

# **LEVEL UP LAW**

South Carolina Legal Services

**LEVELING UP YOUR LEGAL KNOWLEDGE**

**Tuesdays at Noon**

# Special Needs Children: Part 2 (age 18 and over)

Important Considerations for Parents,  
Guardians, and Caregivers

# Agenda

- ▶ Social Security Disabled Child and Supplemental Security Income (18+)
- ▶ Special Education for Students over 18
- ▶ Health Care Decisions
- ▶ Power of Attorney vs. Guardianship/Conservatorship
- ▶ Voting and Selective Service (The “Draft”)
- ▶ Making a Will and Intestacy
- ▶ Housing and Employment (Accommodations/Modifications)

# What happens when your disabled child turns 18

Social Security Disabled Child and Supplemental Security Income (SSI)

## Representative payee

- **When your child turns 18, SSA will begin sending the benefits directly to the now adult child, not to the parent as representative payee**
- **If you do not believe your child can handle his own benefits, you can request that a representative payee be appointed**
- **You should take a letter from your child's doctor to SSA stating that he cannot manage his own benefits before he turns 18 and request to be appointed rep payee.**
- **Even if you are your now adult child's legal guardian, you still must inform SSA that you wish to be rep payee.**

# Income & Assets

- For a disabled child under 18, the parents' income and assets are 'deemed available' to the child for SSI purposes. (Though not for SSDI disabled children)
- When the SSI disabled child turns 18 the parent's income & assets are no longer 'deemed available'. This may result in an increase in the child's benefit.
- However, when the child turns 18, they are also now responsible for paying for their own food & shelter out of their benefit. If they do not pay their pro rata share of living expenses, their check would be reduced by 1/3. (1/3 reduction rule)
- SSA calls this In-**kind** support and maintenance ( food, shelter, or both that somebody else provides for you.)
- If your 18 year old disabled child is still living with you (or others), inform SSA that your child is paying his pro rata share of living expenses .
- SSA has a form to report your living arrangements-in kind support (SSA Form 8006)

# Age 18 Disability Redetermination

- **Whether your child is receiving benefits as SSDI disabled child on a deceased, disabled or retired parent, or is receiving Supplemental Security Income (SSI) as a disabled child , disability is redetermined under adult rules at age 18**
- **This may happen at exactly age 18, or, it may take a year or two.**
- **You will receive a notice that the redetermination is underway.**
- **You will receive a notice if SSA determines your child is still disabled as an adult, or**
- **If SSA determines that your child is not disabled as an adult, you will be notified.**
- **You can request an appeal. You have 60 days to appeal.**
- **If you want benefits (including Medicaid) to continue while the appeal is underway, you must appeal within 10 days.**
- **Remember that once your child turns 18, he/she must sign the appeal requests UNLESS you are the legal guardian (in which case you would sign and attach your guardianship papers.)**

# SS/SSI disability as an adult

- **To establish disability as an adult, you must show that you are unable to engage in Substantial Gainful Activity (SGA) suitable to your age, education and past work history on a full time basis because of physical or mental limitations.**
- **A person who is earning more than a certain monthly amount is considered to be engaging in SGA. For non-blind individuals, the monthly SGA amount for 2021 is \$1310(gross not net). (blind is \$2190)**
- **Adults must establish that their condition(s) meet or functionally equal the medical requirements in the Listings of Impairments, or**
- **Show that they are unable to engage in SGA suitable for their age education and past work history because of their physical or mental limitations.**
- **Adults under 50 years of age must establish they cannot engage in SGA even at the sedentary, unskilled, low stress level of work.**
- **You can request an attorney or disability advocate to assist you with your appeal.**
- **SC Legal Services handles this type of appeal and may be able to help you.**

