

MOTORIZED MOBILITY AIDES IN THE LTC RESIDENCE - POLICY CONSIDERATIONS

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The use of motorized “scooters” or mobility aides in a long term care setting has been a polarizing issue. On the one hand, these devices enable many individuals to maintain an independent lifestyle. On the other hand, these devices can present safety hazards that can result in serious injuries leading to regulatory violations and civil liability. Because the seriousness of the risks and potential consequences, the obvious answer might seem to be, to limit the use of motorized mobility aides (MMAs), or to simply to ban them altogether. After all, whether the community is a skilled nursing facility, assisted living or simply independent senior housing, there is a duty to provide a safe environment for all individuals living in the community. This is best done by implementing appropriate policies that are developed within the framework of applicable rules and regulations.

Policy considerations regarding the use of MMAs are complex and require an artful balance of a resident’s rights with the rights of the facility and the rights of other residents. These “rights” are defined not only in the Federal Regulations that govern nursing facilities but in independent Federal and State statutes. An understanding of the relevant law is necessary in order to develop a sound MMA policy. The following overview is intended to provide you with a fundamental understanding of the issues, as well as some tips for practical application in the development of your own MMA policy.

Federal Law

In addition to the OBRA regulations governing nursing facilities, senior housing communities of all types must comply with other Federal laws including, but not limited to, the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA). Regardless of licensure, a senior housing community could be the subject of a discrimination claim for violating the ADA or FHA if unreasonable restrictions are placed on the use of MMA’s. Of particular significance is the fact that due to the influx of injury to person and property by motorized mobility aides, the Federal Government revised the ADA regulations effective March 15, 2011.

It is clear from the revised regulations that housing providers must permit manually operated wheelchairs and other manually operated assistive devices without exception. Housing providers must also permit individuals who use other power-driven mobility devices to utilize same, unless it can be shown by the housing provider that an individual’s use fundamentally alters its programs, services, activities, or creates a direct threat, and/or safety hazard. This notion is not much different than originally reported. However, the regulations now give guidance to providers in determining what constitutes a “fundamental alteration to its programs, services, or activities, a direct threat, or safety hazard”.¹ More specifically, providers have been granted express permission to utilize the following factors in making the determination:

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

¹ Title II regulation, 28 C.F.R. Part 35, Nondiscrimination on the Basis of Disability in State and Local Government Services and Title III regulation, 28 C.F.R. Part 36, Part 36: Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities.

- Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and
- Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

Under the prior case law, these inquiries may have been considered discriminatory. It is important to keep in mind that if an individual is denied the use of a motorized mobility aide while on the premises, a facility must have evidence to support that the factors above were considered and analyzed. In other words, a facility will have a difficult time maintaining that there was a fundamental alteration in its programs, services, or activities, a direct threat, or a safety hazard by simply labeling operators of motorized mobility aides as “dangerous” without objective, tangible evidence that the analysis set forth the above was undertaken and supports the facility’s conclusion.

State Law

Most states have statutes that parallel the ADA and FHA. Importantly, some of these statutes are more restrictive and have larger penalties than their federal counterparts. Additionally, licensure-specific requirements, which differ from state to state, should also be considered when developing a MMA policy.

Licensure

Senior housing communities may be governed not only by Federal Regulations, such as the OBRA regulations that govern nursing facilities, they may be governed by state specific licensure requirements, which also need to be considered in the development of a policy.

Policy

Unfortunately, the old axiom, “one size fits all” does not apply to this issue. However, as you develop your own facility specific policy regarding the use of MMAs, the following pages contain examples of some basic “dos” and “don’ts” for the unlicensed setting and for the licensed setting. Additional background information can be found on our MMA Resource Page and actual cases involving LTC providers can be found on our Case Review Page.

Policy Review

This information is intended for consideration by a facility as it develops a policy on the use of MMAs. It is NOT intended to be legal advice, nor is it a complete review of all applicable law(s) or regulations.

Please have your MMA policy reviewed by your own local legal counsel prior to implementation to ensure compliance with all applicable laws and regulations.



