TOPIC:

ACCOMMODATING SERVICE AND ASSISTANCE ANIMALS ON CAMPUS: Making Heads or Tails of the ADA, FHA, and Section 504

INTRODUCTION:

Requests to bring dogs and other service animals on college and university campuses are on the rise. These animals can make higher education institutions more accessible for students with disabilities and enrich educational communities by accommodating a broader range of students. At the same time, increasing requests for exotic or untrained animals as service or emotional support animals have raised concerns [1]. To complicate matters, colleges and universities are subject to a number of federal and local antidiscrimination laws, which impose differing obligations and definitions of “service animal.” [2] This NACUANOTE addresses those laws – including the Department of Justice’s recent clarification of the definition of “service animal” under the Americans with Disabilities Act, and the application of the Fair Housing Act to student housing – and suggests best practices for accommodating service and assistance animals on campus.

DISCUSSION:

What laws govern the use of service or assistance animals on college and university campuses?

At the federal level, Titles II and III of the Americans with Disabilities Act of 1990 (“ADA”), Section 504 of the Rehabilitation Act of 1973, and the Fair Housing Act (“FHA”) all prohibit discrimination based on disability, and they all impose various obligations upon colleges and universities to accommodate service or assistance animals. Virtually all higher education institutions are subject to one or more of these laws, as more fully explained below.

Title II of the ADA

 Applies to: State and local governmental entities, including all public colleges and universities.

Obligations: A public entity must modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability [3].

Definition of Service Animal: On September 15, 2010, the Department of Justice issued a Final Rule amending Title II of the ADA to define “service animal” as:

Any dog that is individually trained to do work or perform tasks for the benefit of an
individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability [4].

The work or task that the dog performs must be directly related to the individual’s disability, and can include a wide variety of services, such as assisting those with low vision, alerting individuals who are deaf or hard of hearing, pulling a wheelchair, and retrieving items such as medicine or the telephone [5]. Service dogs may also perform tasks such as recognizing and assisting during seizures. For individuals with psychiatric or neurological disabilities, the dog’s tasks may include preventing or interrupting impulsive destructive behavior [6]. For example, for autistic students, service animals can be trained to interrupt inappropriate repetitive behavior with a persistent nudging task [7].

The DOJ is explicit that the following animals are not considered service animals under Title II:

- Any animals besides dogs – regardless of whether they are domestic or trained (though there is a special provision permitting miniature horses as well) [8];
- Animals that serve solely to provide a crime deterrent effect; and
- Emotional support, comfort or companionship animals [9].

With respect to the last bullet point, the DOJ has made a clear distinction between service dogs that are trained to respond to an individual’s needs, and untrained “emotional support” animals whose mere presence may positively affect a person’s disability [10]. The former, with their recognition and response training, are covered under Title II, while the latter – therapeutic as they may be to the disabled individual – are not covered.

Finally, the regulations also provide that a covered entity need not accommodate a service animal if the owner cannot effectively control it, or if the animal is not housebroken [11].

Accordingly, Title II requires only that public colleges and universities modify their policies to accommodate individually trained dogs that qualify as service animals under Title II of the ADA.

Title III of the ADA

Applies to: Businesses and nonprofit entities that are “public accommodations,” and private entities that offer examinations and courses related to educational and occupational certification [12]. Thus, all public and private colleges and universities, except qualifying religious entities.

Obligations: Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation [13].

Definition of Service Animal: Title III uses the same definition of “service animal” as Title II of the ADA, and likewise excludes emotional support animals, any animals other than dogs, and animals that are not effectively controlled or housebroken [14].

As such, all public and private universities (other than qualifying religious entities) must modify their policies to accommodate dogs that qualify as service animals under Title III.

Section 504 of the Rehabilitation Act

Applies to: Any institution receiving federal financial assistance, which includes nearly all public and private colleges and universities. Federal assistance to any institutional program or department renders the entire institution subject to Section 504.
**Obligations:** A college or university subject to Section 504 “may not impose upon handicapped students other rules, such as the prohibition of . . . dog guides in campus buildings, that have the effect of limiting the participation of the handicapped students in the [institution’s] educational program or activity.” [15]

**Definition of Service Animal:** Although Section 504 and its implementing regulations do not specifically define “service animal,” the Department of Education’s Office for Civil Rights (“OCR”) has adopted the definition provided by Title III (and now Title II) [16]. Thus, Section 504 – which covers nearly every college and university in the country – imposes the same obligations on colleges and universities as the ADA does to permit dogs qualifying as service animals on campus. It should also be noted, however, that the U.S. Department of Housing and Urban Development (“HUD”) has indicated that it applies a broader definition of “assistance animal” when enforcing Section 504 for reasonable accommodation purposes, in the housing context. HUD’s definition of assistance animal is discussed further in the section below.