# Continuing benefits (Section 301 payments)

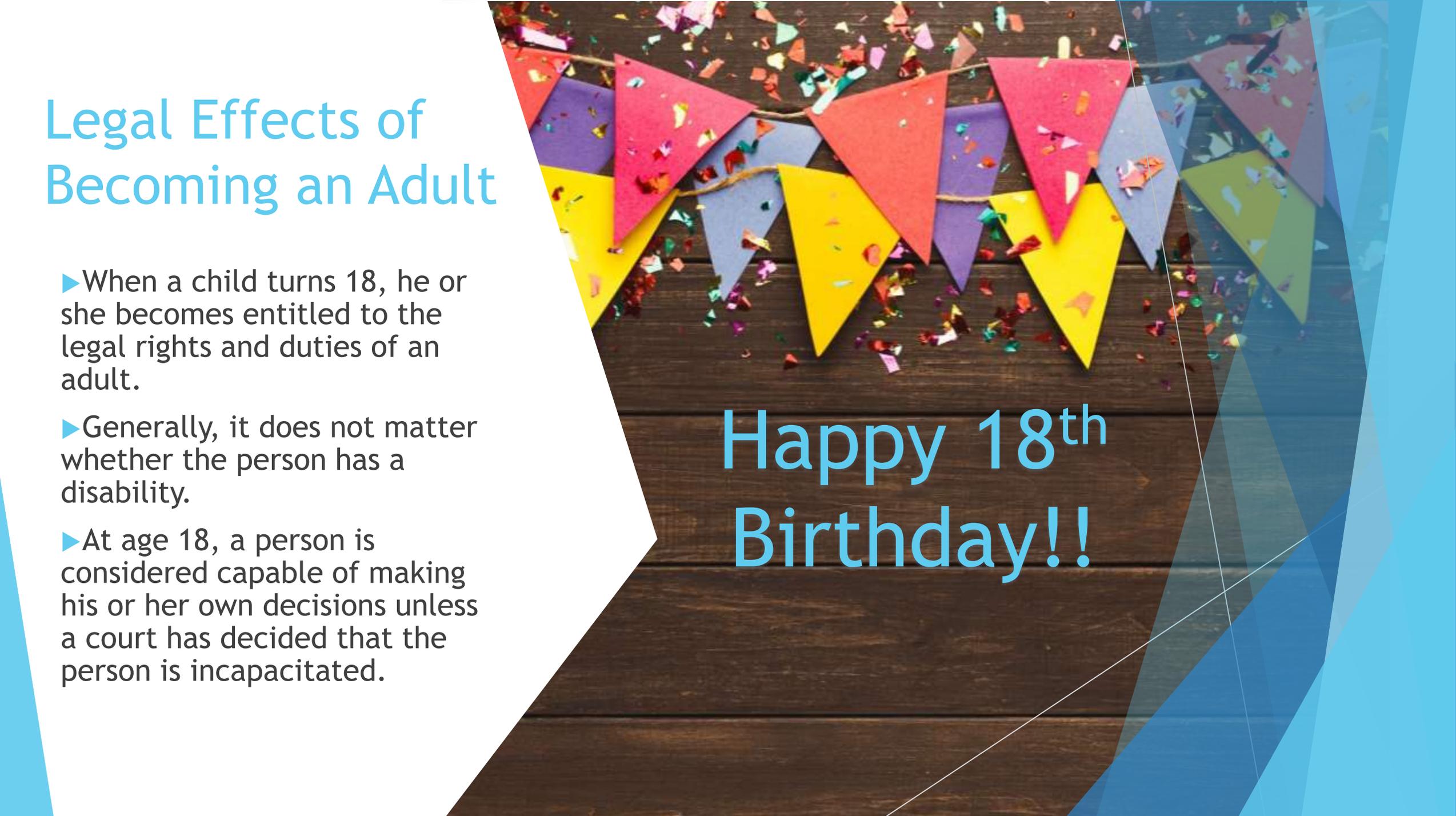
- The term Section 301 refers to a section in the Social Security Act that allows payment continuation for individuals who no longer meet the severity of disability necessary for payment of benefits.
- If your child has enrolled in a program under Vocational Rehabilitation, benefits may continue even though child is not disabled as an adult, until the Voc Rehab program ends
- Your child must have already been enrolled the VR program prior to age 18 redetermination to receive 301 payments
- Enrollment in VR is often included in a child's IEP 'transition'. Check with the school to see if this has been done.
- Make sure SSA knows your child is enrolled

