Smoke-Free Public Housing: Reasonable Accommodations

Safe, quality, affordable housing with the necessary supports is "one of the most basic and powerful social determinants of health."[1]

Smoke-free multi-unit housing offers many benefits, including better air quality and health, as well as lower fire risk and maintenance costs. While these benefits accrue to all residents of a smoke-free property, certain groups of people with higher rates of tobacco use and secondhand smoke exposure stand to benefit more if policies are implemented equitably. For example, while people with mental health or substance use conditions make up 25 percent of the general population, they smoke 40 percent of all cigarettes.[2] Well-implemented smoke-free policies that reach this population have the potential to reduce health disparities and promote health equity.

In its final rule, "Instituting Smoke-Free Public Housing,"[3] the U.S. Department of Housing and Urban Development (HUD) states that smoke-free public housing helps HUD realize its mission of providing safe, decent, and sanitary housing for vulnerable populations nationwide, including people with disabilities. The rule also reminds public housing agencies (PHAs) that individuals with disabilities have the right to seek a reasonable accommodation. This fact sheet explains the legal framework for, and highlights a number of considerations to assist PHAs[4] with, smoke-free reasonable accommodation requests.[5]

Interplay Between Fair Housing, Disability Laws, and Smoke-Free Policies

Laws protecting individuals with disabilities help ensure equal access to fair housing. Under those laws, housing providers are prohibited from discriminating on the basis of disability. The Fair Housing Act, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act (ADA) require that PHAs provide a reasonable accommodation, when requested, if it is necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling. State and local anti-discrimination and fair housing laws may also provide similar[6] or additional[7] protections to people with disabilities.

These laws are important because treating people with disabilities exactly the same as those without disabilities can sometimes have unequal results. For example, a no-pet policy might deny a vision-impaired resident an equal housing opportunity by disallowing a service animal. At the same time, individuals living in federally-assisted housing,[8] people with behavioral health issues,[9] and those with disabilities have disproportionately high tobacco use rates.[10] This is concerning because tobacco use remains the leading cause of preventable death and disease in the U.S.,[11] and there is no safe level of exposure to secondhand smoke.[12] These individuals are

not exempt from the negative health consequences of tobacco use and secondhand smoke exposure, but they disproportionately bear the burdens. Such inequities "are not natural or inevitable. They are the result of choices that we as a community, as states, and as a nation have made, and can make differently."[13] While efforts are needed to address these inequities, smoke-free policies are one opportunity to provide safe, clean, and healthy air for all. Smoke-free public housing has the potential to reverse tobacco-related inequities among public housing residents, including those with disabilities.

Q. What is a "reasonable accommodation" in housing?

A. A reasonable accommodation is a change in a policy, practice, or service that may be necessary for people with disabilities to have an equal opportunity to use and enjoy a dwelling.[14] Reasonable accommodation requests must be granted when individuals can demonstrate that (1) they qualify as persons with a disability and (2) their requested accommodation is necessary to afford an equal opportunity to use and enjoy a dwelling. If an individual can demonstrate both requirements, the only reason a PHA may deny a request is because it is not reasonable. Said another way, there are three reasons reasonable accommodation requests may be denied: (1) there is no qualifying disability, (2) there is no disability-related need for the accommodation, or (3) the requested accommodation is not reasonable. In each of these instances, PHAs are encouraged to work with residents to help them meet their needs and find other ways to comply with the smoke-free policy.[15]

Q. How can residents demonstrate that they qualify as persons with a disability?

A. There are three ways to qualify as a person with a disability under the law. Individuals (1) with a physical or mental impairment that substantially limits at least one major life activity, (2) with a record of such an impairment, or (3) regarded as having such an impairment all qualify for disability discrimination protection.[16]

Q. Does someone who smokes qualify as a person with a disability?

A. The law defines disability "with respect to an individual" and in terms of the impact of an impairment on "such individual," which means disability determinations must be made on a case-by-case basis.[17] That said, in the preamble to HUD's smoke-free public housing rule[18] and accompanying guidance,[19] HUD states that neither smoking nor nicotine addiction are disabilities.

