

Housing Affordability Impact

The rules proposed for readoption would not evoke a change in the average costs associated with housing. The basis for this finding is that the rules proposed for readoption pertain to the safe dispensing of gasoline and have nothing whatsoever to do with housing.

Smart Growth Development Impact

The rules proposed for readoption would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the rules proposed for readoption pertain to the safe dispensing of gasoline and have nothing whatsoever to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12:196.

LAW AND PUBLIC SAFETY

(a)

DIVISION ON CIVIL RIGHTS

Regulations Pertaining to Discrimination on the Basis of Disability

Proposed Readoption with Amendments: N.J.A.C. 13:13

Authorized By: Chinh Q. Le, Director, Division on Civil Rights.
 Authority: N.J.S.A. 10:5-1 et seq., specifically 10:5-8 and 10:5-12.
 Calendar Reference: See Summary below for explanation of exception to calendar requirement.
 Proposal Number: PRN 2011-015.

Submit comments by March 19, 2011 to:
 Gary LoCassio, Deputy Director
 Division on Civil Rights
 P.O. Box 089
 Trenton, New Jersey 08625-0089

The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (Division), in the Department of Law and Public Safety, enforces the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. Pursuant to Executive Order No. 66 (1978) and N.J.S.A. 52:14B-5.1, the Division’s rules concerning discrimination against persons with disabilities, N.J.A.C. 13:13, expire on December 2, 2010. Since the Division has filed this notice of rules proposed for readoption with the Office of Administrative Law on or prior to that date, the expiration date is extended 180 days to May 31, 2011, pursuant to N.J.S.A. 52:14B-5.1c. The rules explain the LAD’s prohibitions against discrimination on the basis of disability in the areas of employment, housing and access to places of public accommodation, and are designed to provide guidance to employers, housing providers and owners and operators of public accommodations, persons with disabilities and others who are impacted by the application of the New Jersey statute.

The Division has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. Additionally, pursuant to Executive Order No. 2 (2010), the Division engaged in the advance notice of the rules proposed for readoption by soliciting advice and views of knowledgeable persons outside of government. From this process, the Division received suggested amendments to the rules upon readoption. The Division has reviewed these suggestions, as well as conducted its own review, and has proposed certain amendments to the rules upon readoption to clarify the rules and make them consistent with the current state of the law on disability discrimination. The rules as amended will continue to establish principles for interpreting the New Jersey Law Against Discrimination’s

protections against discrimination based on physical and mental disability.

The statutory underpinnings of the rules proposed for readoption are well established. The LAD was first amended in 1972 to prohibit discrimination in employment, housing and public accommodations on the basis of physical disability. The statute was further amended in 1978 to prohibit discrimination based on mental disability. In 1992, the LAD was amended again to provide that a failure to design and construct a multi-family dwelling in accordance with the Department of Community Affairs’ Barrier Free Subcode is a violation of the LAD’s prohibitions of housing discrimination. N.J.S.A. 10:5-12.4. See also N.J.S.A. 52:32-4 to 16; 52:27D-119 to 141.

In enacting the LAD, the Legislature declared its intent that “all persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing and other real property” without discrimination. N.J.S.A. 10:5-4. The LAD provides express provisions that prohibit discrimination against persons with disabilities in employment (N.J.S.A. 10:5-12a), in housing (N.J.S.A. 10:5-12g, h and i) and in access to places of public accommodation (N.J.S.A. 10:5-12f). The rules proposed for readoption amplify each of these areas, with Subchapter 2 of the rules governing employment, Subchapter 3 of the rules governing housing and Subchapter 4 of the rules governing places of public accommodation.

On the Federal level, the Rehabilitation Act of 1973 made it unlawful to discriminate against people with disabilities in Federally funded programs. See 29 U.S.C. §794. The United States Supreme Court has held that the Federal Rehabilitation Act requires reasonable accommodation to assure that a person with a disability has a meaningful opportunity to participate in and to enjoy the benefits of a Federally funded program. See *Alexander v. Choate*, 469 U.S. 287, 300-301 (1985). In 1990, Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 et seq., which prohibits discrimination against people with disabilities in employment, public accommodations and government services. Like the Rehabilitation Act, the ADA requires as part of the prohibitions against disability discrimination that covered entities provide reasonable accommodation to people with disabilities, including readily achievable barrier removal and modification of policies to ensure that people with disabilities have fully integrated access to the facilities, goods and services made available to the general public. Additionally, the Federal Fair Housing Act (FHA), 42 U.S.C. §§3601 through 3619, prohibits discrimination by housing providers on the basis of disability. One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604(f)(3)(B).

