Housing IS Health Care in the LGBTQ and HIV/AIDS community

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Agenda

• Fair Housing – Why is it such an important issue
• Disability – frames a large part for the need of this conference and this presentation
• How Older LGBTQ and older persons with HIV are treated in institutions
  • People and institutions with bias against LGBTQ persons use perceived or real disabilities to discriminate
Agenda

• Harassment of LGBTQ persons and persons with HIV
• Criminality in LGBTQ and HIV communities –
  • both real and trumped up
  • Public Housing and Private Housing
  • LGBT rule of 2012
  • Other HUD Guidance
  • UCLA Study Results on the Criminalization of People Living with HIV/AIDS
Why does housing matter?

• Where we live affects how others view us and how we view ourselves.

• In our society, housing is connected to so many critical aspects of life – it contributes to our feeling of success or failure.
Why does housing matter?
Where we live determines many things:

• What kinds of job opportunities will be open to us;
• What kind of education our children will have;
• What kinds of professional and social associations we will have in our community;
• What kinds of physical danger we will be exposed to;
Why does housing matter?

Where we live determines many things:

• What kinds of values and expectations will be opened to us;

• *What kinds of health care facilities, and physicians will be nearby and what standard of care is available to us.*
Application to All “Dwellings”

• The Fair Housing Act covers any “dwelling,” which is defined as any building, structure, or portion of a building or structure that is occupied as, or intended or designed for occupancy as, a residence by one or more families or individuals.
Fair housing laws prevent discrimination in how housing is

- sold,
- rented,
- appraised,
- financed,
- insured,
- inspected
- serviced by vendors or municipalities
- and advertised.
Fair housing laws regulate

- Property owners,
- Landlords,
- Lenders,
- Realtors,
- Appraisers,
- Newspapers/publishers &
- Municipalities
- And any business that intersects with the provision of residential housing
Fair Housing Laws utilize named protected classes

• Color
• Race
• Religion
• Sex
• Familial Status
• Disability
• National Origin
Locally Protected Classes

- Varies from city to city
- Ohio adds Ancestry and Military Status
- Others include:
  - Columbus, age, sexual orientation, gender identity/expression
  - King George County adds personal appearance
  - District of Columbia adds political affiliation
  - Columbus adds marital status
  - 5 jurisdictions in Ohio, like Connecticut and Chicago, add source of income
- [www.cofha.com/reental](http://www.cofha.com/reental) glossary of definitions in publication called “Non-Discriminatory Rental Practices"
Disability (old name - “handicap” - used and defined in the FHAA)

• (h) "Handicap" means, with respect to a person--
  (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
  (2) a record of having such an impairment, or
  (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

• Cite: https://www.justice.gov/crt/fair-housing-act-2
Important Cases and HIV

• In 1998, the United States Supreme Court, in *Bragdon v. Abbott*, US Sup. Ct. No. 97-156, ruled that a person’s asymptomatic HIV infection is a disability under the Americans With Disabilities Act.

• Because of this ruling, it is clear that asymptomatic HIV infection is a disability that is also covered by the federal Fair Housing Amendments Act (FHAA).
Important Provisions for Qualified Individuals with Disabilities

• Reasonable Accommodations (RA) & Reasonable Modifications (RM)

• Under the FHAA,
  • a reasonable *accommodation* is a change, exception, or adjustment to a rule, policy, practice, or service, whereas
  • a reasonable *modification* is a structural change made to the premises.

• Cite: see [www.cofha.com](http://www.cofha.com) click on References and click on either “Accommodations” or “Modifications” – these are the HUD/Justice Joint Statements giving guidance on each provision
RA/RM

- Housing providers are not required to make a RA/RM’s unless one is requested.

- Once Requested:
  - Interactive Dialogue and Prompt Response are required!
  - Refusal or unreasonable delays or processes can be illegal housing discrimination and
  - These things even though these might unintentional, the situation can violate the Act.
RA/RM

- A housing provider can deny a request for reasonable accommodation if it would:
  - Impose an undue financial and administrative burden or
  - Fundamentally alter the nature of the provider’s operations
    - Courts determine this on a case-by-case basis
Reasonable Accommodations

• Who pays the expense?

  • A housing provider may not charge an extra fee, require an additional deposit, or require special liability insurance as a condition of granting a reasonable accommodation.