Under the ADA, before it was amended by the ADA Amendments Act of 2008, at least one court decided that neither smoking nor nicotine addiction qualified as a disability under the law.[20] While the ADA Amendments expanded the definition of disability to more broadly cover individuals with disabilities, and while other addictions have been found to qualify as disabilities in certain instances, individuals are still required to show their impairment "substantially limits" at least one "major life activity." Additionally, the law does not protect people with disabilities whose tenancy either poses a "direct threat" to the health or safety of others or would result in substantial physical damage to the property of others.[21] Neither HUD, the Department of Justice,

nor any court has yet determined that smoking or nicotine addiction itself requires discrimination protection.

It is more likely that an individual's underlying condition may be considered a disability. For example, regardless of whether the person smokes, individuals with respiratory conditions, behavioral health issues, and mobility limitations may qualify as a person with a disability. In these situations, PHAs should then assess if the requested accommodation is both (1) necessary to afford equal opportunity to use and enjoy a dwelling and (2) reasonable.

Q. How can a resident with a disability demonstrate that the requested accommodation is necessary to afford equal opportunity to use and enjoy a dwelling?

A. Laws protecting individuals with disabilities help ensure equal access to fair housing. They require accommodations needed to achieve equal housing opportunities between those with disabilities and those without.[22] To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.[23] In other words, the requested accommodation must be related to the resident's disability in a way that without it, the resident would be denied a housing opportunity afforded to residents without disabilities. This relationship must be determined on a case-by-case basis.[24]

Q. Is a smoke-free accommodation necessary to afford a resident with a disability equal opportunity to use and enjoy a dwelling?

A. It depends on the requested accommodation. Again, the determinative question is whether the accommodation requested is related to the resident's disability in a way that without it, the resident would be denied a housing opportunity that residents without disabilities are afforded.

As the smoke-free movement has grown over the years, reasonable accommodation requests have evolved from ***requests by non-smoking individuals for smoke-free environments***[25] to ***requests from individuals who smoke to allow or facilitate smoking in some way*** (e.g., a transfer to a lower-level apartment unit or a unit closer to an exit). Because there is no safe level of exposure to secondhand smoke, the relationship between a non-smoking resident's disability and an accommodation for a smoke-free environment is clear. Without a smoke-free environment, residents might not be able to reside in their home because of their disability. For example, a resident with a respiratory condition such as asthma might be unable to sleep through the night because secondhand smoke exposure from a neighboring unit makes it more difficult to breathe.

The relationship between accommodations to allow or facilitate smoking in some way and the disability of a resident who smokes is less clear. While no one is exempt from the negative health consequences of tobacco use, including those with behavioral health issues and disabilities, a number of prevailing myths about tobacco use among these populations exist. For example, many believe that smoking is a coping strategy and that abstaining from smoking interferes with recovery from behavioral health conditions. However, studies have shown that tobacco use is an ineffective treatment for this population, people with mental illness can refrain from smoking,

and quitting smoking does not worsen certain mental health conditions or increase use of other substances.[26] Despite this evidence, reducing tobacco use among this vulnerable population remains an ongoing effort, making reasonable accommodations requests challenging to address. The considerations are not only legal in nature, though, and PHAs should assess a range of reasonableness factors when deciding how to handle smoke-free reasonable accommodation requests.

Q. If a resident demonstrates that he or she qualifies as a person with a disability and the requested accommodation is necessary, how does a PHA decide whether the request is reasonable?

A. This determination is also unique to the resident, the request, and each PHA. Some important considerations include the fundamental purpose of the policy in question, the circumstances of the resident's situation, the administrative and financial capacity of the PHA, the feasibility of granting the requested accommodation, the availability of other solutions, and the precedent a PHA wants to set. Some residents and PHAs might have more access to resources and services than others.

