ACCOMMODATION OR MODIFICATION? SOMETIMES THE ANSWER IS TRICKY

At a recent class fair housing class, a client asked an interesting question. Coincidentally, right after the class, another client had a similar situation. Both the question and the situation dealt with your obligation, if any, to install new carpet when a resident starts a lease. More specifically, if a disabled resident asks to have new carpet installed do you have to do it? Is this request a reasonable modification or a reasonable accommodation? Why does it matter if it is a reasonable accommodation or a reasonable modification request? To analyze various carpet scenarios, first we need to review the differences between accommodations and modifications.

A reasonable modification is a structural change made to the premises. A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service. Modifications almost always involve using tools to make changes to physical or tangible items. Accommodations involve exceptions to intangible items that exist only in thought or on paper. You can't touch a policy or a rule. You can only think about it, talk about it, or write it on a piece of paper.

Almost all accommodation or modification requests have associated costs. You can't determine who is responsible for the costs unless you know whether the request is an accommodation or modification. The general rule is that a resident must pay for reasonable modifications, and you bear the cost of reasonable accommodations. The exception to the rule is that communities that receive federal funds must pay for both modifications and accommodations. Failure to know these key principals might result in a fair housing discrimination complaint. For example, a landlord may grant an accommodation request, but at the resident's cost. Since the landlord must bear the burden of reasonable accommodation costs, the landlord has committed housing discrimination by conditioning approval upon the resident bearing the cost.

Many cases are straight forward. However, some cases can become complicated, especially when modification world and accommodation world overlap or collide. For example, your community has a no-reserved parking policy, and a mobility impaired resident requests a close up reserved parking space. However, to grant this request (and you should), your maintenance team needs to install a sign, restripe the space because it needs to be widened and an access aisle needs to be painted, and a curb ramp (curb cut) needs to be constructed. This request clearly involves the use of tools and changes to physical items. So it's a request for a modification, and the resident has to pay for it, right? Wrong. The thrust of the request is for an exception to the community's no-reserved parking policy, which makes this an accommodation request, and courts have consistently ruled this way.

A request for new carpeting or change in flooring is a similarly complicated request. For example, what if a disabled person wants the carpet taken up because their wheelchair does not move easily across carpeting? Is that a reasonable accommodation or modification? Fortunately, this question is answered in the Reasonable Modifications Joint Statement published by HUD and the DOJ. The answer depends on the factual circumstances, and of course your carpet / flooring replacement policy. Three specific examples are then discussed.

Example 1: If the housing provider has a practice of not permitting a tenant to change flooring in a unit and there is a smooth, finished floor underneath the carpeting, generally, allowing the tenant to remove the carpet would be a reasonable accommodation.

Example 2: If there is no finished flooring underneath the carpeting, generally, removing the carpeting and installing a finished floor would be a reasonable modification that would have to be done at the tenant's expense. If the finished floor installed by the tenant does not affect the housing provider's or

subsequent tenant's use or enjoyment of the premises, the tenant would not have to restore the carpeting at the conclusion of the tenancy.

Example 3: If the housing provider has a practice of replacing the carpeting before a new tenant moves in, and there is an existing smooth, finished floor underneath, then it would be a reasonable accommodation of his normal practice of installing new carpeting for the housing provider to just take up the old carpeting and wait until the tenant with a mobility disability moves out to put new carpeting down.

Because the outcome of all disability requests is determined on a case by case basis based on the particular facts and circumstances of each case, HUD's three examples are not an exhaustive list of answers to all carpet related disability requests. As a matter of fact, we just had a non-covered scenario phoned into the situation board recently. A pregnant applicant who has severe allergies requested for the carpet to be replaced prior to occupancy. Is this a modification or accommodation request? Does it have to be granted? If so, who has to pay?

While the request does involve changes to physical items (ripping up the carpet and pad, and installing new carpet and pad), we viewed this as a reasonable accommodation request. Similar to a close up reserved parking space request, the thrust of the request was an exception to a policy, i.e. the community's carpet replacement policy. As with every reasonable modification or reasonable accommodation request, the key questions were 1) is the resident disabled; 2) is the request necessary; and 3) is the request reasonable.

Unless the resident came forward with documentation, the resident is not obviously disabled. Generally, neither pregnancy or allergies are considered to be an impairment that substantially limits an individual. However, pregnancy with complications can meet the fair housing definition of disability. Further, while general or even severe allergies are not considered an impairment meeting

the Fair Housing Act's disability definition, courts have found MCS (Multiple Chemical Sensitivity) or EI (Environmental Illness) to meet the definition.

Similarly, unless the resident came forward with documentation, the resident's need for the accommodation was not obvious. The connection (nexus) between the existing carpet and the resident's asserted disability was not clear or obvious. Specifically, how the installation of new carpet would lessen the impact of the resident's asserted disability was not obvious or demonstrated. Because the resident was not disabled (had not meet the Fair Housing Act's definition of disability), and had not shown that the request was necessary, this request was denied. However, as always, we advised the client to engage in the legally required interactive dialog with the resident to make sure that the resident was given every opportunity to present information, and to make sure that the client had all relevant information in making its determination.

Several key questions can quickly assess a person's fair housing knowledge or IQ. Because personnel with inadequate fair housing training tend to lump all disability related requests together, knowing the difference between an accommodation and a modification is good indicator of fair housing knowledge.

If a person doesn't know the differences between accommodations and modifications, their fair housing knowledge needs to be improved. Complicated disability requests involving both modification and accommodation components illustrate two critical rules for handling disability requests. Every disability request, no matter how far fetched it may sound, should always be evaluated, and only after you have all critical facts regarding disability and need. Engaging in the legally required interactive dialog with residents ensures that you get all the critical facts to make solid decisions regarding disability requests.