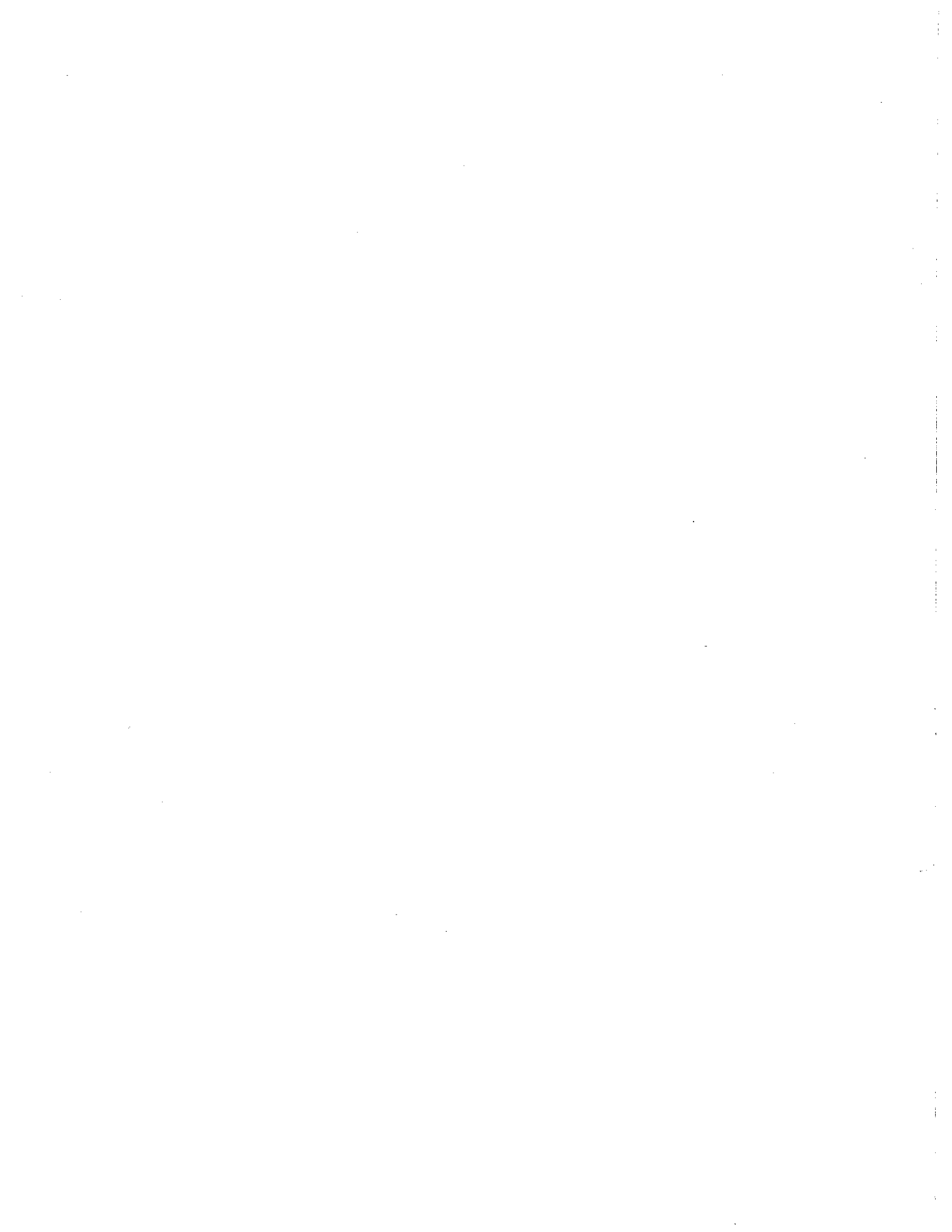


**FAIR HOUSING LAW
FOR
PERSONS WITH DISABILITIES**

By David J. Popiel, Esq



This publication is a public education service of the Community Health Law Project. If you or someone you know needs further information regarding fair housing for persons with disabilities, please contact the Law Project:

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An Introduction to this Manual

This manual will review the state and federal laws that protect persons with disabilities from housing discrimination. While the manual cannot replace advice from a lawyer, its footnotes refer to key statutory and regulatory law and to some of the cases that interpret these provisions. Thus, the curious may use the manual as a starting place for independent inquiry. Towards this end, the manual uses the standard legal abbreviations described below in this section and, under Question 2, guides you to the full texts of the law.

The manual is organized in a question-and-answer format. Every effort has been made to pose questions which experience suggests are either commonly asked or the answers to which are important to know.

Abbreviations for cases:

U.S. - United States Supreme Court Reports. Thus, Bragdon v. Abbott, 524 U.S. 624 (1998), refers to a case named, “Bragdon v. Abbott,” that was decided in 1998 by the United States Supreme Court and that can be found in volume 524 of the United States Supreme Court Reports at page 624. U.S. Supreme Court cases are also published in the Supreme Court Reporter, the abbreviation for which is S.Ct.. Thus, you may find Bragdon v. Abbott cited with two “parallel” citations, like this: Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998).

F.2d or F.3d - Federal Circuit Courts of Appeals. Thus, Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3rd Cir. 1996) refers to a case that was decided in 1996 by the Third Circuit Court of Appeals and can be found in volume 89 of the Federal Reporter, third series at page 1096.

F.Supp or F.Supp.2d - Federal trial courts. Thus, Leshner v. McCollister’s Transp. Systems, Inc., 113 F.Supp.2d 689 (D.N.J. 2000), refers to a case that was decided in the year 2000 by the Federal District Court of New Jersey (D.N.J.) and which can be found in volume 113 of the Federal Supplement, second series, at page 689.

N.J. - New Jersey Supreme Court. Thus, 175 N.J. 1 (2002) refers to a case that was decided in 2002 by the New Jersey Supreme Court and that can be found in volume 175 of the New Jersey Supreme Court Reports at page 1.