Consistent with guidance under Rehabilitation Act, the rules proposed for readoption were first promulgated by the Division in 1984. The rules have been readopted, and amended, since that time, generally remaining consistent with the provisions contained in Federal law. The rules set forth both direct prohibitions against discrimination against people with disabilities in employment, housing and access to places of public accommodation, as well as the requirement to provide reasonable accommodation for people with disabilities, when such accommodation would not impose an undue hardship on the particular employer, housing provider or public accommodation.

While the LAD does not contain express provisions outlining the duty to provide reasonable accommodations to people with disabilities, the New Jersey Supreme Court has found that affording persons with disabilities reasonable accommodation rights is consistent with the LAD’s broad remedial purposes. *Viscik v. Fowler*, 173 N.J. 1, 19-20 (2002). Moreover, the Court recently reviewed the LAD’s history pertaining to disability discrimination, as well as the rules currently proposed for readoption, and found that the regulatory interpretation contained in these rules matches the Legislature’s intent in this area. *Victor v. State*, 203 N.J. 383 (2010).

On the Federal level, regulations have been promulgated by the Equal Employment Opportunity Commission (EEOC) to address disability discrimination in employment (29 CFR Part 1630); by the Department of

Housing and Urban Development (HUD) to address disability discrimination in housing (24 CFR Part 100); and by the Department of Justice (DOJ) to address disability discrimination by public accommodations (28 CFR Part 36). While the rules proposed for readoption are generally not as comprehensive as the Federal rules in each of these areas, they are nonetheless consistent with the requirements in the Federal rules. The proposed amendments to the rules are also consistent with the governing Federal rules. The Division's reference to the governing Federal guidelines in proposing to readopt these rules, and to adopt the proposed amendments to the rules, is consistent with the New Jersey Supreme Court's repeated use of Federal law as a key source of interpretive authority when analyzing allegations of unlawful discrimination under the LAD. See *Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 97 (1990). Additionally, much of the rules in Subchapter 3, pertaining to housing discrimination, are required in order to maintain the designation of the LAD and its implementing rules as "substantially equivalent" to the Federal Fair Housing Act. This designation allows the Division to maintain its work-sharing agreement with HUD, by which the Division receives funding from HUD for case processing and other outreach initiatives.

Summary of the rules proposed for readoption, and descriptions of proposed amendments, follow.

Subchapter 1 sets forth general provisions in connection with the chapter. N.J.A.C. 13:13-1.1 sets forth the purpose of the chapter. N.J.A.C. 13:13-1.2 sets forth the rules for construction of the chapter. N.J.A.C. 13:13-1.3 sets forth definitions used in the chapter.

Subchapter 2 sets forth rules concerning disability discrimination in employment. N.J.A.C. 13:13-2.1 sets forth the rules for employers, labor organizations and employment agencies pertaining to discriminatory job advertising and solicitations. N.J.A.C. 13:13-2.2 sets forth the rules for employers, labor organizations and employment agencies pertaining to discriminatory job referrals. N.J.A.C. 13:13-2.3 sets forth the rules for employers, labor organizations and employment agencies pertaining to discriminatory job selection criteria, including employment tests that have the effect of unlawfully screening out people with disabilities. N.J.A.C. 13:13-2.4 sets forth the rules for employers, labor organizations and employment agencies pertaining to discriminatory pre-employment inquiries as part of the application and job selection process. N.J.A.C. 13:13-2.5 sets forth the rules for employers to provide reasonable accommodation to people with disabilities, including the standards for determining when a particular accommodation imposes an undue hardship on the operation of an employer's business. The Division proposes to amend these standards to indicate that when taking into account whether the cost of a particular accommodation poses an undue hardship, that the availability of tax credits and deductions, as well as the availability of outside funding should be taken into consideration. This proposed amendment is consistent with the EEOC's rules on this topic. See 29 CFR 1630.2(p).

