

Understand how to evaluate requests for emotional support animals as classroom accommodations

By Michael R. Masinter, Esq.

The Fair Housing Act requires housing providers to offer reasonable accommodations to residents with disabilities to enable those residents an equal opportunity to use and enjoy their dwelling. The courts and the Department of Housing and Urban Development have ruled that campus housing is a dwelling under the FHA. And HUD and some courts have ordered housing providers to modify “no pets” rules as a reasonable accommodation for residents who rely on emotional support animals to ameliorate the effects of psychiatric disabilities. As a result, an increasing number of students now live in campus housing with their emotional support animals.

Some students, both on residential and commuter campuses, have begun to seek permission to bring their ESAs to classrooms and to other parts of campus beyond residence halls. Because the FHA extends only to dwellings and the grounds immediately surrounding those campus residences, these requests come under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, not the FHA.

So given that fact, how should disability services offices assess requests to bring ESAs into classrooms and other campus facilities?

Department of Justice regulations under Titles II and III of the ADA distinguish between service animals and ESAs. Because ESAs are not trained to do work or perform a task, but rather just provide emotional support, they are not considered service animals. Accordingly, DOJ service animal regulations do not apply to requests to bring an ESA into a classroom.

To be clear, service animal regulations neither authorize nor forbid ESAs in a classroom. Instead, such requests are requests for reasonable accommodations — they seek an exemption from “no pet” rules for ESAs as accommodations.

HUD policy on emotional support animals is tied to the FHA standard for accommodations: equal opportunity to use and enjoy a dwelling. By contrast, the ADA only requires accommodations when they are “necessary to afford such goods, services, facilities, privileges, advantages, or accommodations

to individuals with disabilities.” The comparable Section 504 standard prohibits discrimination by denying equal access to qualified students with a disability.

Because the standards are different, it does not follow that an ESA necessary for equal opportunity to use and enjoy a dwelling is also necessary to afford classroom access. A school’s determination to allow an ESA in campus housing should never be treated as a determination that an ESA is also necessary for classroom access. To the contrary, a disability services office should make that determination independently, applying ADA and Section 504 standards.

Therefore, a disability services office should treat a request to bring an ESA to class as it would any other request for an unusual accommodation. That is, give it individualized consideration, asking whether it is necessary to afford equal access (i.e., is it really an accommodation or just something the student wants for comfort?). If it is truly necessary for equal access, DS providers should then ask whether it is reasonable

(since not all accommodations are reasonable), using the same Section 504 and ADA standards they would apply to any other request for an accommodation.

If doubts arise on the necessity score, ask for documentation, remembering that the service animal rules limiting inquiries don’t apply. If you have doubts on the reasonableness score, consider the animal and its demeanor (keeping in mind again that service animal rules don’t apply). Another consideration may be the animal’s likely effect on a class. Remember that unlike trained service animals, ESAs commonly are not trained and may be disruptive, unreasonably burdening both the institution and other students.

In the run of cases, disability services professionals may conclude an ESA is not a reasonable accommodation necessary for equal access, but they will always be better served by having asked and considered such questions than by denying the request on the ground that an ESA is not a service animal. ■

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HUD notice on emotional support assistance animals has important implications for institutions

By Michael R. Masinter

On April 25, 2013, the U.S. Department of Housing and Urban Development issued an important Fair Housing Act notice clarifying its interpretation of how that act applies to emotional support animals. The notice answers some, but not all, questions that service providers must consider.

Because more students are requesting assistance animals as disability accommodations, it's critical that you understand how the FHA defines "assistance animals" and its requirements for colleges and universities.

First, the act applies to campus housing. HUD interprets the FHA to apply to "housing associated with a university or other place of education." Given that courts already have come to the same conclusion, campus housing providers must be aware of their obligations under the act.

Second, HUD designates emotional support animals as "assistance animals" under the FHA, even though they are not service animals under the Americans with Disabilities Act.

Importantly, Department of Justice regulations for service animals apply to all aspects of campus facilities, including housing, but specifically exclude emotional support animals from the definition of service animals, and limit service animals to dogs.

For that reason, the HUD notice sensibly recommends first determining whether an animal in question is a "service animal," and if it is, to follow existing service animal rules. If the animal is not a service animal under the ADA, typically because it is an emotional support assistance animal, then the FHA notice and any applicable state laws governing accommodation requests apply but the DOJ service animal regulations do not apply.