N.J. Super. - New Jersey Superior Court. Thus, 325 N.J.Super. 78 (App. Div. 1999) refers to a case that was decided in 1999 by the Appellate Division (App. Div.) of the New Jersey Superior Court and that can be found in volume 325 of the New Jersey Superior Court Reports at page 78. 267 N.J.Super. 125 (L. Div. 1992) refers to a case that was decided in 1992 by the Law Division (L. Div.) of the New Jersey Superior Court and can be found in volume 267 of the New Jersey Superior Court Reports at page 125.

References to pages within a case follow the initial page reference and are separated from

it by a comma. Thus Bragdon v. Abbott, 524 U.S. 624, 629 (1998) refers to a matter discussed at page 629 of Bragdon v. Abbott.

Abbreviations for Statutes:

U.S.C.A. - United States Code Annotated. Thus, 42 USCA §3604 refers to Title 42 of the United States Code Annotated at section 3604.

N.J.S.A. - New Jersey Statutes Annotated. Thus, N.J.S.A. 10:5-4.1 refers to New Jersey Statutes Annotated, Title 10, Chapter 5, Section 4.1.

Abbreviations for Regulations

C.F.R. - Code of Federal Regulations. Thus, 24 C.F.R. §100.202 refers to Title 24 of the Code of Federal Regulations, section 100.202.

N.J.A.C. - New Jersey Administrative Code. Thus, N.J.A.C. 13:13-3.4(b) refers to Title 13, chapter 13, subchapter 3, section 4, paragraph (b) of the New Jersey Administrative Code

A Note on New Jersey Law

New Jersey's fair housing laws for persons with disabilities are among the strongest in the nation. New Jersey goes beyond federal fair housing standards to offer persons with disabilities particularly effective protection against housing discrimination. Sections with the italicized subheading, "*New Jersey Goes Further*," highlight the ways in which the state's laws offer greater protection than federal law.

The manual is organized in a question-and-answer format. Every effort has been made to pose questions that experience suggests are either commonly asked or the answers to which are important to know.

1. What Laws Protect Persons with Disabilities Against Housing Discrimination?

On the national level, the federal Fair Housing Act is the primary source of protection.¹ It goes beyond protection of persons with disabilities to outlaw discrimination based on race, color, religion, sex, familial status or national origin.² The Fair Housing Act offers much the same protections as does New Jersey law, though in some ways New Jersey's protections are stronger.

Three state laws protect persons with disabilities against housing discrimination. The first is the New Jersey Law Against Discrimination, usually referred to as simply the LAD.³ It is the state's comprehensive civil rights law, and as such prohibits discrimination on the basis of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, nationality, sex, and, of course, disability.⁴

The second state law that protects persons with disabilities from housing discrimination is much narrower than the LAD, but nonetheless of great significance. It is the Uniform Construction Code Act, or UCCA. The UCCA requires the state's Department of Community Affairs to establish general construction standards for all types of buildings, including residences. In particular it instructs the Department to adopt a "barrier free subcode" to assure that buildings are accessible to persons with physical disabilities. The Barrier-free Subcode adopted by the Department covers "[m]ulti-family residential buildings with four or more dwelling units in a single structure."⁵

The Law Against Discrimination and the Uniform Construction Code Act intersect. While the UCCA authorizes the Department of Community Affairs to adopt a barrier-free subcode, requires architects and developers to abide by the subcode, and local construction officials to enforce it, it does not establish the right of persons with disabilities to sue when the subcode is violated. Fortunately, however, the LAD does.⁶

The third state law that shelters persons with disabilities from housing discrimination is New Jersey's Municipal Land Use Law, which prohibits municipalities from imposing special zoning requirements on group homes and other community residences for persons with disabilities.⁷

¹42 USCA §3604

²42 U.S.C. § 3604 (a) to (e).

³N.J.S.A. 10:5-1 to 5-49.

⁴N.J.S.A. 10:5-4.1.

⁵N.J.S.A. 52:27D-123b(5).

⁶N.J.S.A. 10:5-12.4.

⁷N.J.S.A. 40:55D-66.1. See Question 17, below.

2. Where Can I Find The Statutes, Regulations and Cases that Protect Persons with Disabilities from Housing Discrimination?

To find the federal Fair Housing Act on line go to the home page of the National Fair Housing Advocate, <http://www.fairhousing.com/index.cfm>. In the left-hand column, under “Legal Research,” click on “Statutes and Regs.” The first listing under “Statutes, regulations and articles,” will be “US Code Title 42, §§3601 et seq. - The Fair Housing Act.” Click on this, and you will be able to pull up the entire Act or its individual sections.

For the regulations promulgated pursuant to the federal Fair Housing Act, go to <http://www.gpoaccess.gov/cfr/index.html>. This site has the entire body of federal regulatory law, known as the Code of Federal Regulations, or C.F.R. The second and third items on the left side of the page will enable you to search for federal regulations by browsing, by searching, or by entering a citation that you already have.

Both the New Jersey Law Against Discrimination and the State’s Uniform Construction Code Act may be found in New Jersey Statutes Annotated (N.J.S.A). Local libraries often have New Jersey Statutes Annotated. Alternatively you can turn to the state legislature’s website. Go to www.njleg.state.nj.us/. In the left-hand column scroll down to the heading, “Laws and Constitution.” Click on “Statutes.” This will bring you to an expandable table of contents. To find the text of a given statutory provision, such as N.J.S.A. 10:5-12.4, the provision of the Law Against Discrimination that makes it discriminatory to build inaccessible multifamily housing, scroll down to and click on the plus (+) icon to the left of “Title 10 Civil Right.” Then scroll down to and click the number of the statute, in this instance “10:5-12.4.” The full text of the statute will pop onto your screen.

The regulations adopted pursuant to the Law Against Discrimination appear to be among those numerous New Jersey regulations that are not available on the internet. Write to the New Jersey Division on Civil Rights, 140 E. Front St., 6th Floor, P.O. Box 089, Trenton, New Jersey 08625-0089.

If your curiosity level is high, you may want a complete copy of New Jersey’s Barrier-free Subcode. But before you do that, you should understand what the Subcode consists of. Thus, the means of obtaining the Subcode are presented in the last footnote of Question 15: “What Housing Must be Accessible to Persons with Disabilities?,” below.