  • However, the housing provider may charge the cost of repairing damage if the disabled individual’s use of the reasonable accommodation results in damage to the premises.
    • Normal wear and tear excepted.
Examples of Reasonable Accommodations

• Allowing a service or companion animal in a building or community that has a “No Pets” policy

• Specifically reserved parking space close to the individual’s unit or front entrance to building – in addition to any “public” handicap parking spaces

• Permission to pay rent after normal due date, without late fee, if income is based upon receipt of SSDI or other public assistance and tenant does not receive rent by due date in lease

• Waiving of rules, i.e. non-tenants prohibited from using laundry; to allow friend/helper to do laundry on behalf of disabled individual

• Having management or other personnel deliver mail, or remove trash for disabled individual with mobility impairments
Examples of Reasonable Modifications

• Installing grab bars in bathrooms
• Lowering kitchen countertops and/or removing lower cabinets
• Installing stove or other appliances with front controls
• Widening doorways
• Installing a ramp or lift to allow easier access to an otherwise inaccessible unit
Reasonable Modifications

• Who pays the expense?

• The Fair Housing Act provides that while the housing provider must permit the modification, the tenant is responsible for paying the cost of the modification.

• Unless the housing provider received federal funds in the development and/or construction of the housing – then certain regulations require the housing provider to pay the cost of the modification.
Disability Scenario
Can the condo association refuse to process the request if Katrina refuses to use their forms?

1. Yes
2. No
Can the association request a certification that the animal is trained to assist with a disability?

1. Yes
2. No
What is the rule for processing a request for Reasonable Accommodation or Reasonable Modifications (RA/RM)?

1. **Prompt Response**
2. A written Response in all cases
3. Giving Requester a definite timeline for response
Reminders from HUD/Justice Departments

• In a situation where the disability and need are obvious, a statement by a requester about the disability and the connection to the requested accommodation, is usually all a housing provider needs to process the request.
Reminders from HUD/Justice Departments – Third Party Verifications

• 2004 General Guidance for all RA’s and RM’s
  1. Doctor/Medical professional
  2. Non-Medical Service Provider
  3. Peer Support Group or
  4. “a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability.”

• 2013 Guidance specific to need for an Assistance Animal for Emotional Support:
  1. “a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability”
Reminders from HUD/Justice Departments

• A provider has an obligation to provide **prompt responses** to reasonable accommodation requests.

• An **undue delay** in responding to a reasonable accommodation request may be **deemed to be a failure** to provide a reasonable accommodation.
Reminders from HUD/Justice Departments

• An interactive process which renders an individual assessment in which the housing provider and the requester “discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all”

• Treating people individually is so important that NAR commissioned the next 2014 video to educate Realtors on Service animals
Video from NAR on Service Animals
Issues in Continuing Care Retirement Communities (CCRC’s), for LGBTQ persons living with HIV

• Admissions
• Inferior Service
• Requirements of Tenancy
• “Independent Living” Requirements
• Transfers between Levels of Care
Common violations under Federal Law and Ohio Law:

• **Denial of admission** by a Housing Provider for older adults, of a female prospective tenant because she wears masculine clothes and engages in other physical expressions that are stereotypically male.

• **Inferior Service:** Staff at a assisted living or nursing facility mistreats or renders inferior care to a gay man because the resident has HIV and they are misinformed that he can infect others through casual contact.
Common violations under Federal Law and Ohio Law:

• **Requirement of Tenancy**: Disability - making statements with the respect to renting a unit in a “independent living facility” that indicate a preference, limitation or discrimination on the basis of disability (or ability) or sexual orientation/gender.

• **Admissions**: Conduct such as lying about the availability of units that makes a unit in an unlicensed/non-medical residence unavailable on the basis of a protected class status such as gender identity, sexual orientation or disability.
Common violations under Federal Law and Ohio Law:

• “Independent Living” Requirements: enforcing unknown standards for the ability to live independently - Attempting to enforce a restrictive covenant based upon an undefined ability to live independently

• Transfers: staff in an independent living facility recommending that a LGBTQ person be transferred to assisted living or a nursing facility by mischaracterizing the person’s health status and ability to live independently.
Harassment in Housing - Final Rule published September 14, 2016

• Link to full text: https://www.gpo.gov/fdsys/pkg/FR-2016-09-14/pdf/2016-21868.pdf

• The most common types of harassment are sexual harassment and racial harassment
Major Elements

• “quid pro quo harassment” occurs when a person is subjected to an unwelcome request or demand because of the person's protected characteristic.