UNLICENSED FACILITIES & MOTORIZED MOBILITY AIDES

Do's, Do Not's, and Considerations

Do's

- Treat individuals with motorized mobility aides the same as all others. In other words, don't impose rules, implement policies, or impose requirements that apply only to individuals with motorized mobility aides.
- When considering a restriction on individuals with motorized mobility aides, balance **legitimate** safety concerns with the individual's right to utilize those mobility aides. Property injury is not enough. Consider the likelihood and seriousness of injury and the number of people at risk.
- Provide reasonable accommodations within the community's rules, practices, *services* and policies in order for individuals with mobility impairments to enjoy the same amenities as other residents.
- Be creative with reasonable accommodations.
- Use your facility lease and/or resident handbook to prohibit property damage by **any** resident (not just by those who use a mobility aide).
- Restrict admission inquiries to those permissible inquires that apply to **all** applicants.
- Accept that an applicant's judgment about their ability to reside in the community is correct – do **not** impose your own judgment.
- Utilize the least invasive means to verify an applicant's qualifications.

Considerations

- Consider placing speed limit signs throughout the facility or in certain areas.
- Consider *offering* (not mandating) motorized mobility aide training.
- Consider examining rules and policies to make sure they do not unintentionally discriminate.
- Consider inquiring only as to every applicant's ability to meet the requirements for tenancy (i.e. ability to pay the rent on time).
- Consider making certain inquiries of an existing resident (not an applicant) if a "nexus" relationship exists between "the fact of the individual's tenancy and [an] asserted direct threat" to the health and safety of other individuals. HUD v. Williams, No. 02-89-0459-1 (1991). For example, if a resident complains that another resident is intentionally running into other residents with his/her motorized mobility aide, consider asking questions of the resident regarding his/her ability to utilize the motorized mobility aide.
- Consider placing mirrors at corridor turns and/or angles.

Do Not's

- **Do not** prohibit motorized mobility aides.
- **Do not** refuse to charge a motorized mobility aide for a resident.
- **Do not** require liability insurance for individuals using motorized mobility aides.
- **Do not** require individuals with motorized mobility aides enter into indemnity agreements with the facility or community.
- **Do not** charge a rental premium or additional fee for use of the motorized mobility aide.
- **Do not** discourage individuals with a motorized mobility aide from residing at the facility; **do not** encourage an individual with a motorized mobility aide to consider a facility that is, for example, "better suited to their needs". In other words, do not debate the applicant's judgment about their ability to live in the community merely because they use a motorized mobility aide.
- **Do not** inquire as to whether the resident needs the motorized mobility aide or has a disability or handicap.
- **Do not** *require* motorized mobility aide training and/or testing.
- **Do not** put a limit on the number of motorized mobility aides usable in the facility.
- **Do not** put limits on the size or weight of motorized mobility aides.
- **Do not** assume individuals with motorized mobility aides are dangerous.
- **Do not** require that individual applicants be able to live "independently".
- **Do not** inquire into the nature and/or extent of the disability or handicap.
- **Do not** require individuals with motorized mobility aides to undergo a medical assessment as a condition of tenancy.
- **Do not** require utilization of a home health agency.
- **Do not** prohibit the use of a home health agency.
- **Do not** put a limit on the number of hours outside assistance is needed or required by the individual.
- **Do not** request medical records.
- **Do not** conduct medical or therapy screening.



LICENSED FACILITIES & MOTORIZED MOBILITY AIDES

Do's, Do Not's, and Considerations

Do's

- Treat residents with motorized mobility aides the same as all other residents. In other words, don't impose rules, implement policies, or impose requirements that apply only to individuals with motorized mobility aides.
- When considering a restriction on individuals with motorized mobility aides, balance **legitimate** safety concerns with the individual's rights to utilize those mobility aides. Property injury is not enough. Consider the likelihood and seriousness of injury and the number of people at risk.
- Provide reasonable accommodations within the facility's rules, practices, *services* and policies in order for individuals with mobility impairments to enjoy the same amenities as other residents.
- Be creative with reasonable accommodations.
- Use your facility admission agreement, lease, and/or resident handbook to prohibit property damage by **any** resident (not just by those who use a mobility aide).
- Restrict admission inquiries and assessments regarding the use of motorized mobility aides to those required for compliance with Federal and/or State rules and regulations.
- Know and apply the Federal and/or State rules and regulations applicable to your specific facility licensure related to resident rights and responsibilities, personal property, prevention of accidents, use of assistive devices, and environmental hazards.
- Know and apply any state specific licensing policies on the issue of motorized mobility aides.