Cases decided by New Jersey’s appellate courts (the Appellate Division and the State Supreme Court) for approximately the last decade can be found at the web site of Rutgers Law School, Camden. Go to <http://lawlibrary.rutgers.edu/>. In the left-hand column, click on “New Jersey Legal Resources.” In the expanded list click on “N.J. Appeals/Tax Decisions.” This will bring you to a page entitled, “Opinions of the New Jersey Courts.” If you want to find one of the cases cited in this manual, and thus have the citation for the case (e.g. 325 N.J.Super. 78), click the box that reads, “Locate a decision by citation or docket number.” Go to the “Find Case by Citation” box. Type the volume number in the small box for “Volume.” Chose “N.J.Super.” in the small “Reporter” box, and type the page number in the small “page” box. Click on “Submit Form,” and you will have the full text of the opinion.

Unfortunately, no web site provides anything more than the last few weeks of opinions from the state’s trial courts.

Many federal cases are available at <http://www.findlaw.com>. Click on the “Search Cases

and Codes” tab. Scroll down the center of the page to “Case Law.”

3. Who is Protected Against Housing Discrimination on the Basis of Disability?

With one exception, only those persons who fall within the law’s definitions of disability are protected against housing discrimination on the basis of disability. New Jersey’s definition is broader and therefore protects more people than does the federal definition.

The federal Fair Housing Act uses the term “handicap,” and defines it as “a physical or mental impairment which substantially limits one or more . . . major life activities.” Even if you don’t actually have such an impairment, you will be considered handicapped if you have a record of such an impairment or are regarded as having such an impairment by the person who is discriminating against you.⁷ The definition encompasses persons who are HIV+ or have AIDS.⁸ And even if you do not fall within the terms of the definition, you are protected if you have been discriminated against because of your association with a person who does.⁹ However, you are not considered handicapped if corrective measures mitigate the effects of your impairment to the point that no major life activity is substantially impaired. For example, if glasses improve your vision so that you can perform all major life activities without substantial limitation, you are not covered by the definition even if, when you take your glasses off, you are nearly blind.¹⁰ Persons currently engaged in illegal use of, or are addicted to, a controlled substance are not included in the definition of handicap,¹¹ and transvestites are not considered to have a handicap solely because of their transvestitism.¹²

New Jersey Goes Further: New Jersey’s definition of the term “disability” is much broader than the federal definition of “handicap.” While the state’s definition is inelegantly written, it boils down to this: any “physical disability,¹³ infirmity, malformation or disfigurement” that is caused by “bodily injury, birth defect or illness” qualifies as a protected disability. Also qualifying is “any mental, psychological or developmental disability” caused by

⁷42 U.S.C.A. § 3602(h).

⁸Bragdon v. Abbott, 524 U.S. 624 (1998) (interpreting the identical definition of “disability” under the Americans with Disabilities Act).

⁹42 U.S.C.A. § 3604(f)(1)(C) and (f)(2)(C). For more on associational discrimination, see section 4.

¹⁰Sutton v. United Lines, Inc., 527 U.S. 471 (1999) (interpreting the identical definition of “disability” under the Americans with Disabilities Act).

¹¹42 U.S.C.A. §3602(h).

¹²24 C.F.R. §100.201 (definition of “handicap”).

¹³One must overlook or excuse the definition-by-redundancy (i.e., defining “disability” with the word “disability”).

an “anatomical, psychological, physiological or neurological [condition]” that either “prevents the normal exercise of any bodily or mental functions” or is simply “demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.”¹⁴ The definition specifically mentions the following as constituting disabling conditions: epilepsy, any degree of paralysis, amputation, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, lack of physical coordination, physical reliance on a service or guide dog or on a wheelchair or other remedial appliance or device, AIDS or HIV infection. Confirming the broad sweep of the Law Against Discrimination’s definition is the absence of the requirement found in the federal Fair Housing Act that the disabling condition substantially limit one or more major life activities.¹⁵ Of at least equal significance, no court has adopted an interpretation of the state definition that takes into account corrective measures that mitigate the effects of one’s disability. So, for example, impaired eyesight will be judged on the basis of your vision as measured when you are not wearing glasses. Moreover, regulations promulgated pursuant to the Law Against Discrimination bring within the definition of disability anyone “who has been [disabled] at any time,” thereby paralleling, and perhaps going farther than, the federal definition, which requires that a person “have a record” of disability.¹⁶ Nor does the Law Against Discrimination preclude a finding of disability that is based solely on transvestitism. Like the federal definition, you will be considered disabled, and therefore covered by the Law Against Discrimination if the person whom you allege is discriminating against you acted on the belief that you have a disability.¹⁷

4. What if I Don’t Have a Disability? Am I Still Protected Against Disability Discrimination?

Yes, you are, at least in certain instances. As just noted, under the federal and state definitions of disability you are considered disabled or handicapped if you have a history of disability or if you are discriminated against by others acting on an incorrect belief that you have a disability. But even beyond this, the prohibition against disability discrimination protects anyone who is harmed by discrimination because they are associated with a person who has a disability. For example, if you do not have a disability, but your child does, a landlord or home seller may not

¹⁴N.J.S.A. 10:5-5(q); Viscik v. Fowler Equipment, 173 N.J. 1, 15-16 (2002).

¹⁵Failla v. City of Passaic, 146 F.3d 149, 154 (3d Cir. 1998); Leshner v. McCollister’s Transp. Systems, Inc., 113 F.Supp.2d 689, 692 n. 2 (D.N.J. 2000); DeJoy v. Comcast Cable Communications, Inc., 968 F.Supp. 963, 985 (D.N.J. 1997); Enriquez v. West Jersey Health Systems, 342 N.J.Super. 501, 519 (App. Div. 2001), *certif. den.* 170 N.J. 211 (2001) (gender dysphoria qualifies as a handicap under the New Jersey Law Against Discrimination); Gimello v. Agency Rent-A-Car Systems, Inc., 250 N.J.Super. 338, 358 (App. Div. 1991).