N.J.A.C. 13:13-2.6 sets forth the prohibitions against discrimination in wages and fringe benefits. The Division proposes to delete from N.J.A.C. 13:13-2.6(c) the reference to medical coverage for preexisting conditions, in order to avoid any confusion or possible contradiction with respect to coverage of preexisting conditions mandated by the recently enacted Federal Patient Protection and Affordable Care Act (P.L. 111-148). In its place, the Division proposes as an example that employers are not required by this section to offer employees medical insurance that may limit coverage for certain procedures or treatments, as long as these activities are not being used as a subterfuge to evade the purposes of the subchapter. This proposed amendment is consistent with the guidance of the EEOC in this area. See 29 CFR 130.16(f). N.J.A.C. 13:13-2.7 sets forth the prohibitions against disability discrimination by labor unions. N.J.A.C. 13:13-2.8 sets forth the standards governing the exception in the LAD permitting employers to refuse to hire a person where as a result of the person's disability he or she cannot perform the essential functions of the job, or where it would be hazardous to the safety or health of the individual, other employees, clients or customers. The Division proposes amendments to N.J.A.C. 13:13-2.8(a)1 and 2 to expressly reference the requirement that reasonable accommodation be taken into account prior to an employer taking an adverse action under the exception. The requirement to consider reasonable accommodation in these situations

currently exists pursuant to N.J.A.C. 13:13-2.5, and is referenced in the preliminary language in N.J.A.C. 13:13-2.8(a), but the Division agrees with comments received during the pre-publication notice period that these requirements would be more clear if referenced within the text of N.J.A.C. 13:13-2.8(a)1 and 2. Moreover, the proposed amendments are consistent with the guidance of the EEOC. See 29 CFR 1630.2(r).

Subchapter 3 sets forth rules concerning disability discrimination with respect to real property. N.J.A.C. 13:13-3.1 sets forth the scope of the application of the subchapter. N.J.A.C. 13:13-3.2 sets forth the prohibitions on discriminatory advertising by housing providers. N.J.A.C. 13:13-3.3 sets forth the prohibition against discriminatory inquiries of prospective purchasers, tenants or occupants. N.J.A.C. 13:13-3.4 sets forth the general prohibitions against discriminatory practices in the sale or rental of property. The Division proposes to amend N.J.A.C. 13:13-3.4(f)2 to make clear that permitting a person with a disability to enjoy use of housing, including the right to reasonable accommodation or reasonable structural modifications to use and enjoy the housing, extends to the public and common areas associated with the housing accommodation. This amendment is consistent with the scope of the LAD, which prohibits housing providers from denying to or withholding from any person "any real property or part of portion thereof" because of disability. N.J.S.A. 10:5-12g. N.J.A.C. 13:13-3.5 sets forth the prohibitions against evicting any tenant because the tenant has a disability or is associated with a person with a disability. N.J.A.C. 13:13-3.6 sets forth the prohibitions against discrimination in financing because of disability. N.J.A.C. 13:13-3.7 sets forth the prohibition, outlined in the LAD, that it is a violation of the LAD to design and construct multifamily dwellings not in compliance with the Barrier-Free Subcode.

Subchapter 4 sets forth rules concerning disability discrimination with respect to access to places of public accommodation. N.J.A.C. 13:13-4.1 sets forth the purpose of the subchapter. N.J.A.C. 13:13-4.2 sets forth definitions used in the subchapter. The Division proposes to delete the word "handicapped" from the definition of disability. The term "handicapped" was removed from the LAD and replaced with the word "disability" in 2003. N.J.A.C. 13:13-4.3, Unlawful practices, clarifies N.J.S.A. 10:5-4.1 and 12, which prohibit discrimination against people with disabilities in places of public accommodation. The section specifies the types of conduct that may render owners or operators of public accommodations liable under the LAD for discriminating against people with disabilities. N.J.A.C. 13:13-4.4 explains that places of public accommodation must, where reasonable, offer goods, services, facilities, privileges, advantages and accommodations to a person with a disability in the most integrated setting appropriate to the needs of that person. N.J.A.C. 13:13-4.5 sets forth the requirements for examinations, and provides that examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional or trade purposes shall be selected and administered to best ensure that when administered to a person with a disability that impairs sensory, manual or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level rather than the individual's impaired skills, except where those skills are the factors that the examination purports to measure. N.J.A.C. 13:13-4.6 provides that it is unlawful to impose a surcharge on people with disabilities to cover the costs of providing access. N.J.A.C. 13:13-4.7 provides that it is unlawful for any person to retaliate, coerce or intimidate another person because that person has filed a complaint, testified, participated in an investigation or exercised or assisted another to exercise any right granted or protected by the LAD. N.J.A.C. 13:13-4.8, Reasonable probability of serious harm, provides that an owner or operator of a place of public accommodation is not required to permit a person with a disability to participate in or benefit from a public accommodation if there is a reasonable probability of serious harm to the person with a disability, or to others. This section further provides that such determinations must be based on an individualized assessment utilizing reasonable judgment and relying on the current medical knowledge or the best available objective evidence. This section also clarifies that only safety requirements that are based on actual risks, rather than speculations or generalizations, are permitted. Presently, the rule provides that an owner of a place of public accommodation may preclude access to a person with a disability when a reasonable probability of serious harm would result that cannot be