**The Fair Housing Act’s Application to Campus Housing – An Unsettled Question**

As discussed above, by virtue of the ADA or Section 504, virtually all colleges and universities are required to accommodate service animals, meaning dogs that are individually trained to do work or perform tasks for the benefit of an individual with a disability. Institutions need not (though they certainly may) accommodate species other than dogs, nor “emotional support” animals in places of public accommodation under the ADA or Section 504.

The same is not true under the Fair Housing Act (“FHA”), which requires covered entities to accommodate a larger universe of “assistance animals,” including untrained emotional support animals, in “dwellings” subject to the Act. Because the FHA imposes significant additional obligations, it is important to consider where the FHA applies and what obligations it places on colleges and universities.

**Applies to:** The FHA, which is enforced by the DOJ and HUD, covers residential “dwellings,” a term that likely encompasses campus housing including residence halls and dormitories, though the courts have not affirmatively settled the matter. As one federal court recently noted in a case involving application of the FHA to a boarding school dormitory:

> The FHA defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.” 42 U.S.C. §3602(b). At first blush, this definition would appear to exclude school dormitories, which ordinarily do not house “families,” but the FHA instructs that “family” includes a single individual. 42 U.S.C. §3602(c). Because a boarding school dormitory is occupied as a residence by one or more individuals, then, it fits the statutory definition of dwelling [17].

At least one other federal court has similarly held that a school dormitory is a “dwelling” subject to the FHA [18]. Courts have also found the FHA to apply to a number of other facilities that provide less-than-permanent housing, including group homes, summer bungalows, seasonal cabins for migrant workers, and nursing homes [19].

However, courts have also held that certain short-term or transient facilities do not constitute dwellings for FHA purposes, including motels [20], bed and breakfasts [21], and city jails [22], leaving some room for debate about whether residence halls and dormitories fall within the Act [23].
While the courts have yet to conclusively apply the FHA to all campus housing, HUD has not been so reluctant. HUD’s reasonable accommodations regulations (implementing the FHA) expand the notion of “dwelling” to encompass a “dwelling unit.” As defined under HUD’s regulations:

\[ \textit{Dwelling unit means a single unit of residence for a family or one or more persons.} \]

Examples of dwelling units include: . . . dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons [24].

Thus, notwithstanding the lack of judicial clarity with respect to the FHA’s definition of “dwelling” applying to campus housing, HUD’s regulations implementing the FHA expressly cover dormitory rooms, at least for reasonable accommodation purposes.

Recent public statements and enforcement actions against universities also indicate that HUD considers the FHA to be fully applicable to residence halls and dormitories in the reasonable accommodation context. For example, in 2009, after a three-year investigation, HUD charged Millikin University in Illinois with violating the Fair Housing Act because of the school’s failure to make a reasonable accommodation by granting a student’s request to live with her assistance animal in a campus residence hall [25]. The charge sought, among other relief, $16,000 civil penalties against both the University and its Vice President for Enrollment. The University settled with the government in federal district court on January 11, 2011 [26]. In discussing the case on the federal government’s Disability Blog, Bryan Greene, the General Deputy Assistant Secretary of HUD explained:

\[ \textit{United States of America v. Millikin University} \text{ highlights the principle that under the FHA, university housing must be provided and administered to persons with disabilities in a non-discriminatory manner – in other words, fair housing does not stop where the campus begins.} \]

\[ \text{HUD stands ready to enforce the fair housing rights of people with disabilities wherever such violations should occur. Please share this article with any students with disabilities who reside in, or plan to reside in, university housing, as well as their parents, friends and advocates [27].} \]

In addition, HUD launched its National Fair Housing Collegiate Partnership Campaign on January 18, 2010, which is intended to “educate college and university students about their fair housing rights,” “conduct fair housing seminars at local colleges and universities that highlight the Fair Housing Act and their rights under the law,” and “provide fair housing information to collegiate administration.” [28]

So while case law is less than definite as to the FHA’s applicability on campus, it appears as a practical matter that HUD is both willing and able to enforce the FHA with respect to reasonable accommodations in campus housing. This is important, because the FHA obliges colleges and universities to accommodate a much broader range of animals than does the ADA.

**Obligations:** The FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such a dwelling because of a handicap of that person . . . .” [29] This includes an obligation on the part of the covered entity to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” [30] As noted above, HUD has extended this obligation to the use and enjoyment of a “dwelling unit, including public and common use areas.” [31]

**Definition of “Assistance Animal:”** The FHA requires accommodation of a much broader range of
animals than the ADA. HUD maintains that this is because the FHA applies in the unique context of housing, as opposed to public facilities. HUD has noted:

There is a valid distinction between the functions animals provide to persons with disabilities in the public arena . . . as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities [32].