¹⁶N.J.A.C. 13:13-1.3 (definition of “disability”).

¹⁷N.J.A.C. 13:13-1.3 (definition of disability); Rogers v. Campbell Foundry Co., 185 N.J.Super. 109 112-113 (App. Div. 1982) (regarding perceived disabilities).

discriminate against you in the rental or sale of a dwelling because of your child's disability. You are protected even when the discrimination is based on the disability of friends who may come to visit.¹⁸ In a like manner, a home owner can't refuse to sell a house to a social service organization because the organization will use the house as a group home for persons with disabilities. If you experience such "associational" discrimination, you may sue even though you do not have a disability yourself.

5. In What Aspects of Obtaining and Using Housing am I Protected?

You are protected in all aspects of obtaining and using housing. You must be shown, rented and sold housing the same as anyone else. For example, a landlord or seller of a dwelling cannot represent to persons with disabilities that a dwelling is unavailable when, in fact, it is available. Landlords and sellers cannot misrepresent the price of a dwelling because you, another prospective occupant, or anyone associated with you or with a prospective occupant has a disability. The price, terms, and conditions of rental or sale must be the same for you as for everyone else. Once you come to live in the dwelling you must have available to you the same services and facilities that are available to everyone else.¹⁹

6. Does Fair Housing Law for Persons with Disabilities Protect Them from Discrimination by Condominium Associations and Cooperatively Owned Apartments?

A simple yes. The protections discussed in this manual apply to your dealings with all types of dwelling owners and operators.

7. Can a Landlord or Someone Who is Selling a Home Ask About My Disability?

The answer is an emphatic no, but with a reasonable exception. It is unlawful for landlords or home sellers to ask about the disability of a prospective tenant or buyer. It is also illegal to ask about the disability of anyone associated with a prospective tenant or buyer (e.g., a prospective tenant's relatives or friends who might visit the apartment). The prohibition against asking about disability extends to inquiries concerning the nature or severity of a disability as well as its existence.²⁰

The sole exception occurs when housing is offered preferentially to persons with disabilities. Thus, under the federal Fair Housing Act, when housing is made available only to persons with disabilities or with particular disabilities, disability-related inquiries may be made to determine eligibility for the housing. The same is true when housing is available on a preferential basis to

¹⁸42 U.S.C.A. §3604(f)(1)(C) and (f)(2)(C); N.J.A.C. 13:13-3.4(a), (b) and (d).

¹⁹42 U.S.C.A. §3604(f)(1) and (f)(2); N.J.S.A. 10:5-12g; N.J.A.C. 13:13-3.4(a) to (e).

²⁰24 C.F.R. §100.202(c); N.J.A.C. 13:13-3.3.

persons with disabilities.²¹

Interestingly, although New Jersey's Law Against Discrimination generally prohibits questions "concerning" disability, it permits them when "required by an agency of local, State or Federal government."²² This exception to the general prohibition may be both broader and narrower than the Fair Housing Act's exception to the same prohibition. On the one hand, private landlords and sellers offering housing or housing priorities to persons with disabilities cannot ask about qualifying disabilities unless the offer is part of a government program. On the other hand, so long as it is required by a government program, landlords and sellers can ask about disability even if the questions are not aimed at determining eligibility for housing or for housing priorities for persons with disabilities. The federal and state law combine in such a way that landlords and sellers can ask only those questions that both bodies of law permit. Thus, questions to determine eligibility for specialized housing or housing priorities may only be asked if the housing or priority is part of a government program (permitted by the Law Against Discrimination), and any other questions regarding disability are banned (by the Fair Housing Act) even if they are part of a government program.

8. What Questions Can a Landlord or Someone Who is Selling a Home Ask?

You can be asked the same questions that anyone else is asked. For example, you can be asked about your ability to meet the financial requirements of ownership or tenancy.²³ Thus, landlords and sellers can inquire as to your credit worthiness. Of course, if such inquiries are made only of persons with disabilities and not of all potential renters and buyers, then the landlord or seller is discriminating.

You can also be asked questions to determine if you are a current illegal drug abuser or addict of a controlled substance, or if you have been convicted of the illegal manufacture or distribution of a controlled substance.²⁴

9. Can the Landlord Charge Me an Extra Fee or Increase My Security Deposit Because I Need Special Equipment Such as a Wheelchair?

No. The fact that you use special equipment such as a wheelchair or need a hospital bed cannot be the basis for increasing your security deposit or for charging you any other type of fee that

²¹24 C.F.R. §100.202(c)(2) and (3).

²²N.J.A.C. 13:13-3.3.

²³24 C.F.R. §100.202(c)(1); N.J.A.C. 13:13-3.3 (prohibiting only questions regarding disability).

²⁴24 C.F.R. §100.202(c)(4) and (5); N.J.A.C. 13:13-3.3 (prohibiting only questions regarding disability).

is not charged to persons without disabilities.²⁵

10. What if My Special Equipment Damages the Apartment?

Although a landlord may not increase your security deposit or charge an extra fee because you require special equipment such as a wheelchair, scooter, or hospital bed, he or she may require you to pay for “specific damage” done to the apartment as a result of your use of the special equipment.²⁶

11. Can I Have Rules, Policies, Practices and Services Changed Because of My Disability?

Yes. Landlords and others, such as condominium associations, must accommodate your need for a change of rules, policies, practices, and services as long as the accommodation may be necessary to afford you an equal opportunity to use and enjoy a dwelling and the accommodation is reasonable.²⁷ This is the “reasonable accommodation” mandate that is central to virtually all disability rights laws. Whether the change you want is reasonable will depend on whether it imposes an undue burden on the landlord or other person or entity, and on whether granting the change would fundamentally alter the nature of that person’s or entity’s business.

A common instance of reasonable accommodation arises when persons with mobility-impairing disabilities request assignment of a parking space close to their apartment. The landlord must grant the request even though parking spaces are normally available on a first-come-first-served basis, unless the landlord can show that granting the request would be an undue burden on the apartment complex or its residents.²⁸

An example of an accommodation request that would fundamentally alter what a landlord does is a request that the landlord provide counseling services or medical assistance.