Housing policies that are essential are not discriminatory if changing them would fundamentally alter the nature of the PHA's operations or impose undue financial and administrative burdens on the PHA.[27] Thus, if a requested accommodation would financially or administratively challenge the very core of a PHA's policies, programs, or activities, it might not be reasonable.[28] That said, PHAs are encouraged to engage with residents to find other ways to meet the needs of both parties.[29]

Q. Can a request to smoke indoors be granted?

A. No. Under HUD's smoke-free public housing rule, PHAs must have smoke-free policies that prohibit the use of tobacco products in all indoor areas and within 25 feet of buildings.[30] In additional guidance on the rule, HUD makes clear that reasonable accommodations must comply with the requirements of a PHA's smoke-free policy and that smoking in restricted areas is not permitted.[31] Presumably, because smoke-free air furthers the mission of providing safe, decent, and sanitary housing for vulnerable populations, granting a request to smoke indoors would fundamentally alter the nature of the PHA's operations, putting the health and safety of others in jeopardy and potentially resulting in substantial physical damage to property. Depending on the details of the request, there may be other reasons to deny a request to smoke indoors: (1) there is no qualifying disability, (2) there is no disability-related need for the accommodation, or (3) other factors make such a request unreasonable.

Q. What can PHAs do to help residents with disabilities that smoke?

A. The specific circumstances of each resident's request and disability, as well as each PHA's reasonable accommodation process (often within a PHA's Admissions and Continued Occupancy Plan, or ACOP), budget to pay for accommodations, vacancies, and access to resources and services that could assist residents, all play a role in answering this question. The notice accompanying HUD's smoke-free public housing rule has suggestions,[32] such as moving

residents with mobility limitations to a floor or unit with closer proximity to an exit or providing designated smoking areas outside the required smoke-free perimeter that are accessible[33] or special assistance to help residents ensure they understand the policy and available quitting resources. For example, one PHA helped a resident with a mental disability comply with its smoke-free policy by having a social worker place signs in the home reminding the resident about the policy's requirement to go outside to smoke.[34] PHAs with social service providers on-site or with access to additional community-based resources and services can provide specialized assistance to highly addicted individuals with disabilities who smoke, and thus make the transition to a smoke-free environment as easy as possible for these residents. For example, quitting aids approved by the U.S. Food and Drug Administration, or FDA, such as nicotine gum and nicotine patches, as well as helping residents find other ways to respond to their urges to smoke, might also be options for PHAs to consider.

Smoke-free policies are meant to improve the health and well-being of all impacted by them. Even so, changing smoking behavior takes time and can be difficult. To that end, HUD has encouraged PHAs to begin implementing smoke-free policies as soon as possible and to work with resident councils to prepare residents for the change.[35] Community outreach and engagement can help PHAs gain the support of residents, staff, and community partners interested in supporting the mission of providing healthier housing for low-income residents. State and local public health (e.g., health departments, foundations, and community-based organizations), as well as other health and social service providers have experience implementing smoke-free policies with other multi-unit housing providers and vulnerable populations, including ideas to help residents comply and connecting them to appropriate resources. When housing providers prepare for effective implementation by actively engaging residents and community partners in the process, policy compliance is higher.

HUD also makes clear that its rule is aligned with the goal of ending homelessness and is structured to discourage overly aggressive and punitive enforcement approaches.[36] While a single violation of a smoke-free policy cannot be grounds for termination, PHAs must enforce their policies, and HUD encourages a graduated approach with specific and progressively escalating monitoring and enforcement.[37] The goal of smoke-free policy implementation is to help residents find ways to comply.

Conclusion

Eliminating smoking indoors is the only way to protect fully against the negative health impacts of secondhand smoke exposure.[38] Smoke-free policies not only reduce exposure to smoke but can also prevent people from starting to smoke, support quitting efforts, reduce the social acceptability of smoking, and yield considerable cost-savings in health care costs and renovation expenses.[39] While the benefits of smoke-free multi-unit housing do not discriminate and have the potential to reverse tobacco-related inequities that exist among public housing residents, the implementation of smoke-free policies can lead to unequal results. Laws protect against such discrimination, and PHAs have long worked to ensure fair housing. The reasonable accommodation mandate for PHAs requires changes to otherwise neutral policies that prevent individuals with disabilities from obtaining the same housing opportunities that those without disabilities automatically enjoy.[40]

Smoke-free policies may seem to raise new legal questions in this area, but HUD makes clear that allowing smoking in violation of a PHA's smoke-free policy is not permitted. This fact sheet provides a legal framework to assist PHAs with smoke-free reasonable accommodation requests. It emphasizes the flexibility that PHAs have to make determinations and acknowledges that the answers are not always clear. The law recognizes a number of non-legal considerations, such as individual clinical diagnoses and symptoms; public health; business operations; resource allocation; ethics; and social and economic conditions. PHAs are tasked with balancing these considerations when making decisions regarding reasonable accommodations. While asking what the law requires is a helpful starting place, ultimately PHAs will need to conduct their own assessments of each individual request, keeping in mind the precedent they want to set and the goal of smoke-free policies to ensure equal access to safe, clean, and healthy air for all.

