

AS20: Making Sense of Service Animal Requests in Your School

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SESSION'S LEARNING OBJECTIVES:

Participants Will:

- **Understand the new federal regulations governing the admittance of service animals in a public entity's facilities.**
- **Be prepared to develop and implement policies and procedures to regulate the admittance of service animals in schools.**
- **Learn how to make case-by-case determinations of the appropriateness of service animals to assist individual students with disabilities.**

I. INTRODUCTION

In the spring of 2010, I was speaking at a large state conference in a western state and began to address the issue of service animals in schools. My remarks drew an immediate and visceral reaction from the audience, composed of both school administrators and parent advocates/attorneys. I was castigated by the parent advocates/attorneys and cheered by the school administrators. My remarks were merely intended to raise the collective consciousness of the audience about an issue that is coming to the forefront of special education law. At the time, much was unknown about how the law would address the difficult discrimination, health, and safety issues raised by a parent's request for his child to be accompanied to school by an animal. On Sept. 15, 2010, the U.S. Department of Justice published in the Federal Register its Final Rules (amending Titles II and III of the ADA) governing the issue of service animals in schools. 28 CFR Part 35.¹ We know much more now, but there are still many unanswered questions that will face schools and most likely require judicial interpretation. The purpose of this presentation is to outline the issues, educate participants, and suggest policies for dealing with a request for a child to be accompanied to school by her dog (or miniature horse).

¹ The regulations become effective on March 15, 2011.

II. WHAT IS A “SERVICE ANIMAL?”²²

A “service animal” means any 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 other mental disability. **Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.** The work or tasks performed by a service animal must be directly related to the handler’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. **The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.** Final Regulations, ADA, 29 CFR 35.136 (emphasis added).

Note:

1. The animal must be “individually trained” to do something that qualifies as work or a task. An animal that is merely a “pet” or “support animal” is not a service animal. Official Commentary.
2. There are no size or weight limitations on a service animal. Official Commentary, p. 41.

But See:

Miniature Horses. A public entity shall make **reasonable modifications** in policies, practices, or procedures to permit the use of a **miniature horse** by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. 29 CFR 35.136(i) (Final Regulations, ADA (emphasis added)).

Assessment Factors. In determining whether reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse into a specific facility, a public entity shall consider:

1. The type, size, and weight of the miniature horse and whether the facility can accommodate these features.
2. Whether the handler has sufficient control of the miniature horse.
3. Whether the miniature horse is housebroken.
4. Whether the miniature horse’s presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

²² The Official Commentary to the Final Regulations states, “[F]ew anticipated the variety of animals that would be promoted as service animals ... which ranged from pigs and miniature horses to snakes, iguanas, and parrots.” P. 40.

Other requirements which apply to service animals, shall also apply to miniature horses. 28 CFR 35.136(i). Ponies and full-size horses are not covered by this provision. Official Commentary, p. 47.

Why Permit Miniature Horses?

1. They are no larger than some breeds of dogs (e.g., Great Danes, Labrador Retrievers, and Mastiffs).
2. They can be housebroken like dogs.
3. They are particularly effective for large stature individuals.
4. They live much longer than dogs (average is more than 25 years of service).

III. WHAT TYPES OF TASKS ARE PERFORMED BY SERVICE ANIMALS?

1. Autism Service Animals

- a. Impulse Running — dog is trained to retrieve child to adult.
- b. PICA — dog is trained to interrupt the behavior.
- c. Self-Stimulation — dog is trained to physically interrupt the behavior.
- d. Self-Harming — dog is trained to interrupt the behavior.
- e. Mood Swings — dog is trained to crawl onto child's lap and calm child.
- f. Night Awakenings — dog is trained to alert parents by barking.

2. Psychiatric Service Animals

- a. “Grounding” the Individual with a Psychiatric Disability (involves “recognition” and “response”; e.g., sensing that the person is about to have a psychiatric episode and nudging, barking, or removing the person to a safe location until the episode subsides).
- b. Calming a person who suffers from panic attacks.
- c. An “emotional support animal” or “therapy animal” is not a service animal. These are animals that have not been trained to perform a specific task that is directly related to an individual's disability.

3. Mobility-Impaired Service Animals

- a. Provide stability for an individual with a disability.
- b. Retrieve items for an individual with a disability.
- c. Open doors for an individual with a disability.
- d. Assist the person in standing and sitting.

IV. NEW ADA REGULATIONS ON SERVICE ANIMALS

General. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 35.136(a).