You may request reasonable accommodation with respect to rules, policies, practices or services that have to do with either your individual dwelling or with common grounds and facilities such as swimming pools or laundry rooms.

Application of the reasonable accommodation mandate is not limited to your dealings with landlords. It applies to anything that has to do with residential matters. Thus, municipalities must “change, waive, or make exceptions in their zoning rules to afford people with disabilities the same

²⁵N.J.A.C. 13:13-3.4(e).

²⁶N.J.A.C. 13:13-3.4.

²⁷42 U.S.C.A. § 3604(f)(3)(B); N.J.A.C. 13:13-3.4(f)2.

²⁸24 C.F.R. §100.204(b)(Example 2). It is unlikely that granting such a request would fundamentally alter the landlord’s business.

opportunity to housing as those who are without disabilities.”²⁹ See section 17.

12. How Must My Guide or Service Dog or Animal be Treated?

Persons with disabilities who have guide or service dogs or other guide or service animals are entitled to lease or buy housing accommodations without discrimination. You may not be charged extra, and rules prohibiting pets are not applicable to guide or service animals. You are, however, liable for any damages to the premises done by your animal.³⁰

13. Must My Guide or Service Dog or Animal be Certified?

Neither the New Jersey Law Against Discrimination nor the federal Fair Housing Act specify the training that a service animal must have. However, before either body of law can be invoked, it is evident that the animal must be able to perform tasks that are useful to the person it serves, so as to distinguish it from a mere pet.³¹

14. Can a Landlord Refuse to Rent to Me Because I Receive Welfare or Other Government Entitlements?

New Jersey Goes Further: No, but only because New Jersey law says so. The federal Fair Housing Act permits landlords to discriminate on the basis of a tenant’s source of income. Court’s that have considered the issue generally reason that discrimination on this basis is not the same as discrimination based on disability.³² However, in New Jersey landlords cannot refuse to rent to you because you receive federal, state or local financial assistance, including medical assistance or housing subsidies. Nor can landlords impose different terms of tenancy upon you.³³ This is the rule regardless of whether you have a disability.

²⁹Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996)(internal quote and citation omitted).

³⁰42 U.S.C.A. § 3604(f)(1) and (2) (general nondiscrimination provisions); 24 C.F.R. §100.204(b)(Example 1)(Tenant who needs seeing eye dog must be afforded an accommodation and permitted to live in apartment in spite of no-pets rule). N.J.S.A. 10:5-29.2; N.J.A.C. 13:13-3.4(c).

³¹See Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995).

³²See, for example, Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301-302 (2d Cir. 1998).

³³N.J.S.A. 10:5-4; N.J.S.A. 10:5-12g; N.J.A.C. 13:13-3.4(g).

15. What Housing Must be Accessible to Persons with Physical Disabilities?

It depends on when the housing was built, on how many units are in a building, on the type of units in the building, and on whether the building has an elevator.

New Jersey has prohibited residential architectural barriers since 1977. The prohibition is today found in the Law Against Discrimination,³⁴ the Uniform Construction Code Act,³⁵ and the regulations promulgated pursuant to the latter, known as the New Jersey Barrier-free Subcode.³⁶ The federal Fair Housing Act has only prohibited architectural barriers since 1991. However, neither body of law prohibits architectural barriers in residential buildings with fewer than four units. Thus, the law permits one-, two-, and three-family homes to have architectural barriers.³⁷ In fact, from 1977 to 1990 New Jersey exempted residential buildings with as many as four units. Even now, in buildings with four or more units, those units above the ground floor are required to be accessible only if the building has an elevator to the upper floors. Otherwise, only the ground floor units must be accessible.³⁸

Even in otherwise covered buildings townhouse units are exempt. However, the definition of a townhouse unit is very specific. It does not cover all two-story dwelling units in multifamily buildings. Key to the definition are the requirements that the unit have “an independent entrance” that serves that unit alone, that the entrance be “at or near grade,” and that “most or all of sleeping rooms . . . be on one story; and most or all of the remaining habitable space, such as kitchen, living, and dining areas, . . . be on another story.”³⁹ Thus, units with two or more floors of living space have to meet accessibility standards if they do not have an independent entrance at or near grade, or if their distribution of rooms does not match the exemption’s criteria. For all practical purposes this means that two-or-more-story units in elevator-serviced buildings, which are unlikely to have independent unit entrances, must be accessible.⁴⁰ However, the accessibility standards for such units are somewhat limited. Understandably, only the entry level must be accessible. More hurtful is the

³⁴N.J.S.A. 10:5-12.4 (Law Against Discrimination statute); N.J.A.C. 13:13-3.7 (Law Against Discrimination regulation);

³⁵N.J.S.A. 52:27D-123b(5).

³⁶N.J.A.C. 5:23-7.1 et seq.

³⁷42 U.S.C.A. § 3604(f)(7); N.J.A.C. 5:23-7.5(a).

³⁸42 U.S.C.A. § 3604(f)(7); N.J.A.C. 13:13-1.3 (Law Against Discrimination defines “covered multifamily dwelling” as buildings covered by the Barrier-free Subcode); N.J.A.C. 5:23-7.5(b), (c)(Barrier-free Subcode elevator provisions).

³⁹N.J.A.C. 5:23-7.3(b)1.

⁴⁰N.J.A.C. 5:23-7.5(b)1, (c)2.

fact that the entry level need not have a bedroom.⁴¹

So, only buildings constructed since 1977, with four or more units, in elevator-serviced buildings or on the ground floor of nonelevator-serviced buildings, that are not strictly defined townhouses must be accessible. That leaves an enormous number of dwellings untouched by architectural barriers laws, greatly restricting the housing market for persons who need accessible homes.

