

Over the last two years, Enterprise Community Partners conducted a series of capacity building trainings, “Embracing Success in Merging Populations,” funded by the W.M. Keck Foundation. This series of trainings offered affordable housing providers an opportunity to increase capacity and address challenges in providing housing to merged populations.

From the series of events and feedback from participants, common areas of concern were identified among both experienced affordable housing developers and those just entering the field. The following fair housing tips and best practices are part of Enterprise’s continuing effort to strengthen the capacity of the affordable housing community.

1 What are the affirmative marketing obligations?

Affordable housing developers are required to operate their rental housing in a nondiscriminatory manner that complies with federal and state fair housing laws. Many recipients of funding from the U.S. Department of Housing and Urban Development (HUD) are also required to develop and implement affirmative marketing procedures for their rental properties to ensure that they reach the people least likely to know of and apply for affordable housing opportunities. Affirmative marketing is one tool for furthering fair housing. The plan and action taken to attract potential applicants must be done without regard to personal characteristics, including race, color, national origin, gender, religion, familial status and disability. Project owners receiving HOME funds are required to have affirmative marketing plans while those programs that provide tenant-based rental assistance are not subject to this requirement. However, it is recommended that all affordable housing developers have a detailed written marketing plan, monitor its effectiveness for achieving diversity and update it through periodic review. Developers may find it helpful to use HUD’s affirmative marketing form, HUD-935.2A, as a “safe harbor.” The form is available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=935-2a.pdf>.

2 Are there any approaches for successfully merging residents with different needs?

The emphasis on merging populations is an important step in furthering integration in affordable housing, including



individuals with a range of supportive services needs. From initial lease-up and building orientation onward, affordable housing providers and property management must apply the same rules to everyone and treat all tenants equally. (Fair housing reasonable accommodations are the exception and discussed in #8 below.)

Set-aside units, like accessible units for those with mobility impairments, should be dispersed throughout the building. If possible, the on-site resident services office should be located away from the property management office to provide privacy for tenants accessing resident services. Building activities should be designed to include and involve all residents with the goal of fostering interaction. Staff training is an essential ingredient in the merging process given the possibility of well-meaning individuals inadvertently disclosing (or revealing) supportive services needs. Some affordable housing developers are taking the approach that all residents in a building should have access to resident services. While the availability of resident services raises funding challenges, this building-wide approach likely goes a long way toward eliminating stigma, reducing turnover and other building costs. Two reports discussing the positive impact of resident services on property performance include:

- *Research Demonstrates Positive Impact of Family Resident Services on Property Financial Performance In Selected Mercy Housing Family Properties Over Two Years*
www.enterprisecommunity.com/resources/ResourceDetails?ID=0087016 ▶▶

- *Resident Services in Subsidized Housing for Low-Income Families: An Evaluation of Property, Tenant, and Community Outcomes*
http://nonprofithousing.org/wp-content/uploads/Documents/Reports/Resident_Services_in_Subsidized_Housing.pdf

3 How do affordable housing developers assess resident needs without violating fair housing laws?

Resident assessment is permissible and does not run afoul of fair housing laws if performed at the appropriate time. An assessment of residents' needs is permissible after an individual has been offered housing and has accepted it. The tenant screening process may not inquire into health status and needs of potential residents, as this could influence the selection process and raise fair housing challenges. In addition to the appropriate timing, the same assessment process must be available to all residents and conducted in a consistent manner. Residents should understand that participation in a resident services assessment is voluntary and all information obtained during the assessment is confidential. Proceeding in this way, affordable housing developers will remain in compliance with fair housing laws, and they are likely to acquire valuable information for assessing resident needs.

One example of an assessment, *Affordable Senior Housing: A Guide to Conducting Resident Assessments*, is available at: <http://www.enterprisecommunity.com/resources/ResourceDetails?ID=67766.pdf>.