# Summary

- **As your disabled child approaches age 18, you should**
- **Check and see if child is enrolled in a Voc Rehab program through school**
- **Decide if your child can manage his benefits on his own or if not, take a letter from child's doctor to SSA and request to be appointed rep payee**
- **If a notice from SSA arrives saying your child is not disabled as an adult request appeal (and continued benefits within 10 days if you want continued benefits) If no continued benefits desired, you have 60 days to appeal.**
- **If your disabled child will still be living with you or others, inform SSA that they will be paying their pro rata share of living expenses (food and shelter)**
- **Contact an attorney or disability advocate for help with the appeal**
- **SC Legal Services 1-888-346-5592**

# Legal Effects of Becoming an Adult

- ▶ When a child turns 18, he or she becomes entitled to the legal rights and duties of an adult.
- ▶ Generally, it does not matter whether the person has a disability.
- ▶ At age 18, a person is considered capable of making his or her own decisions unless a court has decided that the person is incapacitated.



Happy 18<sup>th</sup>  
Birthday!!

# Special Education for Students Over 18



# Right to Special Education continues until age 21

- ▶ A student can enroll and complete a school year so long as the 21<sup>st</sup> birthday occurs after school starts.
  - ▶ If the 21<sup>st</sup> birthday occurs before the start of the new school year, the student is not eligible to enroll that year.
- ▶ If a student is in the graduating class and becomes 21 before graduation, the student is allowed to stay in school and graduate.
- ▶ Education for children with disabilities is required to be provided in public schools between the ages designated for students to attend public schools.
- ▶ Therefore, students with disabilities who are under 21 when school starts and have not graduated may continue to receive special education services until the end of that school year.

# Transfer of rights to 18-year-old students

- ▶ Rights under the Individuals with Disabilities Education Act (IDEA) transfer to the student at 18.
  - ▶ Schools must notify the student and the parents about the transfer of rights to the student at least one year before the student turns 18
- ▶ Student will begin signing the IEP and participating more fully in the IEP Team, but parents still keep their right to receive notices from the school and have access to student's school records.
- ▶ A student who is 18 or over may sign a power of attorney giving parents or another adult the authority to exercise the student's education rights.
- ▶ If a health care provider determines that a student is not able to express education choices, a parent or other family member is designated to make education choices.
- ▶ Or if the student has a court-appointed guardian, the guardianship may include authority to make educational decisions.

# Transition Services



- ▶ In South Carolina, beginning at age 13, special education IEPs must include goals and services needed to transition the student from school to work or college.
  - ▶ This is younger than federal law which requires transition services to start at age 16.
- ▶ The transition “goals” will include if the student is on track to obtain a regular high school diploma or an alternative diploma and what the student hopes to do after high school (college, vocational training, employment, independent living, etc.).
- ▶ Transition “services” are designed to achieve the transition goals and might include the classes the student will take, occupational therapy the student might receive, vocational training, etc.
- ▶ The Student must be invited to attend IEP meetings where transition services are discussed.
- ▶ The School must identify any other agency being invited to attend the IEP meeting (such as the Department of Vocational Rehabilitation).

# Summary of Performance (SOP)

- ▶ SOP is required for students with an IEP who are:
  - ▶ Graduating with a regular diploma, or
  - ▶ Aging out of special education
- ▶ SOP not required for students who leave high school with a GED or alternate diploma and whose eligibility for services has not terminated.
  - ▶ But nothing prevents a school from providing an SOP to a student even when not *required*.
- ▶ SOP should include information about a student's life goals, interests, functional and academic strengths and needs, accommodations, and strategies for success.