New Jersey Goes Further: The federal Fair Housing Act sets out a number of very general statements about what constitutes accessibility. Thus, the Act requires that “public use and common use” areas must be “readily accessible to and usable by” persons with disabilities.⁴² Some considerable flesh, in the way of foot-and-inch standards of accessibility, is added to these generalities by the Fair Housing Accessibility Guidelines, which were formulated by the Department of Housing and Urban Development, the federal agency charged with enforcing the Fair Housing Act. However, the Guidelines are just that. They are not binding, though compliance with them shields developers from liability under the Act.⁴³ More helpful, by far, is New Jersey’s Barrier-free Subcode. The Subcode specifies the elements of buildings that must be accessible (scoping requirements) and lays out the foot-and-inch measurements that render those elements accessible (technical standards).⁴⁴ It is the Barrier-free Subcode that local construction officials must follow.

16. Can I Alter My Apartment or Condo, its Grounds and its Common Facilities to Accommodate My Disability? If So, Must My Landlord Pay for the Alteration?

You may make physical modifications to your apartment, condo, or co-op, the complex’s grounds, and its common areas if the modifications may be necessary to afford you the full

⁴¹N.J.A.C. 5:23-7.5(b)1, (c)2.

⁴²42 U.S.C.A. §364(f)(3)(i).

⁴³24 C.F.R. Ch. 1, Appendix II to Subchapter A, “Fair Housing Accessibility Guidelines - Design Guidelines for Accessible/Adaptable Dwellings.

⁴⁴The Subcode begins at N.J.A.C. 5:23-7.1. These regulations lay out the Subcode’s scoping requirements. The regulations appear not to be available on the internet. You may be able to obtain them by writing to the New Jersey Department of Community Affairs, Division of Codes and Standards, 101 S. Broad St., P.O. Box 802, Trenton, New Jersey 08625-0802. The technical standards are found in a publication known as the International Code Council/American National Standards Institute, “Accessible and Usable Buildings and Facilities,” 1998 (ICC/ANSI A117.1-1998), a document that the Subcode incorporates. N.J.A.C. 5:23-7.2(a). ICC/ANSI A117.1-1998 may be obtained from The American National Standards Institute, 11 West 42nd Street, New York, New York 10036.

enjoyment of the premises, but you must pay for the modifications yourself.⁴⁵ The modifications, of course, must be reasonable.⁴⁶

If you live in a rental apartment and want to modify the interior of your apartment, the landlord can require that you agree to restore the interior to its pre-modification condition, reasonable wear and tear excepted. But the landlord can only require this when the modification interferes with the landlord's or the next tenant's use and enjoyment of the apartment. Thus, if you install grab bars in the bathroom, the landlord can require you to remove the bars and restore the walls to their original condition when you move from the apartment. However, the landlord cannot require you to remove the reinforcements that supported the grab bars, because, being behind the walls, they do not interfere with anyone's use and enjoyment of the apartment, and a future tenant may even want to use the reinforcements to install grab bars again.⁴⁷ Or, if you widen a door to accommodate a wheelchair, the landlord may not require you to return the door to its original narrow width when you move, since a wider door does not diminish the use and enjoyment of the apartment.⁴⁸ There is no restoration requirement at all for modifications you may make to the grounds or common areas of the apartment. Nor is there a restoration requirement if you live in a condominium or co-operative, even if you modify the interior of your home.⁴⁹

Landlords may not increase your security deposit or impose any other fee when you modify your apartment. However, when landlords can require restoration of the modifications, they may, in some instances, also require that you put up a separate deposit to assure that the money needed for the restoration is there when your tenancy ends. However, there are limits on a landlord's ability to require such a deposit. Landlords can only require the deposit when "it is necessary in order to ensure with reasonable certainty" that the funds for restoration will be available when your tenancy ends. So, for example, if you have paid your rent regularly, your credit rating is good, and your income is substantial relative to the anticipated cost of restoration, you should not have to put up a restoration deposit. If you do have to supply the deposit, the landlord cannot simply impose the terms of the deposit upon you. Rather the deposit must result from a negotiation. The amount of the deposit must be reasonable, and in no event may it exceed the cost of the restorations. The deposit must be held in an interest bearing escrow account, the interest accruing to you. And you must be afforded a reasonable time in which to pay the deposit into the account.⁵⁰

⁴⁵42 U.S.C.A. §3604(f)(3)(A); 24 C.F.R. §100.203(a); N.J.A.C. 13:13-3.4(f)1. The requirement that you pay for the modifications assumes that the feature you want to modify was not built in violation of architectural barriers codes. If it was, then the persons or entities responsible for building it should pay for the modifications.

⁴⁶42 U.S.C.A. §3604(f)(3)(A); 24 C.F.R. §100.203(a); N.J.A.C. 13:13-3.4(f)1.

⁴⁷24 C.F.R. §100.203(c)(Example 1).

⁴⁸24 C.F.R. §100.203(c)(Example 2).

⁴⁹42 U.S.C.A. §3604(f)(3)(A); 24 C.F.R. §100.203(a); N.J.A.C. 13:13-3.4(f)1.

⁵⁰24 C.F.R. §100.203(a); N.J.A.C. 13:13-3.4(f)1.ii.

Landlords may withhold permission for accessibility modifications until you supply a “reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.”⁵¹ Such assurances may be provided in communications from a contractor hired to do the work.

17. Can Zoning Laws Contain Special Restrictions on Residences for Persons with Disabilities?

In the recent past New Jersey zoning laws permitted municipalities to impose restrictions on community residences for persons with disabilities (community residences) that were not imposed on other peoples’ homes. Municipalities could require community residences to obtain “conditional use permits” that imposed certain conditions on their right to zoning approval. Municipalities commonly required that the community residence be a given distance from other community residences, that the number of persons residing in a municipality’s residences not exceed a certain number or percentage of the municipality’s total population, that the residence obtain a given amount of insurance against liability attributable to the acts of residents, and that certain staffing and supervision standards be met.

