



# *Reasonable Accommodations in Assisted Living* **Crafting Effective Requests to Promote Housing Choice**

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**N**early one million Americans live in state-licensed assisted living facilities.<sup>1</sup> These facilities, which provide care and supportive services, are intended to meet the care needs of seniors and people with disabilities while allowing for a greater level of independence and integration in the community than would twenty-four-hour nursing care.<sup>2</sup> Given the United States' long history of segregating people with disabilities from others in their communities based on stereotypes about where and with whom they ought to live, the Fair Housing Amendments Act's prohibition against disability discrimination is especially important in these housing settings designed to serve people with disabilities.<sup>3</sup> However, many facility operators—and even the state agencies who license them—are unaware of residents' fair housing rights.<sup>4</sup>

Among protections afforded people with disabilities by the Fair Housing Amendments Act is the right to reasonable accommodations. Fair housing and disability rights advocates have long embraced reasonable accommodations as powerful and

<sup>1</sup>Agency for Healthcare Research and Quality, U.S. Department of Health and Human Services, Residential Care and Assisted Living: Section 1—Introduction and Overview (n.d.), <http://bit.ly/ieuc1k>. We use the term “assisted living” to include any type of licensed residential setting that falls along the spectrum between independent living and nursing care, including settings designed for seniors or for adults with mental health or developmental disabilities or for both such seniors and adults.

<sup>2</sup>There is significant overlap between the senior and disabled populations: according to the U.S. Census Bureau, over half of all Americans over 65 have disabilities (Matthew W. Brault, *Americans with Disabilities 2005*, CURRENT POPULATION REPORTS (Dec. 2008), <http://bit.ly/gFWSnt>). For a discussion of the advantages of assisted living facilities, see Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA LAW REVIEW 121, 137 (2004).

<sup>3</sup>Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3619.

<sup>4</sup>See Matthew Bernt, *Securing Residents' Rights: A Survey of Assisted Living Laws' Incorporation of the Fair Housing Act*, 29 BIFOCAL: BAR ASSOCIATIONS IN FOCUS ON AGING AND THE LAW 1, 8 (2007).

versatile tools to enforce clients' right to live in the housing of their choice. Allowing live-in aides, service animals, or other accommodations in housing can be crucial factors in helping clients with disabilities maintain independence and age in place. However, obtaining reasonable accommodations in assisted living is often more complicated than a standard request to a private landlord or public housing authority. Because assisted living facilities are generally licensed by states to provide only certain types of care for certain medical conditions (and, in some instances, only to people of certain ages), advocates must pay careful attention to state licensing requirements when requesting accommodations to ensure that their advocacy will be effective.<sup>5</sup>

Here we examine two cases in which our organization, the Law Foundation of Silicon Valley, represented clients seeking reasonable accommodations in assisted living. We examine the strengths and limitations of particular approaches and share thoughts for future advocacy around this topic, in particular systemic reform and collaboration among fair housing and licensed care advocates.<sup>6</sup>

## I. Fair Housing Rights of Residents in Assisted Living Facilities

Assisted living facilities are “dwellings” covered by the Fair Housing Amend-

ments Act.<sup>7</sup> For purposes of the Act, a “dwelling” is “any building, structure, or any portion thereof which is occupied as, or designed for or intended for, occupancy as, a residence” by one or more individuals or families.<sup>8</sup> Courts have held that assisted living facilities are covered by the Act and state equivalent laws, meaning that such facilities may not discriminate on the basis of disability or any other protected category.<sup>9</sup>

### A. Assisted Living Facilities Must Provide Reasonable Accommodations to People with Disabilities

To accommodate people with disabilities, housing providers have an affirmative obligation to change “rules, policies, practices, or services” that may be necessary to afford disabled residents equal opportunity to use and enjoy their housing.<sup>10</sup> As the U.S. Department of Justice Civil Rights Division and the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity emphasized, “[s]ince rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling.”<sup>11</sup> To establish a claim for discrimination based on failure to ac-

<sup>5</sup>Regulation of licensed care varies widely throughout the country (see Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STANFORD LAW AND POLICY REVIEW 373, 377–78 (1998); see also Eric M. Carlson, *Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities*, 21 NOTRE DAME JOURNAL OF LAW, ETHICS AND PUBLIC POLICY 363, 373 (2007).

