U.S. Department of Housing and Urban Development (HUD) has released new Guidance regarding Service/Support Animals. Is this what we were waiting for?

Unless you have been living under a rock, you know that emotional support animals ("ESAs") are a hot topic in the multifamily industry and have been for about the last decade. In fact, the number of accommodation requests related to ESAs has increased over that period of time at an exponential rate, to the point that fair housing complaints related to the denial of accommodation requests now comprise approximately 60% of all fair housing complaints received, making it the largest area for potential claims. Part of the difficulty for the owners and managers of multifamily communities stems from the vast amount of fraud that occurs related to ESAs. For $99, pet owners can obtain an official-looking letter adorned with many initials on letterhead purporting to render a "diagnosis" of a non-apparent disability requiring an ESA. The "diagnosis" in question was rendered after said pet owner answered a series of questions over approximately 10 minutes and voila, the pet owner can now make a request and avoid pet fees, pet deposit, and/or pet rent.

This scenario has played out over and over again across the nation to the point that over 35 states have attempted to pass some form of legislation addressing ESAs and/or service animals. In response, the U.S. Department of Housing and Urban Development ("HUD") announced in the first quarter of 2019, that they would be releasing further guidance related to service and/or support animals. Well, HUD finally released a two-part statement providing guidance on "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act" and "Guidance on Documenting an Individual's Need for Assistance Animals in Housing".

Before we evaluate the impact of the guidance, it is important to review the procedure and evaluation that takes place generally and then we can look at how the guidance impacts that process. Community owners and managers must evaluate a request for a reasonable accommodation using general principles applicable to all reasonable accommodation requests. Accordingly, when there is no readily apparent or otherwise previously known disability, you are entitled to receive **reliable** documentation in order to verify that the person (1) has a disability, which is defined as a physical or mental impairment that substantially limits one or more major life activities; and (2) has a disability-related need for an assistance animal that alleviates one or more of the identified symptoms or effects of the existing disability. An accommodation offered to persons with a disability must be (1) reasonable and (2) necessary to (3) afford the handicapped person an equal opportunity to use and enjoy housing. In other words, the person making the request must demonstrate a direct linkage between the proposed accommodation and the equal opportunity to enjoy the relevant dwelling.

It is important to distinguish between a "service animal" for a person with an apparent and obvious disability, and an ESA for a disability which is not apparent at all. Where the disability is readily apparent, such as in the case of visual impairment, and the connection between the handicap and the requested service animal is also readily apparent, no need exists to investigate further and all other inquiries would be deemed

inappropriate. The challenge exists where either the disability or the service the animal provides the disabled resident are unclear.

As an owner or manager, you are entitled to **reliable** disability-related information that is necessary to afford a reasonable and meaningful review to verify that a person meets the legal definition of a legitimate disability; describes the needed accommodation, and shows the relationship between the person's disability and the need for the requested accommodation. This will often come in the form of a letter from a medical provider. You should not ask for any medical records or that the resident or applicant provide anything beyond the bare minimum. Above all else, you should never inquire about the nature or extent of the pet owner's disability. Assuming the resident meets these legal requirements, the accommodation itself must be reasonable. Generally, the burden is on the owner or manager to show that the request is unreasonable. Reasonable accommodations are those that do not impose undue financial or administrative burdens; substantial changes, adjustments, or modifications; or fundamentally alter the nature of the program or multifamily community.

With that as a foundation, the question now is whether the guidance from HUD changes any component of the evaluation or assessment that must be conducted by owners and managers and/or alters the information to be provided by the disabled individual. HUD says it is providing this guidance "to help housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability who simply wants to have a pet or avoid the costs and limitations imposed by housing providers' pet policies, such as pet fees or deposits." However, they make it abundantly clear that the guidance does not expand or alter housing providers' obligations under the Fair Housing Act.