Exceptions. A public entity may ask an individual with a disability to remove a service animal from the premises if:

1. The animal is out of control and the animal's handler does not take effective action to control it; or
2. The animal is not housebroken. 28 CFR 35.136(b).

Animal under handler's control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means). 28 CFR 35.136(d).

Care or Supervision. A public entity is not responsible for the care or supervision of a service animal. 28 CFR 35.136(e).

Inquiries. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as 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. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability). 28 CFR 35.136(f).

Access to areas of a public entity. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs, or activities, or invitees, as relevant, are allowed to go. 28 CFR 35.136(g).

Surcharges. A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. 28 CFR 35.136(h).

Official Commentary on the New ADA Regulations:

** [T]itle II entities have the same legal obligations as Title III entities to make reasonable accommodations in policies, practices, or procedures to allow service animals when necessary to

avoid discrimination on the basis of disability, **unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.**

**** Dogs That Can Be Legally Excluded:**

Dogs that are trained to provide aggressive protection, such as attack dogs, can be excluded. However, the commentary specifies that breeds of dog that are “perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs” cannot be excluded from schools unless:

- a. The dog is out of control and the animal’s handler does not take effective action to control it.
- b. The dog is not housebroken.
- c. The presence of the dog constitutes a “fundamental alteration” in the nature of the service, program, or activity.

**** Other Animals That Can Be Excluded:**

“All wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. Nonhuman primates, including capuchin monkeys, will not be recognized as service animals ... because of their potential for disease transmission and unpredictable aggressive behavior.” Official Commentary to the Final Regulations, p. 41.

V. RECENT CASES INVOLVING SERVICE ANIMALS IN SCHOOLS

Bakersfield (CA) City Sch. Dist., 50 IDELR 169 (OCR 2008).

Without deciding whether a student’s dog qualified as a “service animal,” OCR found that a California district violated Title II and Section 504 by excluding the dog from school. The district did not follow the proper procedures for reviewing the dog’s training, function, or impact on the student’s education. OCR noted that the district did not conduct a specific inquiry as to whether the dog was an appropriately trained service animal, or whether its function addressed the student’s disability-related needs. Instead, the district unilaterally determined that the dog posed a health and safety risk to students and staff. OCR criticized the district’s failure to conduct a hearing about the dog’s status as a service animal. “[T]his denial of a reasonable modification to the student’s disability ..., should have been internally grievable under a Section 504/ADA Title II grievance procedure,” OCR wrote. Even if the dog did not qualify as a service animal, OCR observed, the district should have considered whether the dog’s presence was necessary for the student to receive FAPE. OCR noted that the student’s behavior improved significantly when he brought his dog to class. Moreover, there was no evidence that staff or other students complained about the dog’s presence. By failing to consider whether the dog was a necessary aid or service under the IDEA, the district deprived the student of his procedural safeguards.

Access Now, Inc. v. Town of Jasper, Tenn. 26 NDLR 107, 268 F.Supp.2d 973 (E.D. Tenn. 2003).

The mother of a child with spina bifida sued the town in which they resided, alleging that it violated Title II by failing to grant her a permit to keep a miniature horse at her home as a service animal for her daughter. The District Court held that the child was not disabled under the ADA and, therefore, she did not need to use the horse as a service animal. In addition, the horse did not satisfy the definition of a service animal. As a result, the town did not discriminate against her on the basis of a disability.

To prove that the town violated Title II, the plaintiff needed to establish that her daughter was a qualified individual with a disability, the horse satisfied the definition of a service animal, and that the child needed to use the horse as a service animal to assist her in performing major life activities. Before the child received the horse as a gift, none of her treating physicians recommended that she have a service animal. Although she was weak, she could walk and stand without assistance. She did not use crutches, a wheelchair, or any other walking device. She could also run, swim, jump, bounce a ball while standing, attend special education classes, and play with the horse and other children. This evidence demonstrated that she was not substantially limited in the major life activities of standing, walking, and caring for herself, contrary to her mother's contentions, the court explained. Therefore, she was not disabled under the ADA.

Because the child was not disabled, she did not need a service animal. Even if she did, the horse was not a service animal under the appropriate regulation, the court stated. To be classified as a service animal, the horse needed to be trained to work for the child's benefit. This was not done. Other than showing that the horse could follow basic commands, it did not help the child overcome her impairment. For instance, it did not help her stand, balance, walk, or care for herself. Nor, did she take it everywhere she went. Instead, she used it only around her own residence.

In addition, the town did not intend to discriminate. Before denying the permit, town officials observed how the child used the horse to determine if she needed it to assist her in major life activities, the court concluded.