# Health Care Decisions



# Health Care Decisions

- ▶ In South Carolina, a child who is 16 can consent to all their own health care decisions except operations.
  - ▶ Once a child has reached 16, some providers will no longer accept a parent's request for records of any prior medical care. However, the child can sign a release authorizing the parent access to records.
- ▶ As an adult (at age 18), a person makes all their own health care decisions unless:
  1. A court has declared the person incapacitated and appointed a guardian; OR
  2. Two physicians (one in emergency circumstances) have determined the person is unable to consent
- ▶ If physicians have determined someone is unable to consent to medical care, then health care decisions are made by:
  1. A court-appointed guardian; OR
  2. Someone who has a medical power of attorney from the person; OR
  3. Family members, in the order they are named under the Adult Health Care Consent Act



Power of Attorney  
vs.  
Guardianship/  
Conservatorship

# Power of Attorney



Grants someone the right to legally act as someone else



Can be limited or all-encompassing



Person granting the Power of Attorney must have legal “capacity” to understand what they are doing



A  durable  power of attorney is an alternative to guardianship when granted  *before*  someone becomes mentally incapacitated



# Guardianship/Conservatorship

- ▶ What's the difference?
  - ▶ Guardianship relates to personal affairs, such as health care decisions, where to live, educational decisions, voting, etc.
  - ▶ Conservatorship relates to business/financial affairs, such as investing, buying and selling property, spending money, etc.
- ▶ Both are handled in South Carolina probate courts.
- ▶ Both involve a determination of whether the person is or is not “incapacitated.”
- ▶ Court can order either guardianship or conservatorship or both, depending on what is needed.
  - ▶ If a guardian is appointed without a conservatorship, the guardian still has basic authority to handle the person's financial matters.

# “Incapacity”

- ▶ "Incapacity" means the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, even with appropriate, reasonably available support and assistance cannot:
  - ▶ Meet the essential requirements for his physical health, safety, or self-care, necessitating the need for a guardian; or
  - ▶ Manage his property or financial affairs or provide for his support or for the support of his legal dependents, necessitating the need for a protective order.
- ▶ Just because an individual makes bad decisions or has a disability does not necessarily mean that he or she is an incapacitated person.
- ▶ An incapacitated person is unable to make responsible decisions about their well being.
- ▶ A person with poor judgment has the ability to make responsible decisions, but for one reason or another, chooses not to do so.
- ▶ Whether someone is incapacitated or just has poor judgment can be difficult to determine.



# Voting and Selective Service (The “Draft”)



# Voting

- ▶ “Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote” (S.C. Constitution, Article II, Sec. 4)
- ▶ Having a disability does not disqualify a person from voting.
- ▶ The Probate Court can remove an incapacitated person’s right to vote.
  - ▶ A person under a guardianship can still vote unless the guardianship paper specifically says the person is not eligible to vote.
- ▶ Voters with a disability can receive assistance in the voting booth.



“Curbside” voting from a vehicle, absentee ballots, and early voting are good options for voters with a disability who may have difficulty voting at a polling place on Election Day.

# Selective Service (The “Draft”)



- ▶ Federal law requires ALL men between 18 and 26 to register for the draft.
- ▶ There is no exemption for physical, mental, or cognitive conditions.
- ▶ *If* a man is hospitalized, institutionalized, homebound, or would not comprehend the nature of registration, evidence can be sent to Selective Service and the case will be reviewed to see if registration is required.
- ▶ Failure to register is a crime that could be prosecuted and will result in being permanently barred from student financial assistance ("student loans"), federal job training programs, and most federal employment.

# Making a Will and Intestacy



# Making a Will



- Anyone can make a will once they turn 18, even if they have a disability.
- SC Law allows any person “who is of sound and who is not a minor” to make a will.
- If a person’s disability makes them physically unable to sign a will, SC law allows them to direct someone else to sign their name.
- Witnesses who sign the will must be able to say they believe the testator (person making the will) was “of sound mind.”
- Whether a person was of “sound mind” is ultimately up to the Probate Court Judge.

# “Sound Mind”...???

The South Carolina courts have defined “of sound mind” to mean the person:

1. Has a general idea of the property they have an interest in;
  2. Knows who the natural objects of their bounty (a.k.a. kids/heirs/kin) are; and
  3. Knows to whom they wish to leave their property
- ▶ They must also know they are signing a Will, and not some other document

What if someone wasn’t “of sound mind”?

