individual’s tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct. Generalized assumption, subjective fears and speculation are insufficient to prove the requisite direct threat to others.”<sup>85</sup> Therefore, unless additional evidence of a health or safety risk is discovered, the complainant’s right to use and enjoy her housing would outweigh any slight and unassessed health or safety risk to others. However, if such evidence could be provided, the CCRC would have a viable defense to complainant’s FHA complaint.

#### IV. RECOMMENDATION REGARDING CCRC TRANSFERS: THE MAINE MODEL

The best alternative to protracted legal battles and unintended consequences resulting from the court’s interpretation of federal law is a proactive legal model that spells out the responsibilities of the CCRC to the resident whenever a transfer is considered. The Continuing Care Accreditation Commission’s (CCAC) standard for transfer policies<sup>86</sup> recognizes the importance of a coopera-

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<sup>83</sup> *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).

<sup>84</sup> *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992) (citations omitted).

<sup>85</sup> H.R. REP. NO. 100-711, at 29 (1988) (citations omitted).

<sup>86</sup> THE CONTINUING CARE ACCREDITATION COMMISSION STANDARDS OF EXCELLENCE REQUIRED DOCUMENTS SELF-ASSESSMENT QUESTIONS 20-26 (2002), at <http://www.ccaconline.org/Downloads/StandardsAugust2002.htm> (on file with the New York City Law Review).

tive transfer process, but since CCAC accreditation is voluntary, federal or state law must fill the void so that the interests of residents and facilities are properly balanced and responsibilities are clearly defined. The State of Maine provides the best legislative model for other states. Regarding the transfer of CCRC residents, the Maine Insurance Code provides:

A resident of a continuing care retirement community may be transferred to a residential care unit or a bed within the skilled nursing facility under the following conditions:

1. **Written Consent:** With the written consent of the resident or the resident's authorized representative; or
2. **Health or Safety Danger:** Upon a finding that the resident poses a health or safety danger to other residents or a change in a resident's health status or abilities necessitates a move to a higher level of care. A decision to transfer or change a resident's accommodations may be made only after extended consultation between the provider's interdisciplinary team, including, but not limited to, medical personnel, social workers and therapists of the community, and the resident, the resident's treating physician and the resident's family or other representative. The decision may also consider all reasonable care alternatives. A written decision to transfer or change a resident's accommodations must describe why the resident's health care needs cannot be met at the resident's present location. The resident may appeal this determination to the department pursuant to rules proscribed by the department.<sup>87</sup>

This statute spells out many important elements for an effective CCRC transfer policy. First, it limits the reasons a CCRC can transfer a resident with the resident's consent or when the resident poses a health and safety danger. Other factors, such as how the resident gets along with staff or how he or she interacts with other residents, are not allowed to be considered. Second, it requires that the facility have individuals other than the facility's management participate in the decision-making process. This allows doctors, therapists, and social workers — who must work with the resident, resident's family, and any authorized representative — to participate in the decision-making process. These safeguards ensure that qualified individuals are assessing the resident's health and well-being with the full participation of the resident and his or her loved ones or advocates. Third, it requires a detailed, written explanation for the facility's decision. Lastly, and perhaps most

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<sup>87</sup> ME. REV. STAT. ANN. 24-A § 6228 (1964).

importantly, it provides an appeals process for the resident. This law is comprehensive, simple and direct. No other state has such a law, although many states, including New York, New Jersey, and California, require detailed disclosures of a facility's transfer policy.<sup>88</sup> Federal adoption of the Maine statute would decrease the chance that CCRC residents would need current provisions of the FHA as protection from an unwarranted transfer, a protection the Act is not clearly designed to provide.

#### V. CONCLUSION

This detailed hypothetical is an example of what happens within an industry that is reputable, for the most part, and yet lacks appropriate oversight. CCRCs in general strive to provide a high quality of life and the assurance that whatever challenges senior citizens might face, they have a community that will care for them for many years to come. The CCRC examined here did not show such care. It made a unilateral decision rather than fully consulting with the resident and any other appropriate individual. It refused to see that the complainant was an elderly person with a disability who *could* direct and fund her needs so as to live independently. Respondent's decision would have swiftly decreased the complainant's health and quality of life, given her disability. However, judicial intervention could make new law that would affect the whole CCRC industry, causing unintended consequences. Swift leadership in rulemaking should be taken so that the elderly in specialized housing and the housing providers know what, if any, their rights and responsibilities are under the Federal Fair Housing Act.

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<sup>88</sup> N.Y. PUB. HEALTH LAW § 4608 (McKinney 2003); N.J. STAT. ANN. §52:27D-330 (West 2003); CAL. HEALTH & SAFETY § 1788 (a)(10)(A)(i-iv) (West Supp. 2003).