Indeed, medical professionals have noted that when provided with an emotional support animal, depressed patients show decreased depression, children with severe attention deficit hyperactivity disorder show decreased aggression and improved attention, and patients with autism show increased socialization and attention span [33]. As such, HUD has interpreted its regulations implementing the FHA to extend not just to “service animals,” as defined in the ADA, but to “assistance animals” (including emotional support animals) that alleviate one or more identified symptoms or effects of a person’s disability [34].

HUD has stipulated that under the FHA, a person may keep an assistance animal (including an emotional support animal) in her dwelling unit as a reasonable accommodation if:

(1) the person has a disability;

(2) the animal is necessary to afford the person with a disability an equal opportunity to use and enjoy a dwelling; and

(3) there is an identifiable relationship or nexus between the disability and the assistance the animal provides [35].

Beyond this three part test, HUD has not set forth any restrictions on the type of animal that could qualify as an assistance animal under the FHA, so long as the animal's ameliorative effects are reasonably supported [36]. Indeed, HUD has stated that “species other than dogs, with or without training, and animals that provide emotional support have been recognized as necessary assistance animals under the reasonable accommodation provisions of the FHAct and Section 504.” [37] Courts have likewise held that animals need not be trained [38], nor do they need to be dogs [39] to qualify as “reasonable accommodations” under the FHA.

However, HUD does not require housing providers to permit assistance animals if they would pose a direct threat to the health and safety of others; would cause substantial physical damage to the property of others; would pose an undue financial and administrative burden; or would fundamentally alter the nature of the provider's operations [40].

In summary, the FHA requires reasonable accommodation of a wide potential range of “assistance animals” in covered dwelling units. However, it should be emphasized that the FHA only applies to residential dwellings (or “dwelling units,” under HUD regulations). Thus, while a college or university may be required to reasonably accommodate an emotional support animal other than a dog in a residence hall or campus apartment, the institution is not required to allow the student to bring that animal to other areas or buildings on campus unless the animal also qualifies as a “service animal” under the ADA and Section 504 [41].

State Laws

In addition to federal laws, many states have adopted antidiscrimination statutes that require accommodation of service animals. For example, a 2008 Maine law guarantees the rights of people with disabilities who use service animals. The law's broad definition of “service animal” includes
“Any animal that has been determined necessary to mitigate the effects of a physical or mental disability by a physician, psychologist, physician’s assistant, nurse practitioner or licensed social worker . . . .” [42] This definition is more inclusive than the ADA’s, as it covers “any animal” and does not require that the service animal be trained to perform specific tasks. Other states, like Massachusetts, Maryland and New Jersey, define service animals more narrowly to apply only to dogs [43]. College and university officials should therefore consult local laws when setting their campus policies related to service animals, and consider whether these state laws impose stricter standards than the federal requirements.

Practice Pointers

When navigating the various obligations to accommodate animals imposed by state and federal laws, institutions may wish to consider some of the following practice pointers:

Federal laws provide a floor, not a ceiling

Even if federal laws like the ADA do not require accommodation of certain support animals (i.e. untrained dogs or animals other than dogs) on campus, institutions may wish to consider permitting such animals because of their benefits to students. For those students with emotional or psychiatric disabilities, animals can be therapeutic and provide comfort and support quite apart from the legal framework built around service animals [44]. Other schools have gone further and permitted non-service/assistance pets on campus. Eckerd College [45], Ithaca College, Vassar College, and CALTECH are among the higher education institutions that are considered “pet-friendly.” [46] If the animal is registered with campus housing offices, and all residents on a floor approve, cats can join their owners at MIT and UCLA [47]. Each institution will need to determine whether it wishes to simply meet its legal obligations or consider offering a different standard of access.

Consider how, or whether, to distinguish between the treatment of trained “service animals” and potentially untrained “assistance animals” on campus.

As noted above, “service animals” – narrowly defined by the ADA to encompass only individually trained dogs – must be reasonably accommodated nearly everywhere on campus. “Assistance animals” – which under the HUD regulations could include nearly any untrained animal that meets HUD’s three-part test – must only be accommodated in dwelling units.

Thus, an institution must consider how, or whether, it wishes to distinguish between these two groups of animals. Will the university permit a deaf student to bring a trained “hearing dog” to class, but tell a student with a documented anxiety disorder that her untrained dog, whose presence alleviates her panic attacks, must remain in the dorm while she attends class? Will this decision be made on a case-by-case (or species-by-species) basis, or will it be stated as a general policy? Or, will the institution decide as a general policy matter to accommodate untrained assistance animals in the same general manner as trained service dogs?

Remember that accommodations are not limitless

While some have worried that students could take advantage of the FHA’s broad definition of “assistance animals,” remember that any accommodation request must still be adequately supported, and must be reasonable.