4 Does HIPAA apply to resident services departments?

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects an individual's medical records and health care information, requiring that covered entities implement privacy safeguards to protect personal health information (PHI). Covered entities include (1) health care providers that transmit health or behavioral health claims and similar information electronically, (2) health care clearinghouses that manage health information and (3) health care plans. PHI is information about a person's health that identifies the individual and is prepared or received by a covered health care plan or provider. HIPAA also protects an individual's right to access his or her medical records, except psychotherapy notes. While it is unlikely that resident services offices that merely refer

tenants to health or behavioral health programs are covered entities under HIPAA, other laws require safeguarding confidential information, including an individual's health records. Resident services departments should develop protocols and practices to ensure that any confidential information that comes into its offices is kept confidential. One of the new exciting approaches in affordable housing under discussion is the possibility of having health services on-site to address the needs of low-income residents. Depending on how the housing and health care services would be linked, this new approach could raise novel questions about the applicability of HIPAA.

Resident services departments should review the HIPAA overview at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html>.

5 What information may property management and resident services share?

Both property management and resident services are committed to an individual's successful tenancy. Yet each has a distinct role with access to different information about a tenant. Property management's role is to screen for housing eligibility and the source of a tenant's income and rental history. Resident services' role is to offer supports or the links to supportive services that will assist a tenant in living successfully and independently. In offering this service, resident services likely has access to protected information, e.g., mental health history and needs, substance abuse problems and family dynamics. The roles of property management and resident services may begin to overlap, particularly in a crisis situation where an individual's tenancy is at stake. A good practice is that at the outset of tenancy, affordable housing property managers should make available to all residents a "release of information" form. While a tenant cannot be compelled to authorize a release of information, he or she may voluntarily agree to sign a carefully drafted release that enables resident services to become aware of an alleged lease violation, warning notices or other circumstances that threaten the tenancy. If a tenant understands that the goal of the limited release is to allow intervention by resident services to assist in preserving a tenancy and/or negotiating a reasonable accommodation, the tenant will hopefully allow information sharing. Under no circumstances may resident services share protected health, including mental health, information about a tenant without legal written authorization pursuant to HIPAA. ▶▶

6 May affordable housing providers use house rules?

Permanent supportive housing is independent housing, and developers and property management companies may not impose rules that typically address lifestyle, conduct and housing program obligations. The lease agreement is the document that sets forth the legal obligations of both tenant and landlord with the underlying foundation of California landlord-tenant law. Most leases include provisions that address the ability to be a good tenant, including respecting the quiet enjoyment of other tenants and complying with municipal laws regarding noise, crime and other actions that could be of concern to developers and their property management. Nondiscriminatory lease provisions that are applicable to all tenants are defensible while many house rules are suspect under fair housing laws, aside from being contrary to independent housing.

7 What happens when transition-age youth age out of the eligibility criteria?

Transition-age youth (TAY) refers generally to 18- to 24-year-olds, although some programs may limit participation to 18- to 21-year-olds. State law exception allows programs to target transition-age youth without running afoul of fair housing laws. While initially Los Angeles County provided TAY with housing through a transitional housing program for up to two years, there is a new effort to provide permanent supportive housing to this age group. When a TAY resident reaches the eldest eligible age for program participation, he or she should be permitted to continue residing in the permanent supportive housing unit. Aging out is not a legal basis to evict a tenant from permanent housing. Where a tenant remains after he or she has aged out for program eligibility, the housing developer will need to designate another TAY unit to maintain the commitment to this age group. Given the limited supply of permanent supportive housing, resident services should consider encouraging residents who are able to live independently, without support connected through housing, to move on to other housing opportunities.

8 What is the correct way to evaluate fair housing reasonable accommodation requests from tenants?

Both federal and state fair housing laws require that housing providers make reasonable accommodations to individuals with disabilities. This obligation applies during the tenant application and screening process, tenancy and even when an eviction process is underway. Fair housing laws recognize

that individuals with disabilities may need flexibility in the application of rules and procedures, and even waiver in some instances, when it is necessary to overcome a barrier to housing and for the use and enjoyment of that housing. All housing providers should have a written reasonable accommodation procedure and inform both housing applicants and tenants of the availability of the confidential process to request accommodations. Due to the complexity of this area of the law, it is recommended that one or two staff members have in-depth knowledge of this fair housing legal obligation and be responsible for reviewing requests for reasonable accommodations. Sufficient time and resources should be allocated to designated decision makers as every request for reasonable accommodation must be evaluated individually based on the specific set of facts presented (“a case by case” basis). The model of fair housing reasonable accommodation procedure is embedded in the report below and provides an example for housing providers’ consideration and adaptation to their buildings. (This model is based in part on California’s fair housing law, The Fair Employment and Housing Act.) The model sets forth the analysis that a housing provider should undertake in evaluating a request by an individual with disabilities and also provides forms for effectively administering the procedure.