eliminated with reasonable accommodation. Upon readoption, the Division proposes amendments to N.J.A.C. 13:13-4.8(a) and (b) to provide that an owner of a place of public accommodation may deny access to a person with a disability when a reasonable probability of serious harm would result that cannot be mitigated with reasonable accommodation. The Division believes this reflects the current state of law, that the risk does not need to be "eliminated" but that an individual with a disability should have access to a public accommodation when the risk of harm can be sufficiently mitigated with reasonable accommodation, such that the individual's disability no longer meets the standard of "reasonable probability of serious harm" necessary to preclude access. See 28 CFR 36.208. N.J.A.C. 13:13-4.9 clarifies that the LAD and the rules promulgated thereunder shall not be construed as making it unlawful to prohibit or restrict smoking in public places. N.J.A.C. 13:13-4.10 provides that the LAD and this subchapter shall not be construed as interfering with the operation of a bona fide insurance plan or program. The section does, however, prohibit the refusal to serve a person with a disability because of insurance company requirements conditioning coverage or rates on the absence from the facility of people with disabilities.

N.J.A.C. 13:13-4.11 sets forth the rules concerning reasonable accommodation. This section explains the obligation under the law to make reasonable modifications to a place of public accommodation's policies, practices or procedures in order to ensure that people with disabilities have access to the goods, services and facilities offered to the general public. This section also clarifies that owners or operators of places of public accommodation will not be required to provide accommodations that impose an undue burden on the operation of its business. The section also sets forth factors to be considered in determining whether a requested accommodation creates an undue burden, which include whether the modification will fundamentally alter the nature of the goods, services, programs or activities of the entity, and the nature and cost of the accommodation sought. N.J.A.C. 13:13-4.12 provides a non-exclusive list of examples that should help owners or operators of places of public accommodation recognize some means by which challenges faced by people with disabilities can be reasonably accommodated. The Division proposes to amend this section upon readoption to provide further guidance to places of public accommodation. The Division proposes an amendment to N.J.A.C. 13:13-4.12(a)6 to explain that if a store has only one check-out aisle that is accessible to people with disabilities, and it is generally used for express service, that the store should allow as a form of reasonable accommodation to allow people with mobility impairments to make all their purchases at that aisle. This proposed amendment is consistent with ADA guidelines promulgated the Federal Department of Justice. See 28 CFR 36.302. Additionally, the Division proposes amendments to N.J.A.C. 13:13-4.12(a)7ii to list additional examples of auxiliary aids and services that, absent undue hardship, may be considered a reasonable accommodation. These particular aids are sought to be included as examples as they have become more prevalent since the time of the last readoption, and include screen reader software, magnification software, optical readers and secondary auditory programs. The items subject to the proposed amendment are included in the Federal DOJ guidelines for public accommodations. See 28 CFR 36.303. N.J.A.C. 13:13-4.13 outlines the circumstances under which a place of public accommodation may lawfully refer a person with a disability to another place of public accommodation for special treatment or services.

As the Division has provided a 60-day comment period on the notice for this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption with amendments will have a beneficial social impact in that the rules help to explain the LAD's prohibitions against discrimination on the basis of disability in the areas of employment, housing and access to places of public accommodation. Further, although these rules have been in place since 1985, people with disabilities have continued to face challenges in gaining full participation in society. Readoption of the rules will further the positive societal impact of the LAD by promoting the full inclusion of people with

disabilities into society and by enhancing the public's understanding of existing rights of people with disabilities. These rules will also provide further guidance to covered entities seeking to comply with the provisions of the LAD, and will thereby serve to educate the public and to alleviate uncertainty among New Jersey residents regarding their rights and responsibilities under the LAD. The proposed amendments have a beneficial social impact, since they provide covered entities and the disabled community with the current state of the law in this area, and provide consistency with Federal requirements.