***Cave v. East Meadow Union Free Sch. Dist.*, 49 IDELR 92 (2d Cir. 2008).**

Despite claiming that their son's request to bring his service dog to school had nothing to do with his IEP, the parents of a high schooler with a hearing impairment could not pursue Section 504 and ADA claims against a New York district. The 2d Circuit concluded that the parents' failure to exhaust their administrative remedies under the IDEA barred their discrimination suit. The dispute boiled down to a request for an IEP modification. Although the parents maintained that the district unlawfully prevented the student from accessing a public facility, the district would need to make changes to the student's IEP to accommodate the dog's presence. "It is hard to imagine, for example, how [the student] could still attend the physical education class while at the same time attending to the dog's needs, or how he could bring [the dog] to another class where another student with a certified allergic reaction to dogs would be present," U.S. Circuit Judge Wilfred Feinberg wrote. While the IDEA did not permit the parents to recover the \$150 million in compensatory and punitive damages that they sought, it did offer a remedy: the parents could request a due process hearing and seek to have the service dog identified as an accommodation in the student's IEP. As such, the parents had to exhaust their

administrative remedies before filing suit. The 2d Circuit affirmed a decision in the district's favor, reported at 47 IDELR 162, and remanded the case with instructions to dismiss the case for lack of jurisdiction.

***Kalbfleisch v. Columbia Community Unit Sch. Dist. No. 4*, 53 IDELR 266 (Ill. Ct. App. 2009).**

Neither challenges to a dog's status as a service animal nor allegations that a child's behavioral difficulties were "self-inflicted" persuaded the Appellate Court to reverse an injunction allowing a 5-year-old boy with autism to bring his service dog to school. The court affirmed a decision reported at 53 IDELR 57 that required an Illinois district to allow the animal in the classroom. The Illinois school code states that districts must permit service animals to accompany students with disabilities at all school functions, whether inside or outside of the classroom. 105 Ill. Comp. Stat. 5/14-6.02. Although the district argued that the parents failed to prove the dog's status as a service animal, the court explained that such proof was not necessary for an injunction. Furthermore, the parents presented extensive testimony about the training the dog received to address the child's unique needs. "This testimony was sufficient to raise a fair question regarding whether [the dog] was a 'guide dog ..., signal dog ..., or any other animal individually trained to perform tasks for the benefit' of the child," wrote Justice James M. Wexstten. The court also rejected the district's claim that any behavioral difficulties the child experienced in the dog's absence were "self-inflicted," and that the child could attend school without the dog if he chose to do so. Justice Wexstten pointed out that the child's working relationship with the dog deteriorated significantly after a brief separation resulting from his grandfather's hospitalization. "[The mother] said that [the dog] became less responsive to [the child's] commands, and that [the child's] tantrums increased," the justice wrote. Noting that the district did not rebut the parents' evidence, the Appellate Court found no error with the trial court's finding that the child would suffer irreparable harm if not permitted to bring his service dog to school.

***K.D. v. Villa Grove Community Unit Sch. Dist. No. 302 Bd. of Educ.*, 55 IDELR 78 (Ill. App. Ct. 2010).**

A single provision in the Illinois School Code undermined a district's efforts to keep a 6-year-old boy with autism from bringing his dog to school. Determining that the dog qualified as a "service animal" despite its alleged failure to respond to commands or provide the child with necessary assistance, the Illinois Appellate Court held that the child could bring the dog to all school functions. The decision turned on the plain language of Section 14-6.02 of the school code. That provision states that a district must permit service animals such as guide dogs, signal dogs, or any other animal trained to perform tasks for the benefit of a student with a disability to accompany the student at all school functions, whether inside or outside of the classroom. Justice James A. Knecht wrote, "Despite the inevitable impact a service animal's presence at school will have on a student's individualized education plan, the School Code requires school districts to admit the service animal with the student so long as the animal meets the definition set forth in Section 14-6.02.". The court observed that the dog performed specific tasks to benefit the child. In addition to applying deep pressure to calm the child, the dog prevented the child from eloping when the two were tethered. The court rejected the district's argument that the dog's failure to obey all commands raised questions about its status as a service animal. "Section 14-6.02 does

not specify service animals must behave perfectly at all times,” Justice Knecht wrote. Nor did the dog lose its status as a service animal because it was commanded by a one-to-one aide rather than the child. Because the dog met the definition of a service animal under state law, the court held that the district could not exclude the dog from the child’s classroom. The court affirmed a decision reported at 53 IDELR 300 that allowed the child to bring the dog to school.