Sample Fair Housing Reasonable Accommodation Policy and Procedure

<http://www.enterprisecommunity.org/rapolicy>

9 What is the best way to respond to a tenant who asks why another tenant is being treated differently?

Housing, property management and service providers are prohibited from disclosing information about one tenant to another, including information about specific requests for and the granting of reasonable accommodations. Without disclosing any information, a housing provider should consider responding to an inquiry with a general statement that under certain circumstances, the law provides for exceptions to lease provisions and housing policies and procedures. While this response may not satisfy an inquiring tenant, all staff must remain vigilant in protecting tenants’ privacy and could be liable for a breach of that obligation. Training all staff in the privacy and confidentiality obligations is essential.

For additional information about reasonable accommodations, see *Joint Statement of The Department of Housing and Urban Development and The Department of Justice, Reasonable Accommodations Under The Fair Housing Act*

http://www.justice.gov/crt/about/hce/jointstatement_ra.php



10 How should providers address drug and alcohol problems?

Residential lease agreements typically include a provision prohibiting the use and sale of illegal controlled substances, and may also include a general provision requiring compliance with all relevant state and local laws. There is no legal support for permitting drug use, including medical marijuana, as a fair housing reasonable accommodation. In contrast, the use of alcohol is legal and cannot be prohibited in affordable housing. However, a housing provider may address disruptive and/or dangerous conduct resulting from alcohol use or abuse, preferably using an approach that will preserve the tenancy and assist the resident with a potential substance abuse problem. While property management typically makes a record of this type of problem, it may also be possible to refer the individual to resident services. Under fair housing laws, alcoholism is a disability, so it is possible that a resident whose tenancy is in jeopardy may request a reasonable accommodation which must be considered on a case-by-case basis.

Final Note:

HUD requires all continuums of care (CoCs) to implement a coordinated access and assessment system to provide efficient and fast assistance to end homelessness. Key components of any system include standardized access and assessment and coordinated referrals. Throughout California, CoCs are taking different approaches to developing a coordinated system, starting with the assessment tool used to identify a homeless individual's critical needs. In many jurisdictions, affordable housing developers welcome a coordinated assessment and referral process, but the same developers have questions as to how this new system might impact their operations. Some of these questions include, for example:

- Whether the obligation to affirmatively market units is shifted from the developer to the coordinated entry system
- Whether property management may conduct its own screening of a housing applicant after the referred individual has gone through a coordinated assessment process
- Whether developers should retain their waiting lists even though their CoCs have a coordinated process
- Whether regulatory agreements must be amended when a developer participates in a coordinated entry system

While answers to these and other questions may vary among jurisdictions, it is important for affordable housing developers to understand how this new coordinated process affects their legal obligations.

About the Author

Kim Savage has her own legal practice which provides legal representation, technical assistance, consulting and training in the areas of land use and zoning and civil rights for non-profit housing developers and program providers. She has represented state licensed facilities, transitional and permanent supportive housing providers, mental health treatment programs and shelter operators, assisting them in complying with land use requirements as well as addressing community opposition. Ms. Savage also assists housing providers in reviewing program operations and developing management practices and procedures for compliance with civil rights laws.

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About Enterprise

Enterprise works with partners nationwide to build opportunity. We create and advocate for affordable homes in thriving communities linked to jobs, good schools, health care and transportation. We lend funds, finance development and manage and build affordable housing, while shaping new strategies, solutions and policy. Over more than 30 years, Enterprise has created nearly 340,000 homes, invested \$18.6 billion and touched millions of lives. Join us at www.EnterpriseCommunity.com or www.EnterpriseCommunity.org.

The content provided herein is for general informational purposes and does not constitute legal advice or a legal opinion. Affordable housing developers should seek legal counsel on their specific questions. Additionally, this information was prepared based on California law, and those outside of California also should consult their state and local laws in addressing the concerns discussed herein.