Do Not's

- **Do not** prohibit motorized mobility aides.
- **Do not** refuse to charge a motorized mobility aide for a resident.
- **Do not** require liability insurance for residents who use motorized mobility aides.
- **Do not** require residents with motorized mobility aides enter into indemnity agreements with the facility or community.
- **Do not** charge a rental premium or additional fee for use of the motorized mobility aide.
- **Do not** discourage individuals with a motorized mobility aide from residing at the facility; **do not** encourage an individual with a motorized mobility aide to consider a facility that is, for example, "better suited to their needs". In other words, do not debate the applicant's judgment about their ability to live in the community merely because they use a motorized mobility aide.
- **Do not** inquire as to whether the resident needs the motorized mobility aide or has a disability or handicap.
- **Do not** *require* motorized mobility aide training and/or testing.
- **Do not** put a limit on the number of motorized mobility aides usable in the facility.
- **Do not** put limits on the size or weight of motorized mobility aides.
- **Do not** assume individuals with motorized mobility aides are dangerous.

Considerations

- Consider placing speed limit signs throughout the facility or in certain areas.
- Consider *offering* motorized mobility aide training to residents.
- Consider examining rules and policies to make sure they do not unintentionally discriminate.
- Consider careful and individualized care planning regarding the use of motorized mobility aides, including reasonable accommodations made, for each resident.
- If applicable, consider having the facility's Interdisciplinary Team assess each resident with a mobility aide (motorized or not) in compliance with standard of practice and 42 Code of Federal Regulations § 483.

Motorized Mobility Aide Resources

Fair Housing Act, United States Department of Justice
<http://www.usdoj.gov/crt/housing/title8.php>

Housing for Older Persons Act (HOPA)
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ76.104.pdf

ADA Frequently Asked Questions, Americans With Disabilities Act
<http://www.ada.gov/q%26aeng02.htm>

The Rehabilitation Act Amendments of 1973, as amended
<http://www.access-board.gov/enforcement/Rehab-Act-text/intro.htm>

Your Rights Under Section 504 of The Rehabilitation Act, Department of Health and Human Services
<http://www.hhs.gov/ocr/504.html>

Americans With Disabilities Act, United States Department of Justice
<http://www.usdoj.gov/crt/housing/title8.php>

Reasonable Accommodations Under the Fair Housing Act, Joint Statement of the Department of Housing and Urban Development and the Department of Justice
http://www.usdoj.gov/crt/housing/joint_statement_ra.pdf

Statement of Jessie K. Liu, Deputy Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Committee on the Judiciary U.S. House of Representatives; Hearing Entitled "Enforcement of the Fair Housing Act of 1968", Presented on June 12, 2008, United States Department of Justice
http://www.usdoj.gov/crt/speeches/jl_fha_testimony.pdf

Fair Housing - It's Your Right, United States Department of Housing and Urban Development
<http://www.hud.gov/offices/ftheo/FHLaws/yourrights.cfm>

Are You a Victim of Housing Discrimination?, United States Department of Housing and Urban Development
<http://www.hud.gov/offices/adm/hudclips/forms/files/903-1.pdf>

Understanding the Fair Housing Amendments Act, Eastern Paralyzed Veterans Association
http://www.unitedspinal.org/pdf/fair_housing_amendment.pdf
Securing the Fair Housing Rights of Residents of Assisted Living and Other Long Term Care Facilities, Holly Robinson, ABA Commission on Law and Aging
http://www.nccnhr.org/uploads/File/Robinson_-_Advocacy_Using_the_Fair_Housing_Act.pdf

Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities, Eric M. Carlson, National Senior Citizens Law Center

http://www.nsclc.org/areas/long-term-care/area_folder.2006-09-28.6362697198/area_folder.2007-06-12.0929205271/article.2007-06-12.1298613393/at_download/attachment

The Fair Housing Act: A Legal Overview, Updated May 6, 2003, Jody Feder, Legislative Attorney, American Law Division

https://www.policyarchive.org/bitstream/handle/10207/276/95-710_20030506.pdf?sequence=1

106. *Sample Fair Housing Jury Instructions - Preliminary*, United States Department of Justice, Civil Rights Resource Manual

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00106.htm

107. *Sample Fair Housing Jury Instructions - General*, United States Department of Justice, Civil Rights Resource Manual

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00107.htm

108. *Sample Fair Housing Jury Instructions - Reasonable Accommodation*, United States Department of Justice, Civil Rights Resource Manual

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00108.htm

109. *Sample Fair Housing Jury Instructions - Damages*, United States Department of Justice, Civil Rights Resource Manual

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00109.htm