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EVERYBODY IN THE POOL

FHA CONSIDERATIONS



It's that time of year and pool season is upon us. As you prepare your swimming pool facilities to open for the summer, we remind you to also review your pool rules and regulations. While it is necessary to establish pool safety rules, boards must be careful not to draft such rules in a manner that may violate the Federal Fair Housing Act of 1968 and its amendments ("FHA"), which prohibit housing providers from discriminating in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services in connection therewith on the basis of a protected class. This article will cover some obvious and some not so obvious potential pitfalls that boards should avoid when drafting/revising their pool safety rules.

Protected Classes

First, we will generally address the protected classes under the FHA. The current protected classes are limited to race, color, national origin, gender, religion, handicap and familial status. Most of the categories are

self-explanatory, but we will briefly explain "handicap" and "familial status".

For purposes of the FHA, a handicap is a physical or mental impairment which substantially limits one or more of a person's major life activities, or a record of having such impairment, or being regarded as having such impairment. For illustrative purposes, and by no means an exhaustive list, such disabilities include heart disease, speech and hearing impairments, multiple sclerosis, cancer, diabetes, HIV/AIDS, alcoholism, arthritis, anxiety, depression, obsessive-compulsive disorder, and autism.

The FHA's "familial status" class protects households with children under 18 and pregnant women.

Please note that while these are the only federally protected classes, there may be additional protected classes in your jurisdiction (state and/or locality). For example:

- The Virginia Fair Housing Law includes "elderliness", which applies to those who are 55 and over, as a protected class, and on April 11, 2020, the Virginia Values Act was signed into law, prohibiting housing discrimination based on one's sexual orientation, gender identity, or status as a veteran.
- The Arlington County Human Rights Ordinance also prohibits discrimination because of a person's sexual orientation.
- Maryland's fair housing laws expands the protected classes to include marital status, gender identification, and sexual orientation.
- And, the DC Human Rights Act, which prohibits housing discrimination, has a list of 18 protected "traits", which includes sexual orientation, gender identity or expression, political affiliation, and source of income to name a few.

Therefore, it is important that you are aware of all the protected classes in your jurisdiction.

Disparate Treatment vs. Disparate Impact

Next, we will review how rules can violate the FHA. The case law that has developed in this area of law has distinguished between discrimination that is the result of disparate treatment of a protected class versus discrimination that is the result of the disparate impact felt by a protected class. Disparate treatment is the intentional discrimination against a protected class. An example would be a rule limiting access to a pool by one's race or enforcing a rule only against a specific protected class, but not others.

For the most part, long gone are the days of such patently discriminatory rules. However, there is a category of rules that are intentionally discriminatory that still seem to surface every year. They are age-based rules.

We all know them, they are your “adult swims”, swim tests for children, and adult supervision requirements. While a board may have in good faith proposed such a rule for safety purposes, these rules have been found to be unjustified. Courts have held that if a rule is going to discriminate there must be a compelling business necessity to do so and the rule must be the least restrictive means to achieve that end.

Let's take for example a pool rule that requires children to pass a swim test. Does this rule require all persons under 18 years of age to pass a swim test? If the rule is about pool safety, then all pool users should be tested, after all, not all adults are swim proficient. In fact, in one case, the court pointed out the unreasonableness of the age-based rule by noting that many lifeguards are under 18. Ultimately, while pool safety is a compelling business necessity, arbitrary age-based rules are not the least restrictive means to achieving that end. The case law states that the health and safety concerns in the use of swimming pools is better served with proficiency tests rather than age restrictions that have no connection to swimming ability. Instead, boards can require all pool users to take a swim test before they can wade into water that would submerge them above the shoulders, or any time the lifeguard on duty has reason to believe that a swim test is necessary for him/her to gain confidence in the pool guest's proficiency.

Moving on to rules that violate the FHA because they have a disparate impact on a protected class, we note that these issues are more difficult to catch. A good example is a rule that requires swimmers to wear traditional swimsuits. The rule does not on its face discriminate against any of the protected classes, but does it have a disparate impact on a protected class? Yes, those who practice a religion that does not permit them to wear revealing swim attire. However, the

board has a compelling business necessity in implementing a rule that requires swim attire to be made from swim material for sanitary purposes and be fitting enough to avoid a swimmer from getting entangled in loose clothing for safety purposes. But, instead of the former rule, we recommend a rule that requires swimmers to wear clean, colorfast, lightweight material that is suitable for swimwear, such as Lycra®, spandex, or nylon.