VI. WHAT SHOULD SCHOOLS DO IN RESPONSE TO REQUESTS TO ADMIT SERVICE ANIMALS IN SCHOOLS?

If an animal is properly excluded. If a public entity properly excludes a service animal under 28 CFR 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises. 28 CFR 35.136(c).

VII. QUESTIONS ABOUT SERVICE ANIMALS

1. Will these requests become the basis for IDEA/504 lawsuits? When could the provision of a dog or miniature horse become part of FAPE as a related service, and therefore the responsibility of the school system?
2. When does the presence of a dog or miniature horse “fundamentally alter” the nature of services provided by schools?
3. Can schools require current veterinarian certificates of health and immunizations?
4. Can schools require parents of children with service animals to sign liability waivers?
5. What rights do parents of nondisabled children have if they object to the presence of a service animal in their child’s classroom/school?
6. Will schools be required to permit the presence of service animals at athletic events, assemblies, school dances, field trips, etc.?
7. Are schools required to pay for training a service animal? For buying a service animal?
8. Can schools require parents of children with service animals who are not able to care for/control the animal to attend school with their child for these purposes? Are schools required to provide aides to walk dogs/miniature horses?
9. Are schools required to provide staff training in the control/handling of a service animal?
10. What happens when rights collide (e.g., one child needs a service dog and another child in the same class has a fear of dogs and suffers from PTSD; or a child or staff member has allergies that prevent his exposure to pet dander)?
11. How do schools respond to multiple requests for service animals in the same classroom/school? Is there a limit on the number of service animals in any one school?

SAMPLE POLICIES AND PROCEDURES ON SERVICE ANIMALS IN SCHOOLS

The _____ School District acknowledges its responsibility to permit students and/or adults with disabilities to be accompanied by a “service animal” in its school buildings, in classrooms, and at school functions, as required by the Americans with Disabilities Act, 28 CFR Part 35, subject to the following:

1. All requests for an individual with a disability to be accompanied by a service animal must be addressed in writing to the Superintendent of Schools at [address], and must contain required documentation of vaccinations. This written request must be delivered to the Superintendent of Schools’ Office at least 10 business days prior to bringing the service animal to school or a school function.
2. Owners of a service dog must provide annual proof of the following vaccinations: DHLPPC (Distemper, Hepatitis, Leptospirosis, Paroinfluenza, Parvovirus, and Coronavirus), Bordetella, and Rabies.
3. Owners of service miniature horses must provide annual proof of the following vaccinations: Equine Infectious Anemia (Coggins Test), Rabies, Tetanus, Encephelomyelitis, Rhinoneumonitis, Influenza, and Strangles.
4. All service dogs must be spayed or neutered.
5. All service animals must be treated for, and kept free of, fleas and ticks.
6. All service animals must be kept clean and groomed to avoid shedding and dander.
7. Owners of service animals are liable for any harm or injury caused by the animal to other students, staff, visitors, and/or property.
8. The animal must be a dog or, in specific circumstances, a miniature horse. No other species of animal, whether wild or domestic, will be permitted in schools as a “service animal.”
9. The animal must be “required” for the individual with a disability.
10. The animal must be “individually trained” to do work or a task for the individual with a disability.
11. Special Provisions/Miniature Horses: Requests to permit a miniature horse to accompany a student or adult with a disability in school buildings, in classroom, or at school functions, will be handled on a case-by-case basis, considering:
 - a. The type, size, and weight of the miniature horse and whether the facility can accommodate these features.
 - b. Whether the handler has sufficient control of the miniature horse.
 - c. Whether the miniature horse is housebroken.
 - d. Whether the miniature horse’s presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.
12. Removal of a Service Animal: A school administrator may ask an individual with a disability or his parents to remove a service animal from a school building, a classroom, or from a school function if any one of the following circumstances occurs:

- a. The animal is out of control and the animal’s handler does not take effective action to control it.
 - b. The animal is not housebroken.
 - c. The animal’s presence would “fundamentally alter” the nature of the service, program, or activity.
13. A service animal must have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal’s safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler’s control.
14. The school system is not responsible for the care or supervision of a service animal, including walking the animal or responding to the animal’s need to relieve itself.
- a. The school district is not responsible for providing a staff member to walk the service animal or to provide any other care or assistance to the animal.
 - b. Students with service animals are expected to care and supervise their animals. In the case of a young child or a student with disabilities who is unable to care for or supervise his service animal, the parent is responsible for providing care and supervision of the animal. Issues related to the care and supervision of service animals will be addressed on a case-by-case basis at the discretion of the building administrator.

Reference: ADA Regulations, 28 CFR Part 35 (as amended, 2010).