<sup>6</sup>The Law Foundation of Silicon Valley is a nonprofit legal services organization based in San José, California. It provides free legal services through its five programs: Fair Housing Law Project, Health Legal Services, Legal Advocates for Children and Youth, Mental Health Advocacy Project, and Public Interest Law Firm. Relman, Dane and Colfax PLLC and AARP Foundation Litigation were cocounsel in Mrs. Herriot's case, and Simpson Thatcher and Bartlett LLP was pro bono cocounsel in Mrs. Fox's case.

<sup>7</sup>See 42 U.S.C. § 3602(b). For a discussion of fair housing rights in assisted living generally, see Aisha Anderson Bierma et al., “We Can't Meet Your Needs:” *Fair Housing Opens Doors to Housing with Services*, 42 CLEARINGHOUSE REVIEW 251 (Sept.–Oct. 2008). Many states have their own, more protective housing discrimination laws (see, e.g., CAL. GOV'T CODE §§ 12955–12956.2 (Deering 2011)).

<sup>8</sup>42 U.S.C. § 3602(b)–(c).

<sup>9</sup>See, e.g., *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002 (3d Cir. 1995); *Weinstein v. Cherry Oaks Retirement Community*, 917 P.2d 336 (Colo. Ct. App. 1996) (retirement community's policy forbidding residents from sitting in wheelchairs during meals is discriminatory under Colorado Fair Housing Act).

<sup>10</sup>42 U.S.C. § 3604(f)(3)(B). See also *Giebler v. M&B Associates*, 343 F.3d 1143, 1146–47 (9th Cir. 2003) (internal citations omitted).

<sup>11</sup>U.S. Department of Justice Civil Rights Division & U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity, *Reasonable Accommodations Under the Fair Housing Act 6* (May 17, 2004), <http://bit.ly/fLRwY3>.

commodate, one must demonstrate that (1) one has a disability, (2) one's housing provider knew or reasonably should have known of one's disability, (3) accommodation of the disability may be necessary to afford one an equal opportunity to use and enjoy one's dwelling, and (4) the housing provider refused the accommodation.<sup>12</sup> Accommodations are reasonable if they do not impose a fundamental alteration in the nature of the program or create undue financial or administrative burdens.<sup>13</sup> Moreover, the Fair Housing Amendments Act contemplates an "interactive process," during which the affected parties work jointly to develop solutions to accommodation requests.<sup>14</sup> Reasonable accommodations are based on the individual's specific disability-related needs and range from landlords allowing service animals in no-pet housing to cities making exceptions to zoning requirements to permit housing for people with disabilities.

However, because many states, including California, limit the types of medical conditions that residents of certain facilities may have and the level of care those facilities may provide, an individual resident's accommodation request could implicate the state licensing scheme. On the one hand, some accommodations, such as a visually impaired resident's request to have the resident's admission agreement read aloud to the resident, would not likely implicate the licensing scheme and should be granted independently by the facility. On the other hand, some accommodations would contradict the licensing scheme. For example, if a resident needs to take medication by self-injection, and is trained to self-administer injections, but the regula-

tions prohibit the administration of any medication by injection in assisted living, allowing the resident to take medication could violate the facility's licensing requirements. A court could find that risking citation, loss of licensure, or similar consequences would constitute an undue burden on the facility or a fundamental alteration to its programs. In this instance the individual with the disability would need an accommodation from both the facility *and* the state licensing agency to use and enjoy housing.

## B. State Licensing Agencies Must Provide Reasonable Accommodations

Fortunately the duty to provide reasonable accommodations is not limited to private housing providers. State and local governments must also provide reasonable accommodations in their policies, procedures, and practices that may be necessary to allow people with disabilities to live in the housing of their choice.