All of this has gone by the wayside. In 1996 the New Jersey Federal District Court ruled that the state laws that permitted municipalities to impose such restrictions violated the federal Fair Housing Act.⁵² A year later the state legislature conceded the point, eliminating all municipal authority to zone against community residences. Today, for zoning purposes, the fundamental legal truth regarding community residences for persons with disabilities is that they are single-family residences. They are “permitted uses in all residential districts” and must be treated “the same as . . . single family dwelling[s].”⁵³

18. Are Regular Zoning Ordinances Applicable to Residences for Persons with Disabilities?

Generally, yes. However, even zoning ordinances generally applicable to everyone must yield to a request for reasonable accommodation when the accommodation is needed to afford people with disabilities equal opportunity to obtain and enjoy housing and when the accommodation is not an undue burden to the municipality or a fundamental alteration of the zoning scheme.⁵⁴

19. Can Community Residences for Persons with Disabilities be Required to Notify Neighbors that the Residence is Coming to Town?

Absolutely not! Just as there is no legal basis for demanding notification when African-

⁵¹24 C.F.R. §100.203(b); N.J.A.C. 13:13-3.4(f)1.iii.

⁵²ARC of New Jersey v. State of New Jersey, 950 F.Supp. 637 (D.N.J. 1996).

⁵³N.J.S.A. 40:55D-66.1.

⁵⁴Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996).

Americans, Jews, Catholics, Italians, women, or persons of Irish descent are coming to a neighborhood, so there is no legal basis for demanding notification that persons with disabilities are moving in.⁵⁵

20. Can Persons with Disabilities be Denied a Dwelling on the Basis that they are Dangerous?

Yes, but there are severe qualifications on a landlord's or seller's ability to do so. The federal Fair Housing Act does not require "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."⁵⁶ This is known as the "direct threat" exception to the Fair Housing Act. The Fair Housing Act goes into no further detail, but the direct threat exception also appears in the Americans with Disabilities Act (ADA) where its scope is more precisely defined. The ADA's exposition of the direct threat exception can guide discussion of the same exception to the Fair Housing Act, since courts are likely to draw on the former when interpreting the latter. The ADA provision and judicial commentary on the Fair Housing Act's direct threat language both strongly suggest that the direct threat exception is exceptionally narrow.

To trigger the direct threat exception, proof of dangerousness must be weighty, individualized and reliable. Landlords or property owners must establish that a person poses a significant risk of substantial harm. That assessment must be based on an individualized assessment which in turn relies on either "a reasonable medical judgment" derived from "the most current medical knowledge"⁵⁷ or on "a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation" are insufficient.⁵⁸ Thus, a landlord cannot refuse to rent to all persons with mental illnesses, claiming that they generally pose an increased risk of dangerousness (which claim, of course, is untrue). The landlord must have individualized medical evidence which, in light of confidentiality and privilege protections, will be difficult to obtain, or "objective evidence from the [particular] person's prior behavior that . . . [that particular] person has committed overt acts which caused harm or which directly threatened harm."⁵⁹ Such evidence must be "sufficiently recent as to be credible."⁶⁰ Pointing to "a recent history of a physical or mental illness or disability, or treatment for [same]" does not suffice.⁶¹

⁵⁵Township of West Orange v. Whitman, 8 F.Supp.2d 408 (D.N.J. 1998).

⁵⁶42 U.S.C.A. § 3604(f)(8); 24 C.F.R. §100.202(d).

⁵⁷29 C.F.R. §1630.2(r) (definition of "direct threat" in ADA, Title I (Employment)).

⁵⁸Matter of Commitment of J.W., 288 N.J.Super. 197, 205 (App. Div. 1996).

⁵⁹Matter of Commitment of J.W., 288 N.J.Super. 197, 205 (App. Div. 1996).

⁶⁰H.R. Rep. No. 711, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N 2173, 2181.

⁶¹Matter of Commitment of J.W., 288 N.J.Super. 197, 205 (App. Div. 1996).

And even if a landlord or property owner establishes that an individual poses a significant risk of substantial harm, the direct threat exception still will not exclude that person from the protection of the Fair Housing Act if a reasonable accommodation or a reasonable modification of the landlord's or owner's policies, practices or procedures will reduce the risk to something less than significant or the potential harm to something less than substantial.⁶²

New Jersey Goes Further, Maybe. New Jersey's Law Against Discrimination does not have a direct threat exception to its housing discrimination provisions, and thus would seem to extend its protections further than does the federal Fair Housing Act. However, it is possible that courts would read a similar exception into the Law Against Discrimination, relying on grounds of general fairness.

21. Must Lending Institutions Comply with Fair Housing Laws for Persons with Disabilities?

Yes. Lending institutions may not discriminate on the basis of disability in residential real estate-related transactions.⁶³

22. Must Real Estate Brokers Comply with Fair Housing Laws for Persons with Disabilities?

Yes, again. Federal and New Jersey law prohibit real estate brokers from discriminating against persons with disabilities.⁶⁴ Brokers cannot even accept a dwelling for listing if the seller or lessor "has expressed, directly or indirectly, an intention to discriminate against people with disabilities."⁶⁵

23. Do Fair Housing Laws Apply to Advertising for Housing?

Yes. Advertising that "indicates any preference, limitation, or discrimination based on" disability is prohibited. And it is not only landlords and sellers of homes who are subject to this prohibition. The newspapers that publish the ads are also liable for discrimination.⁶⁶

⁶²Matter of Commitment of J.W., 288 N.J.Super. 197, 206 (discussing School Board of Nassau County, Florida v. Arline, 480 U.S. 203, 107 S.Ct. 1123 (1987), to the effect that "[p]articularized proof is needed that [a] teacher [with tuberculosis], even with reasonable accommodations for her disability, would be a source of contagion in her specific teaching job").

⁶³42 U.S.C.A. § 3605; N.J.A.C. 13:13-3.1 and 3.6.

⁶⁴42 U.S.C.A. § 3606; N.J.A.C. 13:13-3.1.

⁶⁵N.J.A.C. 13:13-3.2(c).

⁶⁶42 U.S.C.A. § 3604(c); N.J.A.C. 13:13-3.2; U.S. v. Hunter, 459 F.2d 205 (4th Cir. 1972).