When attempting to determine appropriate safety rules, there are established organizations to turn to as a starting point. The Pool and Hot Tub Alliance (PHTA) is accredited by The American National Standards Institute (ANSI) and has established model safety standards for pool and hot tub construction, maintenance and use. Additionally, the Centers for Disease Control and Prevention (CDC) provides a model public swimming pool and spa code, which is available at www.cdc.gov/mahc.

Common Pool Rules

Now let's look at some other common pool rules that pose FHA concerns and how they can be revised to achieve the safety objective in mind without violating the FHA.

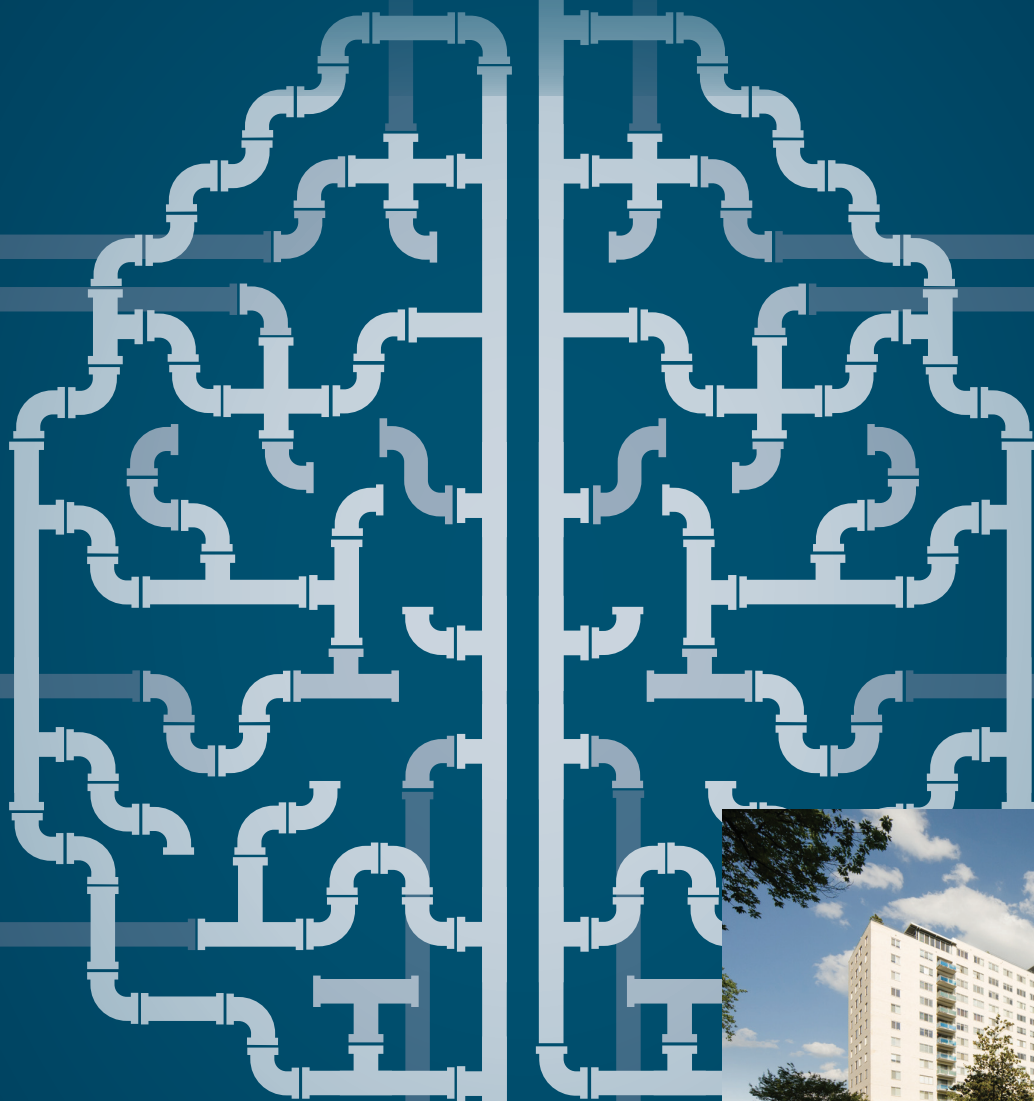
We mentioned above, rules that enforce “adult swim” times. These rules presumably require all children to get out of the pool during a forced break, or maybe the pool closes earlier or opens later for children, so that adults can have exclusive use of the pool. Whether the intent of the rule is to force young swimmers to take a break to avoid overexertion or to create a less raucous experience for older swimmers, courts have ruled that adult swim times are unjustified and violate the FHA as such rules discriminate against families with young children by restricting their access to the association's facilities, and are not the least restrictive means to achieve their intended objectives.