Federal statutes, such as Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, prohibit state agencies from discriminating against people with disabilities.<sup>15</sup> In the licensing context, a public entity may not administer a licensing or certification program in a manner that results in disability discrimination.<sup>16</sup> For purposes of these statutes, discrimination can mean failure to provide reasonable accommodations in agencies' policies and programs.<sup>17</sup>

The Fair Housing Amendments Act's protections against housing discrimination extend to state agencies.<sup>18</sup> Courts have specifically held that government entities' restrictions on housing for peo-

<sup>12</sup>*Giebel*, 343 F.3d at 1147 (internal citations omitted).

<sup>13</sup>*Id.* at 1157 (internal citations omitted).

<sup>14</sup>See *Astralis Condominium Association v. United States*, 620 F.3d 62, 68 n.3 (1st Cir. 2010) (internal citations omitted).

<sup>15</sup>The Rehabilitation Act of 1973, 29 U.S.C. §§ 701–718; Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134; see, e.g., CAL. GOV'T CODE § 11135 (Deering 2011).

<sup>16</sup>28 C.F.R. § 35.130 (b)(6) (2011).

<sup>17</sup>See, e.g., *id.* § 35.130 (b)(7) (2011).

<sup>18</sup>42 U.S.C. § 3604 (f). See also H.R. Rep. No. 100-711, at 24 (1988), reprinted in 1988 U.S.C.A.N. 2173, 2185 (stressing that subsections of Fair Housing Amendments Act prohibiting discrimination against individuals with handicaps in terms, conditions, or provision of services or facilities "would also apply to state or local land use and health and safety laws, regulations, practices and decisions which discriminate against individuals with handicaps").

ple with disabilities can violate this statute and have applied the Fair Housing Amendments Act's antidiscrimination provisions to state policies regarding the regulation of licensed care.<sup>19</sup> To the extent that state regulations contradict provisions of the Act, they are specifically preempted and should be challenged.<sup>20</sup>

However, states' obligation to provide reasonable accommodations in their licensing schemes does not necessarily mean that they provide people who have disabilities with obvious avenues for requesting those accommodations. States such as California do not have protocols in place for residents to request accommodations directly from the state licensing agency. Rather, California has a system for exceptions to and waivers of licensing requirements, but exceptions and waivers must be requested by the facility and may not be requested by the individual resident.<sup>21</sup> A waiver is a variance from a specific regulation based on a facilitywide need or circumstance; an exception is a variance from a specific regulation based on the unique needs and circumstances of an individual.<sup>22</sup> While the exception and waiver processes allow residents and licensees to work together to request that states accommodate disability-related needs, the processes are imperfect because they do not require notice to residents of the existence of exceptions and waivers, and they force people with disabilities to rely on their housing providers to assert their rights under fair housing laws.<sup>23</sup>

## II. Case Studies

California regulations establish a wide range of assisted living facilities—adult residential facilities, residential care facilities for the elderly, and continuing care retirement communities. Each of these categories has its own requirements and restrictions, and facilities' compliance with applicable rules and regulations is overseen by the Community Care Licensing Division of the California Department of Social Services. The two California-specific case studies below are examples of accommodation requests that implicated the state's residential care licensing scheme. Both involve the disability-related needs of residents who wanted to maintain the status quo to be able to age in place in the housing of their choice—an issue of growing concern in the United States.<sup>24</sup>

The different outcomes of these cases may have resulted in part from the different approaches that we took to involving the state of California in our clients' requests for reasonable accommodation. Ultimately, if an accommodation request implicates the state licensing scheme at all, our recommendation is to request the accommodation from the state or, if necessary, negotiate with the facility for the facility to seek an exception or waiver from the state.

### A. Mrs. Herriot

Sally Herriot, 88 years old, lived for fourteen years in an independent living

<sup>19</sup>See, e.g., *Potomac Group Homes Corporation v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (provisions of county's group homes ordinance violated Fair Housing Amendments Act); *Larkin v. Michigan Department of Social Services*, 89 F.3d 285 (6th Cir. 1996) (Fair Housing Amendments Act does not prohibit reasonable regulation and licensing procedures so long as they do not conflict with its antidiscrimination mandates); *Buckhannon Board and Care Home Incorporated v. West Virginia Department of Health and Human Resources*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998) (state laws and regulations that require licensed care residents to be able to remove themselves from danger may be analyzed as intentional discrimination under Fair Housing Amendments Act).