The rules proposed for readoption related to housing discrimination will allow the Division to continue its work-sharing agreement with HUD, which permits victims of housing discrimination to pursue rights under both Federal and State law without having to separately pursue a complaint with HUD and the Division. Such an arrangement would also be beneficial to those entities charged with housing discrimination, as they would only be subject to a single investigative proceeding.

Economic Impact

While under the rules proposed for readoption with amendments employers, housing providers and places of public accommodation may incur costs in providing reasonable accommodations to individuals with disabilities, these costs depend on the particular circumstances and are limited to costs that do not impose an undue hardship on the business. Moreover, any costs incurred in complying with these rules would otherwise be incurred in complying with the similar reasonable accommodation requirements of the Americans with Disabilities Act, the Fair Housing Act and/or the Rehabilitation Act.

The rules proposed for readoption with amendments that are related to housing discrimination will have a positive economic impact on the State, as they will permit the Division to continue its work-sharing agreement with HUD, allowing the Division to continue to receive Federal funding for case processing and other outreach initiatives.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption with amendments are intended to clarify the New Jersey Law Against Discrimination, and are not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or attempts to effectuate Federal law, standards or requirements. To the extent that the rules pertaining to the housing discrimination allow the Division to enter into a work-sharing arrangement with HUD, those rules are consistent with the FHA and are required by HUD. While the rules are not otherwise intended to implement or comply with any program established under Federal law, and instead are promulgated under the authority of and to interpret the LAD, because of commonalities between Federal law and the LAD the proposed rules are generally consistent with Federal standards.

Jobs Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the number of jobs in the State.

Agriculture Industry Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments will not impose any reporting or recordkeeping requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules would impose compliance requirements on small businesses that are employers, owners of places of public accommodation or involved in the sale or rental of real property, particularly related to providing reasonable accommodations to individuals with disabilities. However, the requirements imposed on small businesses continue to be limited to those accommodations that are reasonable in light of a number of factors, including the size and financial resources of the business in question and the nature and cost of the accommodation needed. The rules specifically provide that the size of the business be taken into account when determining whether an accommodation needs to be provided. Further, the scope of the rules is consistent with the coverage of the LAD, which prohibits discrimination by businesses involved in employment,

housing and public accommodations, regardless of size. While some small businesses choose to retain the services of an attorney when addressing the issue of disability discrimination, which is the subject matter of the rules, the Division believes that professional services are not required for compliance with the rules and that the guidance provided by the rules should make it easier for small businesses to understand the LAD's prohibitions against discrimination based on disability without having to retain professional services.

Smart Growth Impact

The Division does not anticipate that the rules proposed for reoption with amendments will have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan, otherwise known as the State Plan.

Housing Affordability Impact

The Division does not anticipate that the rules proposed for reoption with amendments will have any impact on affordable housing in New Jersey, and there is an extreme unlikelihood that the rules would evoke change in the average costs associated with housing. While the rules proposed for reoption with amendments do relate to housing inasmuch as they prohibit housing providers from discriminating against people with disabilities and require housing providers to provide reasonable accommodation for people with disabilities, the requirements in these rules should not affect the average cost of housing since housing providers are only required to provide accommodations that do not impose an undue hardship on the provider. Moreover, housing providers would be required to provide such accommodations nonetheless under the Fair Housing Act. Further, while there may be certain costs associated with constructing housing that is accessible to people with disabilities, any such costs would otherwise be required by the ADA and the State Barrier-Free Subcode. To the extent the rules declare it unlawful under the LAD when a developer constructs multi-family housing in violation of the Barrier-Free Subcode, that prohibition is contained in the LAD. See N.J.S.A. 10:5-12.4.

Smart Growth Development Impact

The Division does not anticipate that the rules proposed for reoption with amendments will have any impact on smart growth and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey. The rules proposed for reoption with amendments prohibit housing providers from discriminating against people with disabilities, and only pertain to housing production to the extent that multi-family complexes are required to be built in accordance with the State Barrier-Free Subcode. However, this is an existing requirement under the LAD and not imposed solely under these rules. See N.J.S.A. 10:5-12.4.