- ▶ The will is not valid.
- ▶ If the person has a previous will, *that* will may still be valid.
- ▶ If the person does not have a valid will, they are “intestate”
- ▶ The deceased person’s property would be distributed according to state intestacy law to:
  - ▶ Spouse/Children
  - ▶ Parents
  - ▶ Siblings
  - ▶ Etc. Etc.

# Housing and Employment





# Housing

- ▶ Various federal laws require housing providers to make reasonable accommodations and reasonable modifications for individuals with disabilities.
- ▶ The Fair Housing Act prohibits discrimination in the sale, rental, and financing of dwellings on the basis of membership in a protected class, which includes disability.

# FHA Discrimination

- ▶ FHA violations can be proven by:
  - ▶ Disparate Treatment - action that, on its face, treats someone in a protected class differently from someone not in a protected class. Examples:
    - ▶ Renting to single men, but not to single women (gender)
    - ▶ Refusing to rent to someone who is mentally ill because of their mental illness (disability)
  - ▶ Disparate Impact - a policy or practice that, while it doesn't discriminate on its face, has a disproportionate negative affect on a protected class. Examples:
    - ▶ A “one strike” policy of evicting victims of domestic violence. Because the vast majority of victims are female, such a policy has a disparate impact on women. (gender)
    - ▶ A 9pm curfew for children under 18 years of age. This rule has a disproportionately negative impact on families with children. (familial status)
- ▶ The FHA does not apply to: small buildings (less than five apartments) occupied by the owner, single-family homes rented or sold without a broker, religious organizations, private clubs, and senior housing.

# Reasonable Accommodations and Modifications

- ▶ The FHA requires that reasonable accommodations and modifications be made for persons with disabilities.
- ▶ A reasonable accommodation is a change in a rule, policy, practice, or service that may be *necessary* to allow a person with a disability an equal opportunity to use and enjoy a dwelling.
- ▶ A reasonable modification is a structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises

# Reasonable Accommodations

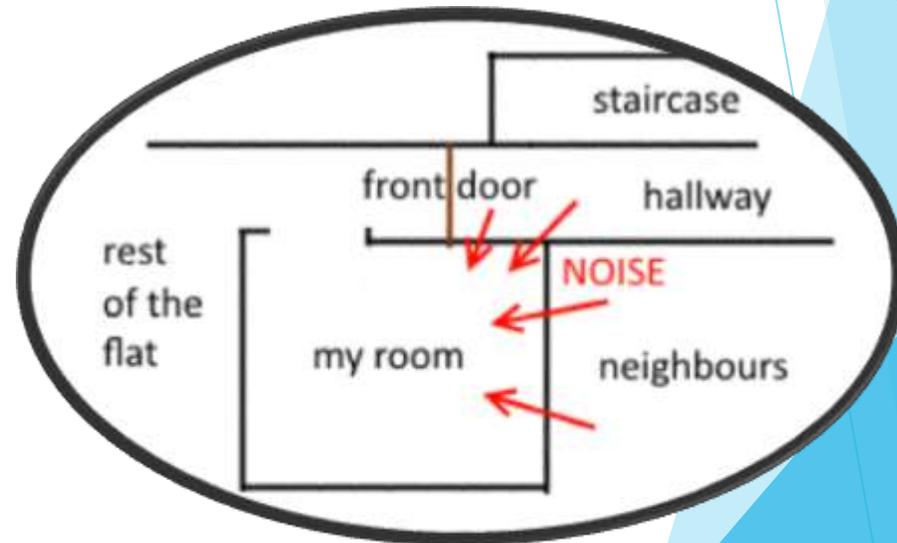
- ▶ A change is necessary if it
  - ▶ Frees the tenant from a rule, policy, or practice that interferes with their right to use and enjoy the dwelling;
  - ▶ Enhances their quality of life by relieving the effects of their disability; or
  - ▶ Enables them to satisfy the essential requirements of tenancy in the same way that a non-disabled person can.
- ▶ A change is reasonable UNLESS:
  - ▶ It is an undue financial or administrative burden; or
  - ▶ It is a fundamental alteration in the nature of the business or program