<sup>20</sup>42 U.S.C. § 3615.

<sup>21</sup>See CAL. CODE REGS. tit. 22, § 80024 (2011).

<sup>22</sup>See *id.* § 80001(w) for the definition of "waiver" and *id.* § 80001(e)(6) for the definition of "exception."

<sup>23</sup>Some states that follow a system similar to California's exceptions and waivers are Connecticut, Maryland, and Texas (see CONN. AGENCIES REGS. § 19-13-D105(b)(7) (2011); MD. CODE REGS. tit. 10, § 10.07.14.22 (2011); TEXAS HEALTH & SAFETY CODE ANN. § 247.066(c) (2009)). Advocates representing residents of assisted living facilities need to get to know their states' licensing schemes and determine whether they have any parameters that instruct or limit how residents can advocate for themselves with the state licensing agency. Our advice to advocates is that, if your state's licensing scheme is silent as to whether residents may request accommodation directly, residents should be allowed to do so. State licensing agencies are required to consider such requests pursuant to their duties to accommodate people with disabilities.

<sup>24</sup>See generally Schwemm & Allen, *supra* note 2, at 126–30.

apartment at Channing House, a continuing care retirement community with three levels of care: independent living, assisted living, and skilled nursing.<sup>25</sup> In California an entire continuing care retirement community—less its skilled nursing unit—must have a license for a residential care facility for the elderly.<sup>26</sup> Residential care facilities for the elderly provide care, supervision, and assistance with activities of daily living and may provide incidental medical services to persons 60 years old and older and persons under 60 who have compatible needs.<sup>27</sup> Residential care facilities for the elderly may not accept residents who require twenty-four-hour, skilled nursing, or intermediate care.<sup>28</sup> Nor may these facilities accept residents who depend upon others to perform all activities of daily living for them.<sup>29</sup> For residential care facilities for the elderly, admission and retention of residents with dementia is discretionary, and licensees accepting people with dementia must take certain precautions to ensure their safety.<sup>30</sup>

Mrs. Herriot's apartment was her home: it was a private space that she had decorated with family photos and mementos of travels with her late husband, and it was large enough for her to entertain guests. However, following a decline in her health,

Channing House twice in two months gave Mrs. Herriot notice of its intent to transfer her to its assisted living floor because it alleged that she was not ambulatory and that her care needs exceeded the level that it could provide in independent living.<sup>31</sup> Mrs. Herriot's family, personal physician, and counsel intervened to request that she be allowed to stay in her apartment with twenty-four-hour privately paid aides as an accommodation of her disabilities.<sup>32</sup> Mrs. Herriot's doctor opined that this accommodation was medically necessary because moving her would cause her health to deteriorate; Channing House would suffer no undue burden or fundamental alteration because it had accommodated other residents whose requests implicated the licensing scheme. Moreover, the Community Care Licensing Division knew of Mrs. Herriot's alleged nonambulatory status and declined to issue a citation.

Channing House denied Mrs. Herriot's request and refused to rescind its transfer notices. Mrs. Herriot sued Channing House for intentional discrimination and failure to accommodate in violation of the Fair Housing Amendments Act and other state and federal antidiscrimination laws.<sup>33</sup> After over a year of

<sup>25</sup>The facts of this case study come from the pleadings and other documents on file in *Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617 (N.D. Cal. Jan. 29, 2009). Continuing care retirement communities are designed to meet the long-term residential, social, and health care needs of elders and seek to provide a continuum of care, minimize transfer trauma, and allow services to be provided in an appropriately licensed setting (CAL. HEALTH & SAFETY CODE § 1770 (Deering 2011); see also Schwemm & Allen, *supra* note 2, at 141).

<sup>26</sup>CAL. HEALTH & SAFETY CODE § 1771.5 (Deering 2011).

<sup>27</sup>California Department of Social Services, Residential Care Facilities for the Elderly (RCFE) (2007), <http://bit.ly/eC3qa5>.

<sup>28</sup>CAL. CODE REGS. tit. 22, § 87455 (2011); see also *id.* § 87612.