First, the Guidance takes a look at Service Animals under the Americans With Disabilities Act ("ADA") and defines a Service Animal as "any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability." Interestingly, this definition excludes miniature ponies which are recognized under the ADA as Service Animals. The Guidance goes on to provide a 2 step evaluation process for accommodation requests related to Service Animals. In essence, it limits the inquiry to: (i) Is the animal a dog; and (ii) Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability. If the answer to both of those questions is yes, further inquiries are unnecessary and inappropriate according to HUD. Where it is not readily apparent that the dog has been trained to perform work or perform tasks the guidance limits the inquiry to: (i) Is the animal required because of a disability; and (ii) What work or task has the animal been trained to perform. When evaluating a request under the ADA, the Guidance sets forth that you may not request documentation from the applicant if they can identify at least one task or action the dog is trained to take which is helpful to their disability you must grant the accommodation. This seems to be a new position from HUD regarding documentation but in most instances with a Service Animal, the disability is likely to be readily apparent.

Next, the Guidance provides some new considerations for accommodation requests under the Fair Housing Act which is where ESAs once again come up. The Guidance makes it clear that owners and managers cannot **require** the disabled individual to put their accommodation request in writing but it does at least encourage everyone to put requests in writing, guarding against any miscommunication. HUD further makes it clear that accommodation requests can be made by the individual before or after acquiring

the assistance animal even going so far as to state that the individual can make the request after a housing provider seeks to terminate the resident's lease or tenancy. HUD acknowledges that the timing of such a request may create an inference of bad faith but owners and managers must still evaluate the request the same as any other request or face possible findings of a discriminatory practice.

HUD provides a series of questions that owners and managers may use to evaluate an accommodation request which is certainly a step in the right direction. However, some of the questions and information deemed acceptable as a response still seems to invite potential fraud by residents and/or "diagnosis" providers. The first series of questions address whether the person has a disability by notating whether the disability is observable or if you as the housing provider already have information giving you reason to believe that the person has a disability. This information could be a knowledge of SSI or SSDI benefits received by the resident. If the answer to these questions is yes you move on to the question of whether information has been provided showing the disability-related need for the animal (i.e. that the animal does work or provides some form of emotional support).

It is here that HUD first provides some Guidance on those "internet letters" we first cited in our intro. HUD states that documentation from the internet is not, **by itself**, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal. That sounds like music to everyone's ears, until you read the next portion of the Guidance wherein HUD then goes on to recognize that many legitimate health care professionals deliver services remotely, including over the internet. It sets forth that if the provider states that they have personal knowledge of the individual/resident as part of a note confirming the disability and disability-related need, then you have established the disability and disability-related need and may not inquire further about those components. HUD seems to imply through the Guidance that you may not even test the authenticity of the letter by contacting the provider and inquiring whether they are treating the individual and whether they prepared the letter in question.

One component of the Guidance that seems to be somewhat new is the final evaluation that takes place. Historically, once it was established that the resident had a disability and disability-related need for the animal the only further inquiry was whether the accommodation request was reasonable. Now HUD has added one additional layer to the evaluation regarding considerations of what type of animal is being requested. If the animal is one that is commonly kept in households the accommodation request should be granted. However, if the animal is one that is not commonly kept in households the individual/applicant must demonstrate a disability-related therapeutic need for the **specific** animal or the **specific** type of animal. In order for the accommodation request to be granted in such an instance, the individual would have to show some unique set of circumstances.

In closing, the new guidelines have some beneficial components but it doesn't change much in the overall landscape of ESAs and some would argue that it provides a roadmap to further fraud by disclosing what should be contained in "diagnosis" letters and not providing for a right to test the authenticity of such letters by contacting the provider. The Guidance does make it clear that you may require the information provided by the resident/applicant to be true so long as you otherwise require other information provided by the resident as part of the Lease or application to be true. However, you may not require a medical provider to fill out additional forms or answer

inquiries under oath or penalty of perjury. Finally, HUD makes it quite clear that the Guidance simply sets forth what they view as best practices but goes on to state that “Failure to adhere to this guidance does not necessarily constitute a violation by housing providers of the FHA or regulations promulgated thereunder.” In the end, it still leaves lots of areas for questions.

This article was written by Brownlee Whitlow & Praet, PLLC. This article is not legal advice and should not be relied upon as such.