

The Provider's Guide to Mobility Device Policies in Senior Living Facilities

Senior housing providers should be aware that the Fair Housing Act (FHA), Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 apply to their facilities.¹ In general, these Acts prohibit discrimination against individuals with disabilities, which in turn provides protection for mobility device users. Under both the FHA and the ADA, individuals with disabilities are considered a protected class. This means that a senior housing provider cannot treat a person who uses a mobility device due to an ambulatory disability any differently than a person who does not require the use of a mobility aid.

The FHA and subsequent amendments prohibit discriminatory housing practices. Under the FHA, a senior housing provider cannot discriminate based on a person's disability "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."² While the FHA has not been applied to nursing homes, it applies to other licensed facilities such as senior housing accommodations.

In addition, the ADA, in part, prohibits discrimination against individuals with disabilities through the protection of public spaces.³ Unlike the FHA, the ADA does not regulate housing. However, spaces in senior housing facilities that are open to the public must comply with the ADA. For example, the areas in a senior living facility that are used for meal preparation, transportation, recreational activities and activities of daily living (ADL) are covered by the ADA.

Finally, the Rehabilitation Act of 1973 provides additional protection for individuals with disabilities. This Act prohibits discriminatory action when it limits a person's access to a federally financed program or service.⁴

While senior living providers should be aware of the ADA and the Rehabilitation Act of 1973, challenges to mobility device policies have typically arisen under the FHA. In general, courts have upheld mobility device policies in senior living facilities when the policy imposed limited restrictions based on legitimate safety concerns. For example, courts have allowed guidelines that limited the use of motorized aids in certain common areas during meal times, but that did not restrict meaningful access to the facility.

In contrast, courts have invalidated policies that were not tied to legitimate safety

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concerns. One court held that a ban on wheelchairs in the facility's dining room was not based on a legitimate reason and only served to give the impression of a disability-free environment. Another court invalidated a policy that required mobility device users at a senior living community to purchase liability insurance since insurance coverage did not promote the goal of accident prevention. Policies found in violation of the FHA can result in civil penalties against senior housing facilities and facility administrators as well as financial awards to residents for emotional distress caused by the policy.

While challenges to mobility device policies have typically arisen under the FHA, the ADA recently issued mobility device regulations under both Title II and Title III of the ADA.⁵ The Title II and Title III regulations on mobility devices are essentially the same; however, the regulations in Title II apply to public entities⁶ while the Title III regulations apply to public accommodations.⁷ The new regulations distinguish "manually powered mobility aids" such as wheelchairs from "power-driven mobility devices." In sum, public entities and facilities with public accommodations are required to allow a person with a mobility disability to use "wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices . . . in any areas open to pedestrian use." In contrast, public entities and facilities with public accommodations should generally allow the use of "power-driven mobility devices" unless they can show that the device in question does not meet legitimate safety requirements adopted by the facility.

The revised regulations provide five assessment factors that a facility must use when determining whether a "power-driven mobility device" is acceptable in the entity's facility.

These factors include:

- The type, size, weight, dimensions and speed of the device;
- The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month or year);
- The facility's design and operational characteristics (e.g., whether its service, program or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);
- Whether legitimate safety requirements can be established to permit the safe

operation of the other power-driven mobility device in the specific facility; and

- Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with federal land management laws and regulations.

The revised ADA regulations also prohibit an entity from asking a person specific questions about their disability. A facility may ask a person to show proof of disability by asking to see their state-issued disability parking tag; however, a person's verbal assurance of their disability can be sufficient.

The new ADA mobility device regulations under Title III apply to the public spaces of senior housing facilities. Therefore, like public entities under Title II, senior housing facilities are required to follow these mobility aid restrictions. In addition, senior housing providers must consider the five assessment factors when crafting a mobility device policy for their facility. In addition to considering the ADA assessment factors, providers must formulate mobility device policies that are specifically tailored to address a legitimate concern at the facility, such as safety.

When adopting or modifying a mobility device policy, senior housing providers should:

- Document any threats to health or safety caused by the use of mobility devices in the facility before deciding to adopt a policy.
- Specifically tailor policies to address the needs of the disabled resident and the safety of all residents.
- Consult the ADA assessment factors and document how the facility considered each factor when adopting the policy.
- Clearly communicate any existing policy to new residents and seek resident input when formulating new policies.
- Make accommodations in the facility that allow for the safe use of mobility devices. For example, installing wide-angle mirrors at hallway intersections can prevent collisions.
- Ensure that policies clearly state the health or safety concern that they seek to address.



- Consider adopting speed limits and rules that allow pedestrians the right-of-way.
- Designate parking and charging areas for mobility devices to ensure safe storage and charging of devices.
- Require that mobility device users be responsible for any damage to the facility that surpasses normal wear and tear.
- Train staff to observe resident use of mobility devices to ensure that residents continue to operate their devices in a safe manner.
- Consult with an attorney to ensure mobility device policies do not violate federal, state or local laws. In adopting a mobility device policy, a senior housing facility cannot:
- Require residents to purchase liability insurance or pay a security deposit to use their mobility device. Any liability insurance requirement or indemnification agreement violates the FHA due to the weak connection between these policies and accident prevention.
- Adopt a policy to eliminate mobility devices for the sole reason of making the facility appear disability free.
- Create a policy based on a general statement that mobility devices are dangerous.
- Restrict the use of mobility devices to a particular floor of the facility.
- Devise a policy that imposes the same restrictions on manually powered devices and motorized devices. Wheelchairs and other manually powered aids do not create the same risks as motorized devices. Therefore, fewer restrictions can be placed on manually powered aids as opposed to motorized aids. Senior housing facilities should carefully craft mobility device policies that allow disabled residents to take advantage of such devices while also addressing specific safety concerns. If you would like assistance in preparing a mobility device policy or reviewing your existing policy or have questions regarding the FHA, ADA or other laws applicable to mobility aids in senior housing facilities, please feel free to contact a member of Reinhart's Long-Term Care, Assisted Living and Senior Housing Practice Group.

¹ Providers should also consider applicable state and local regulations. For example, Wisconsin Statute Section § 106.50 prohibits discriminatory housing practices. Wis. Stat. § 106.05 (2012).

² 42 U.S.C. § 3604(f) (2006).

³ 42 U.S.C. § 12182(a) (2006).

⁴ 29 U.S.C. § 794 (2006).

⁵ 28 C.F.R. § 35.137 (2012); 28 C.F.R. § 36.311 (2012) (both effective March 15, 2011).

⁶ Public entities are defined, in part, as state and local governments and instrumentalities of state or local governments such as agencies or special purpose districts. 28 C.F.R. § 35.104 (2012).

⁷ Public accommodations include privately run facilities that fall within one of twelve enumerated categories, which cover social service center establishments. 28 C.F.R. § 36.104 (2012). The regulation in Title III applies to senior living facilities while the regulation in Title II does not.

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