To prevent abuse of the system, colleges and universities may require documentation to support reasonable accommodation requests involving animals, if the need for the animal is not readily apparent. For example, if a student requests accommodation of an assistance animal under the FHA, the institution may require sufficient information or documentation to determine that the student has a disability that substantially limits a major life activity, that the animal is necessary for the
student to use or enjoy her residence, and that there is a nexus between the student’s disability and
the relief that the animal provides. This documentation generally includes letters from a treating
physician or mental health provider. Note however, that under the ADA, if it is readily apparent that
the animal is a “service animal” – for example, the dog is leading a blind individual or pulling a
wheelchair – the university cannot require specific documentation that the dog is an individually
trained service dog.

Accommodations also must be reasonable. Reasonableness is a determination that will be made on
a case-by-case basis and should involve balancing the needs of the disabled individual with
institutional concerns like the health and safety of other students and the administrative or financial
burden involved in housing a particular animal on campus. Reasonableness can also include a
requirement, for example, that the service animal wear a leash or harness (except in those limited
circumstances where such a device would hinder the animal’s ability to perform its task).

Train disability services and residence hall staff

The law surrounding accommodation of animals is complex. In addition, there is sometimes a stigma
or skepticism associated with assistance animals, especially those that do not fit the mold of the
traditional seeing eye dog. Colleges and universities would be well served to educate residence hall
and disability services staff about the benefits of service and assistance animals and the institution’s
legal obligations and policies regarding these animals.

Policy Suggestions

Below are some suggestions for items to include in an assistance and service animal policy. Keep in
mind that these are of a general nature, and each institution should tailor them to the specific
institution’s culture and structure.

- Overarching Principle: UNIVERSITY is committed to compliance with state and federal laws
  regarding individuals with disabilities. Members of the UNIVERSITY community who seek
  reasonable accommodation for disabilities should contact the [e.g. Disability Office].
- With respect to a request for a service or assistance animal, UNIVERSITY will determine, on
  a case by case basis, and in accordance with applicable laws and regulations, whether such
  animal is a reasonable accommodation on campus. In doing so, UNIVERSITY must balance
  the needs of the individual with the impact of animal
  s on other campus patrons.
- Where it is not readily apparent that an animal is a service animal as defined by the ADA, or
  an assistance animal under the Fair Housing Act, UNIVERSITY may require sufficient
  information and documentation to determine whether the animal qualifies as a service or
  assistance animal under the applicable law. UNIVERSITY may require that the
  documentation be provided on the letterhead of a treating physician or mental health
  provider, and permit UNIVERSITY to determine:
    - that the student has a disability for which the animal is needed;
    - how the animal assists the student, including whether the animal has undergone
      any training;
    - the nexus between the student’s disability and the assistance that the animal
      provides.
- For students seeking reasonable accommodation, an accommodation review process will be
  undertaken, and may involve additional conversations between the Disability Office and the
  requesting student.
- If a student desires that a service or assistance animal live in campus housing, the student
  must notify the Disability Office at least thirty (30) days prior to the desired move-in date so
  that UNIVERSITY can best accommodate the student and the animal. If all other criteria are
  met, as set forth by the Disability Office, a meeting will be arranged between the student and
  the Office of Residential Life to discuss how to best accommodate the student, the service
  or assistance animal, and the campus community.
Consistent with federal and state law, a service or assistance animal may be prohibited from a UNIVERSITY facility or program if the animal's behavior or presence poses a direct threat to the health or safety of others. It may be excluded from areas where its presence fundamentally alters the nature of a program or activity, if the animal is disruptive, if its presence would result in substantial physical damage to the property of others, or if it substantially interferes with the reasonable enjoyment of the housing or public accommodation by others.

The owner of the animal takes responsibility for the following requirements: [Include state and local requirements regarding vaccination, licensure, leash control, cleanup rules, animal health, etc.].

Appeal/grievance process: See [e.g. Disability Office procedures/handbook]

CONCLUSION:

As illustrated, the law with respect to service and assistance animals is complex. College and university officials must not only consider federal and state laws, but must balance the rights of disabled students with the health, safety and educational goals of others in the campus community. By engaging in a thoughtful review of the applicable law, campus counsel can assist in drafting a service and assistance animal policy that strikes such a balance.

FOOTNOTES

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RESOURCES:

- Final Rule on Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164 (September 15, 2010)
- U.S. Department of Housing and Urban Development, Memo from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs to FHEO Region Directors (February 17, 2011)
- HUD-DOJ Joint Statement on Reasonable Accommodations under the Fair Housing Act (May 17, 2004)
- HUD’s National Fair Housing Collegiate Partnership Campaign website
- United States v. Millikin University, FHEO No. 05-06-0829-8 (September 18, 2009)
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