24. Is there Housing to Which Fair Housing Laws do not Apply?

Yes, but they are not common. In the absence of certain indicia that the owner is engaged in the business of selling homes, the federal Fair Housing Act does not apply to the sale or rental of single-family homes. Even this exemption is unavailable to owners who use the services of a broker, agent, or salesperson or engage in discriminatory advertising.⁶⁷ The federal Fair Housing Act also exempts owner-occupied buildings with no more than four units, and permits religious organizations and private clubs to limit the occupancy of their noncommercial lodgings to their own members.⁶⁸

New Jersey Goes Further. While New Jersey's Law Against Discrimination permits religious organizations to limit occupancy of dwellings to their own members, regardless of the commercial or noncommercial nature of the housing, it contains no such exemption for private clubs. More significant, the Law Against Discrimination does not exempt the sale or rental of single-family houses at all, and it exempts owner-occupied homes only when the home is a two-family dwelling, and then only when it is being offered for rental. Sales of such homes must comply with the Law Against Discrimination's nondiscrimination provisions. Rentals of single rooms in one-family dwellings are also exempt.⁶⁹

25. How Can I Enforce My Fair Housing Rights?

You have four means of enforcing your rights. You can file a law suit in federal or state court, for which you are well advised to obtain a lawyer. Or you can file an administrative complaint with either the New Jersey Division on Civil Rights for violations of the Law Against Discrimination or with the federal Department of Housing and Urban Development (HUD) for violations of the federal Fair Housing Act. You have **180 days** from the date of the act(s) of discrimination in which to file with the Divisions on Civil Rights and **one year** in which to file with HUD.

Instructions for filing with the Division and with HUD, along with complaint forms, accompany this manual.

⁶⁷42 U.S.C.A. § 3603(b)(1).

⁶⁸42 U.S.C.A. § 3603(b)(2)(owner-occupied residences with four or fewer units); §3607(a)(religious organizations and private clubs).

⁶⁹N.J.S.A. 10:5-5n.

INSTRUCTIONS FOR FILING A HOUSING DISCRIMINATION COMPLAINT

Housing Discrimination Includes Many Things

It is illegal to discriminate on the basis of race, color, religion, sex, familial status, national origin, disability, HIV infection or AIDS. Discrimination includes more than an outright denial of a home. You have been discriminated against if, because you are a member of one of the listed groups, you have been offered different terms, conditions, or privileges of sale or rental, or different services or facilities; if you have been told a dwelling is not available when, in fact, it is; if you have been "steered" toward or away from a certain neighborhood; or if a financial institution such as a bank has not dealt fairly with you in extending a mortgage loan.

Discrimination against persons with disabilities also includes a refusal to make reasonable accommodations in rules, policies, practices or services; a refusal to permit reasonable modifications of premises (meaning both your dwelling and the grounds on which it is located) that you plan to undertake at your own expense, and a failure to design and construct buildings with four or more dwellings so that they are accessible.

The above list of discriminatory acts is not complete. If you think someone has discriminated against you in any matter involving housing, and you want more information, please feel free to call the Community Health Law Project at 973/275-1175.

You Can File a Housing Discrimination Complaint with Either the State or Federal Government

Both the Federal Department of Housing and Urban Development (HUD) and the New Jersey Division on Civil Rights (DCR) will investigate and act upon your housing discrimination complaint.

There are four ways to file a complaint with HUD. You can:

- Call HUD's toll-free number, 1-800-669-9777. TTY: 1-800-927-9275
- File a complaint online by going to the HUD web site at www.hud.gov/complaints/housediscrim.cfm and clicking on **online form**;
- Print out a complaint form from the HUD web site (click on **print out a form**), complete it and drop it off at a HUD office or mail it to :

Office of Fair Housing and Equal Opportunity
Department of Housing and Urban Development
Room 5204
451 Seventh Street, S.W.
Washington, DC 20410-2000

- Write HUD a letter with:
 - ✓ Your name and address
 - ✓ The name and address of the person your complaint is about
 - ✓ The address of the house or apartment you were trying to rent or buy
 - ✓ The date when this incident occurred
 - ✓ A short description of what happened
- Then mail the letter to:

U.S. Department of Housing and Urban Development
26 Federal Plaza, Room 3532
New York, New York 10278-0068
(212) 264-9610
1-800-496-4294
TTY (212) 264-0927

You have **1 year** from the date of the act(s) of discrimination in which to file a complaint with HUD.

To File a Complaint with the New Jersey Division on Civil Rights you must fill out a complaint form at a Division office or with a Division official or field investigator. Division personnel can assist you in filling out the complaint form.

The Division may insist that you come to one of their offices to file the complaint. However, if you have a disability that makes it difficult or impossible for you to come to one of their offices, the Division must accommodate your disability and afford you another means of filing the complaint (e.g., by letting you mail the complaint or by sending someone to help you fill out the complaint in your home).

You have **180 days** from the date of the act(s) of discrimination in which to file a complaint with the New Jersey Division on Civil Rights. However, if you choose to file a court action, rather than a complaint with the Division on Civil Rights, you have **2 years** from the date of the act(s) of discrimination in which to file the complaint.

The addresses and telephone numbers of the local offices of the Division on Civil Rights are:

26 S. Pennsylvania Ave., 3rd Floor
Atlantic City, New Jersey 08401
609/441-3100
TTY: 609/441-7648
*Serving Atlantic, Cape May,
Cumberland, Salem and Southern
Ocean Counties*

One Park Center
2 Riverside Dr., Suite 402
Camden, New Jersey 08103
856/614-2550
TTY: 856/614-2574
*Serving Camden and Gloucester
Counties*

31 Clinton St., 3rd Floor
Newark, New Jersey 07101
973/648-2700
TTY: 973/648-4678
*Serving Essex, Hudson, Middlesex and
Union Counties*

100 Hamilton Plaza, 8th Floor
Paterson, New Jersey 07505
973/977-4500
TTY: 973/977-1955
*Serving Bergen, Morris, Passaic,
Sussex and Warren Counties*

140 E. Front St., 6th Floor
P.O. Box 090
Trenton, New Jersey 08625-0090
609/292-4605
TTY: 609/292-1785
*Serving Burlington, Mercer, Hunterdon,
Somerset, Monmouth and Northern
Ocean Counties*