Full text of the rules proposed for reoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:13.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 2. EMPLOYMENT

13:13-2.5 Reasonable accommodation

(a) (No change.)

(b) An employer must make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

1.-2. (No change.)

3. In determining whether an accommodation would impose undue hardship on the operation of an employer's business, factors to be considered include:

i.-ii. (No change.)

iii. The nature and cost of the accommodation needed, **taking into consideration the availability of tax credits and deductions and/or outside funding**; and

iv. (No change.)

13:13-2.6 Wages and fringe benefits

(a)-(b) (No change.)

(c) It is an unlawful practice for any employer to discriminate against people with disabilities, with regard to fringe benefits provided either directly by an employer or through contracts with insurance carriers. Fringe benefits as used in this section include, but are not limited to, medical, hospital, accident and life insurance, retirement benefits, profit sharing and bonus plans[,] and leave. This subsection does not, for example, prohibit any employer from providing medical insurance, which [does not cover the cost of any medical condition arising out of preexisting illnesses, which costs are incurred following an employee's date of hire] **limits coverage for certain procedures or treatments, unless these activities are being used as a subterfuge to evade the purposes of this subchapter.** Rather, whatever medical insurance is made available to non-disabled employees must be equally available to employees with disabilities.

(d) (No change.)

13:13-2.8 Exception

(a) It shall be lawful to take any action otherwise prohibited under this section where it can reasonably be determined that an applicant or employee, as a result of the individual's disability, cannot perform the essential functions of the job even with reasonable accommodation.

1. Refusal to refer, admit to membership, hire[,] or transfer a person with a disability may be lawful where the nature or extent of the individual's disability reasonably precludes the performance the essential functions of the particular employment **even with reasonable accommodation.** Such a decision, however, must be based upon an objective standard supported by factual evidence rather than on the basis of general assumptions that a particular disability would interfere with the individual's ability to perform the essential functions of the job.

2. Refusal to select a person with a disability may be lawful where it can be demonstrated that the employment of that individual in a particular position would be hazardous to the safety or health of such individual, other employees, clients or customers **where hazard cannot be eliminated or reduced by reasonable accommodation.** Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular disability would create a hazard to the safety or health of such individual, other employees, clients or customers. A "hazard" to the person with a disability is a materially enhanced risk of serious harm.

3. (No change.)

SUBCHAPTER 3. REAL PROPERTY

13:13-3.4 Sale or rental

(a)-(e) (No change.)

(f) It is unlawful for any person to:

1. (No change.)

2. Refuse to make reasonable accommodations in rules, policies, practices or services, **or reasonable structural modifications**, when such accommodations **or modifications** may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, **including public and common areas.**

(g) (No change.)

SUBCHAPTER 4. ACCESS TO PUBLIC ACCOMMODATIONS

13:13-4.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings:

...

"Person with a disability" and "people with disabilities" shall have the same meaning as the term ["handicapped" or] "disabled" as defined in N.J.S.A. 10:5-5(q), and explained in N.J.S.A. 10:5-4.1, and shall include people who are perceived as having a disability.

...

13:13-4.8 Reasonable probability of serious harm

(a) Nothing in this subchapter shall be construed as requiring an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to permit a person with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation if to do so creates a reasonable probability of serious harm to the person with a disability, or to others, that cannot be [eliminated] **mitigated** with reasonable accommodation.

(b) In determining whether providing a person with a disability with access to a public accommodation poses a reasonable probability of serious harm to that individual, or to others, that cannot be [eliminated] **mitigated** with reasonable accommodation, an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the probability that the serious harm will actually occur and whether reasonable modifications of policies, practices, or procedures will [eliminate] **mitigate** the probability of serious harm.

(c) (No change.)

13:13-4.12 Examples of reasonable accommodation

(a) Accommodations that may be reasonable in a particular situation include, but are not limited to:

1.-5. (No change.)

6. Providing an accessible check-out aisle or modifying policies and practices to ensure that an equivalent level of convenient service is provided to a person with a disability as is provided to others. **If only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all their purchases at that aisle;**

7. Providing auxiliary aids and services to ensure effective communication, such as:

i. (No change.)

ii. Qualified readers, Brailled materials and versions of books, books and materials on audio cassettes, [and] large print materials[;], **screen reader software; magnification software; optical readers; secondary auditory programs (SAP); and/or**

iii. (No change.)