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Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu with any questions about the information included in this publication. The information contained in this document is not intended to constitute or replace legal advice.

Notes

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1 CSH, *Housing is the Best Medicine: Supportive Housing and the Social Determinants of Health* (2014), http://www.csh.org/wp-content/uploads/2014/07/SocialDeterminantsofHealth_2014.pdf.

2 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *The NSDUH Report: Adults with Mental Illness or Substance Use Disorder Account for 40 Percent of All Cigarettes Smoked* (2013).

3 U.S. DEP'T HOUSING & URBAN DEV, Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430, 87,441 (Dec. 5, 2016) (to be codified at 24 C.F.R. pt. 965 & 966) [hereinafter HUD Instituting Smoke-free Public Housing], https://www.federalregister.gov/documents/2016/12/05/2016-28986/instituting-smoke-free-public-housing.

4 Although this fact sheet focuses on reasonable accommodation analysis for PHAs, it also applies in general to other types of housing providers. The Fair Housing Act applies to both private and public housing providers with limited exceptions. 42 U.S.C. § 3604. Section 504 places additional obligations on housing providers that receive federal financial assistance, and the Americans with Disabilities Act applies to state and local "public entit[ies]" and "place[s] of public gathering" by private entities. 29 U.S.C. § 794; 42 U.S.C. §§ 12131, 12181.

5 This fact sheet does not address reasonable modifications, or structural changes made to existing premises to afford a person with a disability full enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(A), 29 U.S.C. § 794, 24 C.F.R. pt 8. Generally, the framework for analyzing reasonable modifications is similar to the reasonable accommodation analysis, except regarding the party responsible for costs. However, reasonable modifications in housing that receives federal financial assistance are considered reasonable accommodations. Additional information about reasonable modifications can be found in the Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Modifications Under the Fair Housing Act* (Mar. 5, 2008), https://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf.

[6] For example, the Minnesota Human Rights Act closely resembles federal law with regard to protecting individuals with disabilities from housing discrimination. MINN. STAT. §§ 363A.03, 363A.10.

[7] For instance, California's laws are meant to provide greater protections than federal law. CAL. GOV'T CODE §§ 12926(j), (m); 12955.6.

[8] Veronica E. Helms, et al., *Cigarette Smoking and Adverse Health Outcomes Among Adults Receiving Federal Housing Assistance*, 99 PREVENTIVE MED. 171 (2017), http://ac.els-cdn.com/S009174351730049X/1-s2.0-S009174351730049X-main.pdf?_tid=f3973a8c-08c1-11e7-afc3-00000aacb362&acdnat=1489501656_3752d6440ff1cb96e4a2dd368532116a.

[9] SAMHSA-HRSA CTR. FOR INTEGRATED HEALTH SOLUTIONS, *Tobacco Cessation*, http://www.integration.samhsa.gov/health-wellness/wellness-strategies/tobacco-cessation-2#research; Smoking Cessation Leadership Ctr., *Behavioral Health: Mental Health and Tobacco*, https://smokingcessationleadership.ucsf.edu/behavioral-health.

[10] CTRS. FOR DISEASE CONTROL & PREVENTION, *Current Cigarette Smoking Among Adults—United States 2011*, 61 MORBIDITY & MORTALITY WKLY REP. 889 (Nov. 9, 2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6144a2.htm?s_cid=mm6144a2_w.

[11] U.S. DEP'T HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014), https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

[12] U.S. DEP'T HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL (2006), https://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf.

[13] Statement from Larry Alderman, Series Exec. Producer & Co-Director of Cal. Newsreel (March 2008), http://unnaturalcauses.org/producer_perspectives.php.