<sup>29</sup>*Id.* § 87615 lists health conditions rendering people ineligible for residential care facilities for the elderly and notes that people who depend on others for "activities of daily living" are also ineligible. "Activities of daily living" include bathing, dressing and grooming, toileting, transferring, continence, eating, vision, hearing, speech, and walking (*id.* § 87459).

<sup>30</sup>*Id.* § 87705 (2011).

<sup>31</sup>Involuntary transfers may occur at the discretion of the continuing care retirement community operator. In California these communities *may* involuntarily transfer residents to a higher level of care if the residents are nonambulatory or require care beyond that which may be legally provided in a specific unit (CAL. HEALTH & SAFETY CODE § 1788(a)(10)(A)(i), (iii) (Deering 2011)).

<sup>32</sup>Live-in aides for people with disabilities are specifically authorized in federally subsidized housing and commonly accepted as accommodations in private housing (see, e.g., 42 U.S.C. § 1437a(b)(3)(B); 24 C.F.R. § 5.403 (2011)).

<sup>33</sup>Because the state of California did not cite Channing House for allowing Mrs. Herriot to live in her apartment with the assistance of her aides and did not order it to transfer her, counsel strategically decided not to challenge the Department of Social Services regulations that Channing House relied upon to issue its transfer orders. During litigation Channing House sought a second opinion from the Community Care Licensing Division, which warned it that it would be cited if it did not comply with residential care facility for the elderly regulations. As a result, Channing House's staff physician assessed Mrs. Herriot and determined that she required a transfer to skilled nursing, not assisted living, because of her fall risk, frailty, dementia, and need for assistance with all activities of daily living. The licensing division never cited Channing House for allowing Mrs. Herriot to remain in her apartment through the duration of the litigation.

litigation, both parties filed for summary judgment, and the district court granted summary judgment in Channing House's favor with respect to Ms. Herriot's accommodation request. The court held that Ms. Herriot's request was not reasonable because regulations prohibited Channing House from retaining anyone who requires twenty-four-hour care or who depends upon others to perform all activities of daily living for them in its independent or assisted living sections.<sup>34</sup> The court reasoned, "[T]o the extent that the ... regulatory scheme vests it with discretion, Channing House may not exercise that discretion in a manner inconsistent with the regulations."<sup>35</sup>

We then filed a request for reconsideration, arguing that Channing House should have requested an exception from the Community Care Licensing Division to allow Mrs. Herriot to remain in her independent living unit with her aides. We had not advocated that Channing House utilize the exception process because the licensing division had not acted on the alleged regulatory violations. Still, the court sided with Channing House, and stated that, "although there may be some circumstances where a facility's refusal to seek an exception on a resident's behalf would be actionable, that is not the case here."<sup>36</sup> The court found that, although the regulations contemplated exceptions, Mrs. Herriot's particular request would have "unreasonably and impermissibly" required Channing House to violate its legal obligations and that California law prohibited Channing House from delegating its care duties to private aides; the court also expressly authorized

Channing House's proposed transfer of Mrs. Herriot.<sup>37</sup>

## B. Ms. Fox

Sue Fox, a physically healthy 74-year-old woman with a severe mental health disability moved to Nueva Vista, an adult residential facility, in late 2005.<sup>38</sup> In California, adult residential facilities, colloquially "board and care homes," are "facilities of any capacity that provide 24-hour non-medical care for adults ... who are unable to provide for their own daily needs. Adults may be physically handicapped, developmentally disabled, and/or mentally disabled."<sup>39</sup> At that time the licensing scheme forbade adult residential facilities from accepting or retaining residents who were 60 and older.<sup>40</sup>

Ms. Fox thrived there, engaging in activities with other residents and receiving appropriate care for her mental health symptoms. However, after four months, Ms. Fox faced eviction from Nueva Vista not because of anything she had done but because of her age. The Community Care Licensing Division cited Nueva Vista for admitting Ms. Fox, and when Nueva Vista requested an age exception for her to stay, the licensing division denied the request and subsequent appeal. With the assistance of counsel, Ms. Fox in a letter requested Nueva Vista to allow her to stay as a reasonable accommodation of her disability; she sent the licensing division a copy of her letter. However, persisting in its position that Nueva Vista must evict Ms. Fox, the licensing division issued an additional citation and threatened to punish Nueva Vista further if Nueva Vista did not comply.