8.-10. (No change.)

(a)

**DIVISION OF CONSUMER AFFAIRS
Uniform Regulations; Licensee Duty to Cooperate
and Comply with Board Orders**

Proposed Readoption: N.J.A.C. 13:45C

Authorized By: Paula T. Dow, Attorney General.

Authority: N.J.S.A. 5:8-30.2, 45:1-17(b) and 52:17B-122.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-023.

Submit written comments by March 19, 2011 to:

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Acting Director
New Jersey Division of Consumer Affairs
PO Box 45027
Newark, NJ 07101

The agency proposal follows:

Summary

The Attorney General proposes to readopt N.J.A.C. 13:45C. These rules are scheduled to expire on July 25, 2011 pursuant to N.J.S.A. 52:14B-5.1c. The Division of Consumer Affairs (Division) notes that the Attorney General is proposing the readoption of these rules pursuant to N.J.S.A. 45:1-17(b) and will file the appropriate notice to all licensing entities within the Division.

In compliance with N.J.S.A. 52:14B-5.1, the Division undertook a thorough review of the existing provisions of N.J.A.C. 13:45C in order to delete unnecessary or unreasonable rules. The rules proposed for readoption are necessary, reasonable, understandable and responsive to the purposes for which they were originally promulgated, namely, to establish a licensee's duty to cooperate and comply with orders of a board, committee or sub-unit within the Division. The rules additionally set forth specific conduct that is deemed to be a failure to cooperate and provide that certain privileges are not available in investigative or disciplinary proceedings. The following summarizes the rules in the chapter.

N.J.A.C. 13:45C-1.1 states to whom the rules apply and defines the term "licensee." N.J.A.C. 13:45C-1.2 details a licensee's duty to cooperate in investigative inquiries and the consequences of a licensee's failure to cooperate.

N.J.A.C. 13:45C-1.3 enumerates conduct that is deemed a failure to cooperate, including failing to provide information or records, to attend scheduled proceedings or to answer board inquiries. N.J.A.C. 13:45C-1.4 states that the failure to comply with board orders is professional or occupational misconduct.

Pursuant to N.J.A.C. 13:45C-1.5, there are specific privileges that would otherwise arise from the professional relationship between a licensee and a patient or client that are not available in a Division investigation or disciplinary proceeding. The rule dictates that statements or records that would otherwise be subject to a claim of privilege, but which are obtained by a board, its agent or the Attorney General pursuant to the rule, must remain confidential. N.J.A.C. 13:45C-1.6 concerns the maintenance of, and access to, privileged records that are submitted to the Division for review.

A 60-day comment period is provided for this notice of proposal, and, therefore, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3.

Social Impact

The rules proposed for readoption benefit society by reducing recalcitrant conduct by licensees who attempt to interfere with legitimate inquiries into their conduct. The rules permit the prompt investigation of complaints regarding a licensee's conduct, fitness or capacity to engage in a licensed profession or occupation. The public, licensees and the licensing and enforcement entities benefit from increased efficiency and expeditious investigations and disciplinary proceedings.

Economic Impact

The rules proposed for readoption will have no economic impact on the general public but may have some effect on licensees. Licensees who do not comply with the provisions of the rules may incur expenses such as attorney fees, litigation time, loss of practice time and penalties incurred from professional or occupational misconduct. The boards, committees and sub-units of the Division benefit economically from the inherent efficiencies when the rules are applied and enforced uniformly. This also avoids unnecessary expenses that may be incurred in enforcement litigation.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption are not subject to any Federal standards or requirements.

Jobs Impact

The Attorney General does not anticipate that the rules proposed for readoption will increase or decrease the number of jobs in the State.

Agriculture Industry Impact

The rules proposed for readoption will have no impact on the agriculture industry in the State.

Regulatory Flexibility Analysis

Since the licensees subject to the rules in N.J.A.C. 13:45C are individually licensed, under the Regulatory Flexibility Act (the Act), N.J.S.A. 52:14B-16 et seq., they may be considered "small businesses" for the purposes of the Act.

The costs imposed by the rules proposed for readoption are the same for all licensees as outlined above in the Economic Impact statement.