# Reasonable Accommodations

- ▶ Must be determined on a case-by-case basis.
- ▶ Examples
  - ▶ Changing the rent due date for someone who receives Social Security Disability benefits or SSI (or waiving late fees incurred by check delays).
  - ▶ Sending copies of letters/notices to a tenant's family member who can assist them in handling their affairs.
  - ▶ Allowing an emotional support animal or "seizure dog" in an complex that has a no-pets rule.
  - ▶ Withdrawing a termination notice or eviction notice for someone whose conduct was the result of mental illness.

# Reasonable Modifications

- ▶ Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas.
- ▶ Under the Fair Housing Act, prohibited discrimination includes a refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.



# Reasonable Modifications

- ▶ Under Section 504 of the Rehabilitation Act, a housing provider that receives federal financial assistance is required to provide and pay for the structural modification as a reasonable accommodation unless it amounts to an undue financial and administrative burden or a fundamental alteration of the program.
  - ▶ If an undue burden or fundamental alteration exists, the housing provider is still required to provide any other reasonable accommodation up to the point that it would not result in an undue financial and administrative burden on the housing provider and/or constitute a fundamental alteration of the program.
- ▶ But this excludes the ultimate beneficiary of the federal financial assistance.

# Does the disability have to be verified?

- ▶ Yes, but:
  - ▶ Person only needs to disclose what is necessary to show that they suffer from a disability
  - ▶ Don't need medical records
  - ▶ The disability may be obvious or known to the landlord already
  - ▶ Proof of receiving SSDI or SSI could be enough (it requires a determination of disability)
  - ▶ Information from a doctor, therapist, peer support group, non-medical service provider, or another reliable third party with knowledge may be enough.
  - ▶ Something signed by a doctor is not required.

# Employment

▶ Title I of the Americans with Disabilities Act (ADA) prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

- ▶ Does not apply to private employers with less than 15 employees.



# ADA Requirements

- ▶ ADA prohibits employers from discriminating against qualified individuals with disabilities.
- ▶ A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question
- ▶ The ADA requires reasonable accommodations as they relate to three aspects of employment:
  1. Ensuring equal opportunity in the application process;
  2. Enabling a qualified individual with a disability to perform the essential functions of a job; and
  3. Making it possible for an employee with a disability to enjoy equal benefits and privileges of employment.

# Examples of Employment Accommodations

- ▶ Physical changes
  - ▶ Installing a ramp or modifying a rest room
  - ▶ Modifying the layout of a workspace
- ▶ Accessible and assistive technologies
  - ▶ Ensuring computer software is accessible
  - ▶ Providing screen reader software
  - ▶ Using videophones to facilitate communications with colleagues who are deaf
- ▶ Accessible communications
  - ▶ Providing sign language interpreters or closed captioning at meetings and events
  - ▶ Making materials available in Braille or large print
- ▶ Policy enhancements
  - ▶ Modifying a policy to allow a service animal in a business setting
  - ▶ Adjusting work schedules so employees with chronic medical conditions can go to medical appointments and complete their work at alternate times or locations

A black and white photograph of a chalkboard. The text "Any Questions?" is written in white chalk. "Any" is on the top line, and "Questions?" is on the bottom line. The chalkboard has some texture and faint marks from previous writing.

Any  
Questions?

# S.C. Legal Services Contact Information

Legal Aid Telephone Intake Service

1-888-346-5592

Intake Specialists Are Standing By

M-Th 9 a.m. - 6 p.m.

Apply Online at

<https://www.lawhelp.org/sc/online-intake>

Stay Connected: Resources for the general public:

<https://sclegal.org/>

<https://www.lawhelp.org/>

<https://www.youtube.com/user/sclegalservices>

<https://twitter.com/sclegal/>

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