<sup>34</sup>*Herriot v. Channing House*, 2008 U.S. Dist. LEXIS 65871, at \*14 (N.D. Cal. Aug. 26, 2008), citing CAL. CODE REGS. tit. 22, §§ 87455(c)(2), 87615(a)(5).

<sup>35</sup>*Id.* at \*16.

<sup>36</sup>*Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617, at \*14 (N.D. Cal. Jan. 29, 2009).

<sup>37</sup>*Id.* at \*14–17, citing CAL. CODE REGS. tit. 22, §§ 87566, 87411, and CAL. HEALTH & SAFETY CODE § 1788(a)(10)(A). Mrs. Herriot's case settled to the mutual satisfaction of the parties.

<sup>38</sup>Sue Fox is a fictional name. The facts of this case study come from the pleadings and other documents on file in *California Association of Mental Health Patients' Rights Advocates v. Allenby*, No. 1-06-CV-061397 (Cal. Super. Ct. Santa Clara Cnty. filed April 10, 2006).

<sup>39</sup>California Department of Social Services, Adult Residential Facilities (ARF) (2007), <http://bit.ly/eIDBL5>. Note that the definition available on the website as of December 12, 2010, still contains the limitation "for adults ages 18 through 59," which was removed by amendment to the regulations in August 2009.

<sup>40</sup>CAL. CODE REGS. tit. 22, § 85068.4 (amended 2005, 2009).

Following the licensing division's subsequent orders, counsel for Ms. Fox sent a letter directly to the Department of Social Services; counsel demanded that the department immediately rescind its order requiring Nueva Vista to evict Ms. Fox as a reasonable accommodation of Ms. Fox's disability. When the department refused to withdraw its order, Ms. Fox filed a complaint and petition for writ of mandate against the department. Ms. Fox alleged that, in forcing her eviction, the department denied a reasonable accommodation of her disability in violation of the Fair Housing Amendments Act and other antidiscrimination statutes. The complaint sought relief for Ms. Fox and a systemic reform of the licensing scheme to prevent situations such as Ms. Fox's from occurring.

After we filed suit, the Community Care Licensing Division granted Nueva Vista an exception to allow Ms. Fox to continue living there. However, an investigation of the case had revealed that Ms. Fox's experience was not unique. In fact, the regulation prohibiting adult residential facilities from accepting residents who were 60 or over unfairly limited the housing choice, throughout the state, of seniors with disabilities; this resulted in seniors languishing in locked psychiatric facilities or other overly restrictive settings. We filed an amended complaint that removed Ms. Fox as a plaintiff but that added the California Association of Mental Health Patients' Rights Advocates as a plaintiff. We proceeded with the lawsuit on the association's behalf, and ultimately the Department of Social Services agreed to change its adult residential facility regulations.<sup>41</sup> In contrast to its previous outright ban on the admission of seniors to adult residential facilities, California now explicitly allows seniors with disabilities to live in these facilities, thereby preventing seniors from being segregated in residential care facilities for the elderly.

### C. Lessons

As fair housing advocates for assisted living residents, we learned many valu-

able lessons from Mrs. Herriot's and Ms. Fox's cases. Both clients faced denial of their chosen housing due to a licensing scheme rooted in stereotypes about which types of people should live in which types of places. For Mrs. Herriot, Channing House assumed that her declining health meant that she must progress up the continuing care retirement community ladder to assisted living, then to skilled nursing, even though the presence of aides made it possible for her to live safely in her apartment. Ms. Fox, a lively 74-year-old who wanted to live in an adult residential facility, faced eviction and possible transfer to a residential care facility for the elderly because the licensing scheme assumed that younger adults with disabilities lived in adult residential facilities but older adults lived in residential care facilities. These situations appeared on their face to be classic examples of where reasonable accommodations would be appropriate and effective but where the interplay of the clients' needs with the state licensing scheme complicated matters. We learned that if a resident's request for accommodation touched on the regulatory scheme, advocates must involve the state in a request for accommodation.