Institutions may require students not already known to have a disability who seek the accommodation of an emotional support assistance animal to live in campus housing "to submit reliable documentation of a disability and of their disability-related need for an assistance animal."

By contrast, DOJ service animal rules specifically forbid asking for documentation of the need for a service animal. The FHA notice specifies that documentation from mental health professionals should suffice if it establishes that students have a disability

and that the animals will provide disability-related emotional support.

Emotional support assistance animals may be virtually any species of animal and need not be specifically trained to provide emotional support. Assuming there is documentation of a disability and the disability-related need for an emotional support animal, the HUD notice requires permitting students to live with and use emotional support animals in all areas of the housing where people ordinarily go "unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services."

HUD offers no new guidance on either determination, but the FHA doesn't give students the right to take their support animal to class or to other campus facilities, so students are responsible for the behavior of their animals when they are left in campus residences.

Direct threat denials must be based on individualized assessments of a specific animal, not its breed or size or harm caused by other animals. In evaluating direct threats, an institution may take into account threats to the health or safety of others and substantial physical damage to its property.

While students cannot be required to pay a deposit to defer costs attributable to their animals, they can be required to reimburse the institution for any damage their animals cause beyond normal wear and tear, a particular concern likely to arise since students will have to leave their animals behind when attending classes or other campus activities.

Finally, the HUD notice is silent on the question of whether emotional support assistance animals must be under the control of their handlers when the animals are in common areas of student housing.

Although the notice may not have the same binding force as a regulation, it will guide HUD in its enforcement of the Fair Housing Act. Therefore, institutions should adjust their policies accordingly, bearing in mind that reasonable accommodation requests under the FHA require individualized assessments made within the framework of the notice.

If you'd like to read the notice, you may do so at http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf. ■

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Prepare to address increased demand for therapy animals in campus housing

By Allan L. Shackelford

In the worlds of student affairs, residence life, disability services, risk management and legal counsel, “service animals” have been the subject of a lot of attention as an accommodation for students with certain disabilities. In 2011, this issue was somewhat narrowed when the Department of Justice amended the regulations regarding service animals under Title II and Title III of the Americans with Disabilities Act.

With one limited exception, “service animal” is now defined as a dog that has been individually trained to do work or perform specific tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Other “therapy” or “support” animals, whether trained or not — and dogs not trained to perform specific disability-related tasks and used purely to provide emotional support — do not qualify as service animals.

The use of service animals can raise difficult safety and legal issues, including what to do when another student has a significant allergic reaction — perhaps an asthma attack — from exposure to a service animal.

But issues related to service animals are now just the tip of the disabilities, risk and legal icebergs that lie ahead regarding animals on campus. The Departments of Justice and Housing and Urban Development, along with disability rights and advocacy groups, are pushing to require that higher education institutions allow therapy or “assistance” animals to stay in campus housing as accommodations for students with disabilities.

Their arguments are based on the more expansive accommodation requirements set forth in the Fair Housing Act and the implementing regulations and guidelines of the Department of Housing and Urban Development.

In March 2011, the DOJ filed a lawsuit against the University of Nebraska-Kearney and five administrators for denying a student’s request to have a therapy dog in a university apartment as a disability accommodation for her diagnosed depression and anxiety.

On April 19, 2013, a federal district court judge denied the university’s motion to dismiss and granted partial summary judgment against the institution. It ruled that university-owned housing is subject to the FHA. Following this decision, on April 25, HUD sent a

notice to its regional offices stating that campus housing officials must provide reasonable accommodations for “an assistance animal that provides emotional support.”

Early last year, a similar lawsuit was filed against Grand Valley State University, its regents and several administrators. A former student, in conjunction with the Fair Housing Center of West Michigan, claimed the university violated the FHA when it denied her the right to keep a guinea pig in campus housing.

The animal’s purpose was to help her cope with severe depression and a heart condition requiring a pacemaker. Earlier this year, GVSU paid \$40,000 to settle the

case. It also agreed to work with the Fair Housing Center to develop a policy for providing accommodations for therapy or support animals in on-campus residences and to train staff to implement the policy.