[14] 42 U.S.C. § 3604(f)(3)(B).

[15] U.S. DEP'T HOUSING & URBAN DEV. & DEP'T JUSTICE, JOINT STATEMENT: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 7 (2004) [hereinafter HUD JOINT STATEMENT] http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

[16] 42 U.S.C. §§ 3602(h), 12102; 29 U.S.C. § 705(20).

[17] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

[18] HUD Instituting Smoke-free Public Housing, *supra* note 3.

[19] U.S. DEP'T HOUSING & URBAN DEV., *HUD Guidance on Instituting and Enforcing Smoke-Free Public Housing Policies* 5 (Feb. 15, 2017) [hereinafter HUD Guidance], https://portal.hud.gov/hudportal/documents/huddoc?id=pih2017-03.pdf.

[20] Brashear v. Simms, 138 F. Supp. 2d 693, 695 (D. Md. 2001).

[21] 42 U.S.C. § 3604(f)(9). "Direct threat" is defined by HUD at 24 C.F.R. § 9.131 as a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation.

[22] Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923 (10th Cir. 2012).

[23] *See* HUD JOINT STATEMENT, *supra* note 15, at 6.

[24] *See* HUD Guidance, *supra* note 19.

[25] Examples of successful discrimination claims against housing providers involving reasonable accommodation requests to provide a smoke-free environment include Matarese v. Archstone Pentagon City, 795 F. Supp. 2d 402 (E.D. Va. 2011); U.S. Dep't Housing and Urban Dev. v. Magnolia Walk

Apartments II, Ltd., Case No. 04-10-0110-8 (2011); U.S. v. Seattle Housing Authority, C01-1133L (W.D. Wa., 2002) (consent decree); In re U.S. Dep't Housing and Urban Dev. & Kirk & Guilford Mgmt. Corp. & Park Towers Apartments, Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998).

[26] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *Enhance Your State's Tobacco Cessation Efforts Among the Behavioral Health Population: A Behavioral Health Resource* (June 2016), https://smokingcessationleadership.ucsf.edu/sites/smokingcessationleadership.ucsf.edu/files/State%20TA%20Resource%20on%20Tobacco%20Cessation%20in%20BH_June%202016_final.pdf.

[27] 24 C.F.R. § 8.33.

[28] HUD Joint Statement, *supra* note 15.

[29] *Id.* Courts vary in whether they view this interactive process as necessary. *Reasonable Accommodation in Federally Assisted Housing*, NAT'L HOUSING L. PROJECT, Oct. 2012, at 8, http://www.fairhousingnc.org/wp-content/uploads/2014/10/NHLP-Reasonable-Accommodation-Outline-Current-10-2012.pdf.

[30] *See* HUD Instituting Smoke-Free Public Housing, *supra* note 3.

[31] HUD Guidance, *supra* note 19, at 5-6. In its questions and answers to the proposed version of the rule, HUD stated that allowing residents to smoke in areas required to be smoke-free is not an accommodation that can be granted. U.S. Dep't Housing & Urban Dev. *Questions and Answers on HUD's Smoke Free Public Housing Proposed Rule*, , https://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf.

[32] HUD Guidance, *supra* note 19, at 6.

[33] Designated smoking areas are not required by HUD's smoke-free public housing rule, but they are permitted so long as they comply with the law. Some housing providers report that designated smoking areas help with compliance while others say they cause additional problems. The decision whether to provide a designated smoking area will depend on the specific PHA property and resident population.

[34] U.S. Dep't Housing & Urban Dev., *Change is in the Air: An Action Guide for Establishing Smoke-Free Public Housing and Multifamily Properties* (2014), at 70, https://portal.hud.gov/hudportal/documents/huddoc?id=smokefreeactionguide.pdf.

[35] HUD Guidance, *supra* note 19, at 1.

[36] HUD Instituting Smoke-Free Public Housing, *supra* note 3.

[37] *Id.*; *see also* HUD Guidance, *supra* note 19, at 4-5.

[38] *See The Health Consequences of Involuntary Exposure to Tobacco Smoke*, *supra* note 12.

[39] *See* Helms et al**.,** *supra* note 8.

[40] Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923 (10th Cir. 2012).