We also learned that some—but not all—accommodations that run contrary to the licensing scheme would be found by courts to be reasonable. Although the court found that Mrs. Herriot's particular exception request would not have been reasonable for Channing House to make because it would have constituted a fundamental alteration, the court did not indicate that requesting an exception would never be appropriate. Therefore we believe that the option of asking a facility to request an exception from the state as a reasonable accommodation remains open. If the resident's requested accommodation will not cause the facility to stray too far from its legal obligations, the facility should make the request. If the facility refuses to make an exception request as a reasonable accommodation, the facility may be liable for violating the

<sup>41</sup>*Id.* §§ 85068.4(b)–(h). Besides amending the regulation, the Department of Social Services created new procedures and training to ensure that licensing staff and facility operators apply the regulation (and its provisions about waivers and exceptions) consistently throughout the state.

Fair Housing Amendments Act and other antidiscrimination laws.

Perhaps the most significant difference between Mrs. Herriot's and Ms. Fox's cases from an advocacy perspective was the willingness of the facility to champion the client's accommodation request. Channing House refused Mrs. Herriot's request absent any intervention from the state, but Nueva Vista wanted Ms. Fox to stay and affirmatively sought an exception to keep her. Nueva Vista's alignment with Ms. Fox made it more obvious to the state that a reasonable accommodation request must be made. Nueva Vista's choice—risking further citations, fines, and loss of licensure—to retain Ms. Fox would have been an undue burden or fundamental alteration and therefore would not have been reasonable. Rather, the accommodation needed to be granted in tandem by the facility and the state.

Ms. Fox's case also demonstrates that obtaining a reasonable accommodation from the state licensing agency may not be easy. Only after we filed a lawsuit did the Community Care Licensing Division concede to her remaining at Nueva Vista. However, the fight for the accommodation was worthwhile because not only did Ms. Fox get to stay in her chosen housing but also the Community Care Licensing Division changed its regulations and policies to benefit assisted living residents throughout the state.

### III. Intersection of Housing and Health Care

Because of the complicated interplay between the Fair Housing Amendments Act and state regulation of licensed care, advocates should be especially diligent in identifying and counteracting housing discrimination in assisted living and seeking reasonable accommodations on behalf of residents with disabilities. Advocating, through litigation where necessary, that individual providers and state agencies grant reasonable accommodations creates opportunities to

educate them about their duty to accommodate people with disabilities and can catalyze systemic change. Where state licensing schemes do not expressly incorporate the fair housing protections of the Fair Housing Amendments Act and other statutes, advocates should also participate in legislative and regulatory reform.<sup>42</sup>

Combating housing discrimination in assisted living is a unique opportunity for advocates practicing in different legal services areas to collaborate. As Mrs. Herriot's and Ms. Fox's stories show, the accommodation-related issues that clients face in assisted living cannot be viewed solely through the lenses of fair housing, licensing, landlord-tenant, or quality of care. Assisted living represents the intersection of housing and health care, and the legal framework within which we analyze clients' issues is necessarily complex. As such, fair housing, licensed care, disability rights, and seniors' and tenants' rights advocates need to share expertise with one another. For example, fair housing advocates can offer expertise in fair housing laws and complaint investigation techniques but may not be steeped in regulatory arcana; licensed care advocates have a better sense of the history and scope of abuses that occur in assisted living but may not deal with reasonable accommodations every day. In preparing to draft this article, we spoke to several advocates around the country and were inspired to learn about their hard work and creative efforts to combat housing discrimination in licensed care settings. We plan to continue these conversations because believe that continued collaboration will yield more effective strategies for advocating clients' fair housing rights.

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<sup>42</sup>See Holly Robinson, *Education Through Legislation: Incorporating Fair Housing Act Rights into State Assisted Living Facility Laws*, 42 CLEARINGHOUSE REVIEW 261 (Sept.–Oct. 2008), for a discussion of legislative advocacy on this topic, especially model statutory language.