

Review, revise service animal policies in light of new ADA rules

Learn what service animal issues experts say you should understand, based on newly amended ADA rules. (Aug. 9) **NEW!**

Key points:

- Consider federal, state laws on use of service animals in schools
- Find out how safety of others factors into decision-making
- Seek guidance on application of new ADA rules in school context

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New ADA amendments, which the Justice Department released July 23, address rules for mobility devices and accessible design standards.

But perhaps the most significant and timely ADA Title II and III rule for your district pertains to service animals, sources say, because parent-led requests in this area are on the rise.

“Service animals are wonderful for children with disabilities who need them, but they raise legal issues for schools,” said Melinda Jacobs of The Law Office of Melinda Jacobs in Knoxville, Tenn. “There are still a lot of unanswered questions, and unfortunately for schools, this means more OCR investigations and litigation as we try to interpret these things.”

Here are some issues on service animal that experts say you should understand, based on the amended ADA regulations.

- **Know what constitutes “service” under the ADA.** The new amendments are helpful because they clarify what constitutes a service animal, as opposed to an emotional support animal, said Linda Yoder, a school attorney with Shipman & Goodwin LLP in Hartford, Conn.

The Justice Department explains that “the difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs.” That is, “the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of th[e] definition.”

Specifically, the revised rule defines 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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.” However, the department noted, the use of trained miniature horses may be permissible under certain circumstances.

“It [also] was very significant that the department clearly distinguished a service animal from a pet,” said Dave Richards, a school attorney with Richards, Lindsay & Martín in Austin, Texas. “While a pet is capable of recognizing when its owner is in distress, a service animal is trained to do a task in response to that recognition.”

What’s more, “the work or tasks performed by a service animal must be directly related to the handler’s disability,” he said. See examples here.

- **Determine if state laws hold your district to higher standards.** “Districts may have state laws in place that have varying degrees of protection for service animals,” Richards said. “Some states give service animals a high level of access to schools and other places, even if others have allergies to the animal.” In other words, he said,

some states may go further in terms of protection. Overall, “whichever law gives [individuals] more protection is the one you have to comply with,” Yoder added.

- **Make proper inquires regarding service animals.** The revised regulations provide specific guidelines on what staff members can ask individuals about a service animal. “A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform,” the Justice Department said. However, you cannot ask about the nature or extent of an individual’s disability or require documentation, such as proof that the animal has been certified, trained or licensed as a service animal. Districts need more clarification on the scope of a proper inquiry in the school setting, Yoder said. “Schools are open to allowing properly trained service dogs into the school setting when they have been able to do their due diligence. This includes knowing if the dog has been trained and requesting recent records from a veterinarian,” she said. “A person with a seeing-eye dog obviously shouldn’t be stopped and questioned regarding the animal, but having a service animal in the school setting raises additional questions for which schools need more guidance.”

- **Carefully consider safety issues.** The regulations allow public entities to look at the effect the service animal might have on others and whether allowing the animal into a particular setting would constitute a fundamental change in the nature of the program, Yoder explained. The rule states that “a public entity may ask an individual with a disability to remove a service animal from the premises if the animal is out of control and the animal’s handler does not take effective action to control it or if the animal is not housebroken.” The Justice Department also writes that while it did not adopt specific regulatory language stating that a service animal can be excluded if it poses a direct threat, the addition of a definition of “direct threat” in the regulations should be sufficient. A direct threat is defined as “a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices or procedures.” Schools also should consider extra precautions in case a service animal attacks someone at the school, Jacobs said. “I’m going to advise my clients to have parents sign a waiver of liability,” she said. “It doesn’t matter how good your training is. This is an animal, and they can be unpredictable.”

- **Don’t forget your FAPE obligations.** Even if an animal does not meet the definition of service animal under the ADA, schools still should consider if the animal is required for FAPE, Yoder said. She noted that in *Bakersfield (CA) City School District*, 50 IDELR 169 (OCR 2008), OCR found that even if the requested service dog did not qualify as a service animal, the district should have considered whether the dog’s presence was necessary for the student to receive FAPE. On the other hand, Richards said, “if a school has other supports in place that provide a student with FAPE, the school may not have to permit the use of a service animal,” as illustrated by *Cave ex rel. Cave v. East Meadow Union Free School District*, 47 IDELR 162 (E.D.N.Y. 2007), affirmed 49 IDELR 92 (2d Cir. 2008). Despite the finding in this case, it’s unclear what districts must do if a parent wants to replace her child’s services with a service animal, Richards said. Is that an educational methodology question reflecting parent preference, or is the student entitled to bring the animal to school because the regulations say the animal can be taken into public places? It’s unclear how these issues are squared, he added.

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