• “hostile environment harassment” occurs when, because of a protected characteristic, a person is subjected to unwelcome conduct that is sufficiently severe or pervasive such that it interferes with or deprives the victim of his or her right to use and enjoy the housing or to exercise other rights protected by the Act.
Final Rule – Neighbor on Neighbor Harassment – an important specification for LGBTQ persons and persons with HIV

• rule says that a person who knew or should have known of the harassment and has the power to do so must take corrective action to end the harassment.

• Landlords have the authority, usually under leases or local laws that say that they provide a quiet habitat or similar obligations. That gives them the power to do something about harassment and makes them liable if they don't.
Quote from the text of the Final Rule

- **Corrective actions must end the harassment**
- “HUD has reworded the provision in the final rule. Proposed § 100.7(a)(1)(iii) stated that a person is directly liable for
- “failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct.
- The duty to take prompt action to correct and end a discriminatory housing practice by a third-party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowner’s association condominium or cooperative),”
Unwelcome Conduct can be:

• written, verbal, or other conduct and does not require physical contact.
• threatening imagery (e.g., cross burning); damaging property;
• physical assault;
• threatening physical harm to an individual, family member, assistance animal or pet; or
• impeding the physical access of a person with a mobility impairment
• could be spoken or written, such as requests for sexual favors.
Unwelcome Conduct may include

• gestures, signs, and images directed at the aggrieved persons.
• use of racial, religious or ethnic epithets,
• derogatory statements or expressions of a sexual nature,
• taunting or teasing related to a person's disability, or
• threatening statements.
• the use of email, text messages, or social media.
LGBTQ Criminal History Issues
- An Email Inquiry

- I have a question for you. We had a phone call today from a woman that has a felony. We do not approve people with felonies. She proceeded to tell us that hers is a unique circumstance. She lived in a state where having “gay relations” is against the law. She was charged with a “Crime against Nature”. She wanted to know if we would deny her for that since Ohio does not have that law. I have heard of states with this law, but I have never had an applicant with this charge on their record. Just wanted to run this by you.
Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions

• Issued: November 2, 2015

Purpose

- Arrest records may not be the basis for denying admission, terminating assistance or evicting tenants,
- HUD does not require PHAs and owners adopt “One Strike” policies,
- Remind PHAs and owners of their obligation to safeguard the due process rights of applicants and tenants,
- Reminder of civil rights obligations under fed., state, local laws and,
- Provides best practices and peer examples for PHAs and owners to review
Equal Access to Housing Rule

The LGBT Rule

Effective March 5, 2012

clearly and unequivocally
The LGBT Rule

• This rule ensures that HUD programs, including programs administered by the Office of Community Planning and Development (e.g., CDBG, HOME, NSP, HOPWA) are open to all eligible individuals regardless of sexual orientation or gender identity.
The LGBT Rule

- Requires owners and operators of HUD-assisted housing, or housing whose financing is insured by HUD, to make housing available without regard to the sexual orientation or gender identity of an applicant for, or occupant of, the dwelling, whether renter- or owner-occupied.
The LGBT Rule

• Prohibits lenders from using sexual orientation or gender identity as a basis to determine a borrower’s eligibility for FHA-insured mortgage financing.
The LGBT Rule

- Clarifies that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, will have the opportunity to participate in HUD programs
The LGBT Rule

• Prohibits owners and operators of HUD-assisted housing or housing insured by HUD from asking about an applicant or occupant’s sexual orientation and gender identity for the purpose of determining eligibility or otherwise making housing available.
The LGBT Rule Provides the following exemption which is modified!

- (2012) Prohibits inquiries into a person’s sexual orientation or gender identity for unlawful purposes
- Sept. 14, 2016 – New rule strengthens 2012 rule

*Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs* – funds shelters e.g.
What Strengthens the rule?

- This rule amends HUD’s definition of “gender identity” to more clearly reflect the difference between actual and perceived gender identity and eliminates the prohibition on inquiries related to sexual orientation or gender identity,

- the final rule is clear that shelter and housing providers can only inquire about an applicant’s or resident’s sexual orientation and gender identity for lawful purposes;
  - for example: as part of the routine and voluntary collection of demographic data concerning sexual orientation and gender identity for program evaluation
Fair Housing Testing of private landlords in the New Orleans area showed African-American testers faced discrimination 50% of the time:

- Leasing agents and Landlords:
  - Provided inconsistent information about the criminal background policies to minority testers
  - Coached white testers on how to appeal a negative admission decision, and on how to obtain definitive answers about their eligibility before submitting applications and fees.
  - Made exceptions for whites
    - to stated criminal background policies and
    - waived stated standard fees
Statistics:

- 53% of New Orleanians rent, rather than own, their homes.
- 60% of African-American men in New Orleans have been arrested.
- 43% of African-American men have been convicted of a crime.
- 17% differential between arrests and convictions!
Therefore

- If an apartment complex has rules denying persons with an arrest record an application or admittance based solely on that arrest record, it has a disproportionately negative impact on African American men who have never been convicted of a crime in that area.
- Landlords do use criminal backgrounds as a tool and an indirect means (proxy) to commit racial and/or gender discrimination in violation of fair housing laws.
- These are examples of what the guidance wants housing providers to avoid.
Similarly:

• If an apartment complex has rules denying persons with an arrest record an application or admittance based solely on that arrest record, it has a disproportionately negative impact on
  - LGBTQ persons who have been arrested for *Crimes Against Nature* or
  - claims that transgender, gay and lesbian people are sexual predators, substance abusers, and prone to domestic abuse and child molestation.

• “It is a false-cause fallacy to imply, suggest, or allow others to suggest a causal relationship between sexual orientation or gender identity and criminal activity.”

• See [http://www.glaad.org/reference/crimes-lgbt](http://www.glaad.org/reference/crimes-lgbt)
LGBTQ and HIV persons do commit crimes – some need treatment not jail

• We must ensure that our clients with mental health issues get treatment and not jail time

• Learn about the Stepping Up Initiative in Ohio – part of a “National Initiative to Reduce the Number of People with Mental Illnesses in Jails”
Stepping Up Initiative

- September 10, 2016 “I was putting people in jail thinking that they would get treatment because I didn’t know any better,” said Ohio Supreme Court Justice Evelyn Lundberg Stratton.

- See https://csgjusticecenter.org/mental-health/county-improvement-project/stepping-up/

- Columbus, Ohio first city to now hand off its list of arrests daily to mental health agencies in an effort to alert advocates and social workers that their particular clients may have ended up in jail when in reality they need mental health services.
HUD issues guidance for all housing providers April 4, 2016

• “While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).

• Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability)."
Advice from HUD’s Guidance

• By delaying consideration of criminal history until after an individual’s financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

• Policies that exclude persons based on criminal history must be tailored to serve the housing provider’s substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction.
Individualized considerations Landlords might include when screening an applicant with a criminal history:

- the facts or circumstances surrounding the criminal conduct;
- the age of the individual at the time of the conduct;
- evidence that the individual has maintained a good tenant history before and/or after the conviction;
Individualized considerations Landlords might include when screening an applicant with a criminal history:

- evidence of rehabilitation efforts (drug/alcohol treatment, community supervision completion);
- community ties/support (is an applicant in a family re-unification project or a re-entry program?);
- employment/training history.
Best Practices include but are not limited to:

• Abandoning a blanket policy that a “business does not accept felons” or “refuses an applicant based solely on an arrest record.”

• Implement a policy that your business conducts criminal background checks in order to make **informed decisions** about applicants suitability.

• Keep this policy: Management reserves the right to refuse any applicant who poses a health or safety threat to other residents.
Note to Advocates—HUD Guidance is not a tool to get every person into every unit they desire

• Quote the Guidance: “In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.”

• Therefore, the criminal background check can serve as a tool, among many, for the landlord to make an informed decision about your suitability for their units. Be prepared with evidence of rehabilitation!

• There are also exclusions based on for example:
  • “disparate impact claims based on drug manufacturing or distribution convictions”
ON THE OTHER HAND, advocates, know what you are up against!!

• Black PLWHA Face Higher Rates of Incarceration, Longer Sentences as confirmed in a UCLA School of Law Think Tank the Williams Institute study:
  • *HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS* conclude:
    • “Like the rest of the criminal justice system, we are seeing certain communities bearing more of the weight of the penal code than others,”
Significant Samples of Study Results

- Ninety-five percent of these incidents involved allegations of sex work. The law that criminalizes sex workers living with HIV does not require intent to transmit HIV or exposure to HIV.
- Blacks and Latinos made up 67 percent of those who came into contact with the system based on charges of these crimes.
- Examining all HIV-specific criminal incidents, 60 percent of white men were released and not charged. While only 36 percent of black men, 43 percent of black women and 39 percent of white women were released and not charged.
Thank You

For your attention and your hard work on behalf of and dedication to those living with HIV/AIDS and your commitment to LGBTQ individuals.