So, how can such rules be revised to avoid an FHA violation? Well, if the goal is to prevent overexertion, then the rule should apply to all swimmers. Many pools now enforce a 15-minute break in the last quarter of each hour or at the top of every hour. If the goal is to provide a quieter swim experience for those who prefer it, a board can adopt “lap times” that would be applicable to all users.

Another set of rules that similarly violate the FHA that we encounter often are the “supervision” requirements. These rules typically require children or guests under a certain age to be accompanied by a parent or adult. While similar rules have been upheld for health and safety reasons, the challenge is in setting the appropriate age limit that is the least restrictive and using the right language. For example, in one case a rule requiring children 14 and under to be supervised was upheld. We encourage boards to refer to the local

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ordinances regarding unsupervised children in determining a suitable age restriction. Additionally, the terms “parent” or “guardian” have legal definitions that would unreasonably exclude a babysitter or older sibling from accompanying a young child; as such, using such terms would violate the FHA as unreasonably restrictive. Similarly, the term “adult” would exclude a 16-year old babysitter from supervising a young child at the swimming pool. We suggest referring to the accompanying person as a “responsible party who can pass a swim test”.

Here are a couple other rules that violate the FHA and alternative language that would avoid the violation:

Rather than a rule that states “children who are not toilet trained are prohibited from entering the pool”, we recommend “any person who is not toilet trained or is incontinent must wear appropriate swim diapers under their swimsuits”.

Instead of “no children’s toys are permitted in the pool area”, try “no beach balls, rafts, inner tubes, squirt guns, sports balls, or the like are permitted in the pool area”.

It is important to keep in mind that the behavior many associations are concerned about when creating pool rules that target children can be addressed through non-age specific rules that apply to all – no running, no excessive yelling/screaming, no unruly behavior, etc.

Enforcement

Even if a rule does not violate the FHA, the enforcement of the rule may. We are referring to “reasonable accommodations” under the FHA. Under the FHA, a housing provider is required to make reasonable accommodations, which includes a change, exception, or adjustment in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling.

Take for example a rule that states “no animals are permitted in the pool facility”. To comply with the FHA, an exception would have to be made for assistance animals on the pool deck (although the animal could still be prohibited from entering the water due to health and safety concerns).


For those jurisdictions that protect gender identity, enforcing locker room/restroom designations is not encouraged.

Enforcing rules that regulate behavior can also be tricky because boards, lifeguards, and pool managers must be mindful of those patrons who have disabilities (see above for discussion on what constitutes a disability) that require a reasonable accommodation.

For instance, a person who has autism or has Tourette’s syndrome may involuntarily shout or use offensive language; such individuals should not be suspended from the pool facility because they are unable to comply with rules prohibiting such behavior.

The FHA, however, does not protect an individual who poses a direct threat to the health or safety of other individuals or substantial physical damage to the property of others (based on reliable objective evidence such as current conduct or a recent history of overt acts) unless the threat can be eliminated or significantly reduced by a reasonable accommodation.

Courts have also ruled that associations are not required to make accommodations that fundamentally alter the nature of the association’s operations or services. Consider a physically disabled resident who requests a companion to provide him physical assistance while in the pool. Since most community associations do not have the staff, properly trained or otherwise, to provide such service, the association would not be required to grant the resident’s request. Rather, the association should offer to exempt the resident’s personal caregiver from membership/guest pass requirements.

Lastly, please note that this article does not address the Americans with Disabilities Act (“ADA”). The ADA regulates places of public accommodations, so if your pool facility is open to the public, or otherwise meets the definition of a public accommodation, you will have to comply with the requirements of the ADA as well. 



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