These cases, and HUD’s notice, signal there will be many more requests to come — especially considering what research and empirical studies are indicating about the potentially positive effects provided by therapy animals for physical or psychological challenges. Therapy animals, usually dogs, are now being used to comfort individuals at medical facilities, disaster sites, airports, academic institutions and other facilities.

The legal battle over this issue is not over. It may be just beginning. However, as part of your proactive thinking and planning with senior administrators regarding how to respond to this issue, consider the following:

1. Involve legal counsel in reviewing FHA and HUD regulations and guidelines regarding accommodations for therapy or assistance animals.
2. Confer with appropriate risk management personnel and legal counsel regarding how to respond to the potential additional risk of having animals with less or no training on your campus. Also, consult with your insurance carriers about this issue.
3. Ensure that student affairs and/or residence life units have policies and procedures in place for resolving situations in which students have conflicting disabilities, such as significant allergies, related to animals.
4. Place the responsibility for supervising, controlling and caring for animals on the users.
5. Review what other institutions are doing to address this evolving issue. ■

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Conflicting ADA, HUD rules leave colleges open to lawsuits

By Allan L. Shackelford

The rules that apply to service and therapy animals have experienced substantial changes over the past few years, and new issues have yet to be addressed.

There is a renewed focus on the scope of an institution's obligations to accommodate students who use service and therapy animals. Plus, concerns have arisen regarding when those animals pose a health or safety risk to others. And while there is a significant difference between "service" and "therapy" animals, current events may blur that distinction.

Last year, the Department of Justice's Title II and Title III Americans with Disabilities Act regulations regarding accommodations for service animals were amended. "Service animal" is now defined as a dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or mental disability.

Dogs that are not trained to perform specific tasks that mitigate the effects of a disability, including those used purely for emotional support, are not considered service animals. Other animals, whether trained or not, do not generally qualify as service animals. However, the rule includes an exception permitting the use of trained miniature horses as alternatives to dogs under limited circumstances.

"Therapy animals" fall outside this definition and related obligations under the ADA. The term describes animals used to provide comfort and emotional support for someone suffering from anxiety or depression, whether that diagnosis rises to the level of a disability or not.

Such animals can include dogs, cats, ferrets and others. However, individuals with mental disabilities who use service animals that are trained to perform a specific task related to their disabilities are protected under the revised ADA regulations.

Almost every institution has specific policies and procedures addressing their obligation to accommodate students who require the use of service animals. With a very few exceptions, institutions do not permit students to have therapy animals in their dorm rooms or in class. However, the basis for

Remember these tips concerning animal-related conflicts

There has recently been increasing push-back from those who suffer significant allergic reactions — including asthma attacks — from exposure to service and therapy animals. A new layer of discussion was added to the conflict in late January when a six-year-old boy was attacked and killed in Kentucky by a "medical service dog" used by a soldier suffering from post-traumatic stress disorder.

The following tips can help you sort through issues involving service and therapy animals:

- Remember that a request for a service dog may be denied if the animal poses a direct threat to the health and safety of others that cannot be reduced or eliminated by modifying the accommodation. Place responsibility for supervising and controlling the animal on the user.
- Understand that you may be faced with a situation involving people with conflicting disabilities, and you cannot treat one as more important than the other. Be flexible and creative in solving such situations.
- Consider separating or segregating those affected, using air purifiers or filters, and requiring the regular use of dander care products on the offending animals to alleviate the problem. ■

this distinction is currently under legal challenge.

Last March, the DOJ filed a lawsuit against the University of Nebraska at Kearney and five individual administrators because they denied a student's repeated requests to be allowed to have a therapy dog live with her in a university apartment as a disability accommodation. She cited her diagnosed depression and anxiety as the reasons she needed the dog.

The basis for this lawsuit is not the ADA, but the Fair Housing Act and the implementing regulations and guidelines of the Department of Housing and Urban Development. Last February, HUD issued a memorandum stating that individuals should be allowed to use therapy or "assistance" animals if the animal allows them "equal opportunity to use and enjoy a dwelling," or participate in housing services or programs, and there is a demonstrated "relationship, or nexus," between their disabilities and the assistance the animals provide. Animals other than dogs may qualify under this definition.

The University of Nebraska at Kearney is challenging the application of the Fair Housing Act to college and university housing and has stated that it intends to vigorously contest this lawsuit. ■

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