



Date: July 12, 2010

To: Ginger Odle
Manager, Non-Long Term Care Certification & Enforcement Branch

From: Office of the General Counsel
Region VI, Dallas, Texas

Subject: Required Accommodations for Disabled Individuals' Service Animals in
Dialysis Facilities

I. Background

You asked for our assistance in assessing the accommodations required of health care facilities (specifically, dialysis facilities) for disabled patients' service animals. In response to your request, the Office of the General Counsel has the following interpretations and suggestions.

II. Brief Answer

Generally, it is difficult to exclude a service animal from a hospital or health care setting because the ADA is construed very broadly and with great deference to disabled individuals. With respect to dialysis units, it is very unlikely that a service animal can be excluded unless it presents an individual threat to health and/or safety.

That said, while the hospital must admit service animals, it is under no obligation to supervise or care for them. For example, while a patient is receiving dialysis and cannot get up to walk or toilet the animal, the hospital is not required to step in. It is the patient's duty to arrange for a handler.

III. Legal Analysis

A. In general, a service animal must be permitted in a hospital or health care setting.

The Americans with Disabilities Act provides protection to disabled individuals seeking access to public facilities. The Act, in its entirety, may be found at 42 U.S.C. §§ 12101-12213. In pertinent part, it states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by

any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a)

The term “disability” encompasses dialysis patients because it includes the limited function of a bodily organ or system. 42 U.S.C. §§ 12102(1)(A), (2)(B). The diminished kidney function of ESRD patients certainly meets this criterion. Moreover, the Act requires the definition of “disability” to be construed generously in order to provide maximum protection. 42 U.S.C. § 12102(4)(A).

A hospital, health care provider’s officer, or other similar service facility is a “public accommodation” for the purposes of the Act. 42 U.S.C. § 12181(7)(F). It is therefore required to make “reasonable modifications in policies, practices, or procedures” as are necessary to provide disabled individuals with access to services and facilities. 42 U.S.C. § 12182(2)(A)(ii). The Code of Federal Regulations (C.F.R.) clarifies that permitting a disabled individual’s use of a service animal is such a reasonable modification. 28 C.F.R. § 36.302(c)(1) (2010)¹. A service animal is defined as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of a [disabled] individual.” 28 C.F.R § 36.104.

As a practical matter, the hospital should be cautious in how it ascertains whether an animal is a legitimate service animal, rather than a pet or therapeutic animal. Per ADA informational materials published by the Department of Justice-Civil Rights Division,² an establishment may ask either what task or function the animal performs or simply whether the animal is a service animal. It may *not* ask about the nature of the individual’s disability, request documentation of the individual’s disability, or require certification or ID stating that the animal is a registered service animal.³ It is generally best to accept an individual’s oral assurances that an animal is a service animal. *See* DEPT. OF JUSTICE, COMMONLY ASKED QUESTIONS ABOUT SERVICE ANIMALS IN A PLACE OF BUSINESS (1996), <http://www.ada.gov/qasrvc.htm> [hereinafter, “Service Animal

¹ All citations to the Code of Federal Regulations in this brief refer to the October 1, 2008 revision of the regulations unless indicated otherwise.

² 42 U.S.C. § 12206(c)(3) requires federal agencies responsible for implementing and overseeing the Act to make available technical assistance manuals and other educational materials clarifying rights and duties under the Act. Formal publications by federal government agencies are within this category and may be relied upon for guidance. Courts have routinely relied upon such publications and guidance. *See e.g., Grill v. Costco Wholesale Corp.*, 312 F. Supp. 2d 1349 (W.D. Wash. 2004) (citing the “DOJ Business Brief” and “DOJ Guidance” and stating that they are owed deference); *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. Super. Ct. 2005) (taking into account information received from the DOJ’s ADA Information Line).

³ Within a hospital or healthcare setting, the nature of a patient’s disability will likely already be known or apparent. However, it is wise to keep these guidelines in mind if a patient’s known disability does not seem to relate to the service animal’s function. For example, an individual with ESRD is disabled for the purposes of the Act, but it may appear to hospital personnel that the individual’s service animal does not perform a task related to that disability. Hospital staff must be careful in how they ascertain the legitimacy of the service animal because the patient may have another, underlying disability that necessitates the use of the service animal.

CAQ”]; DEPT. OF JUSTICE, ADA BUSINESS BRIEF: SERVICE ANIMALS (2002), <http://www.ada.gov/svcanimb.htm> [hereinafter, “Service Animal Business Brief”].

B. A facility is only required to admit a service animal; “reasonable modifications” do not extend to taking responsibility for the animal.

The Code of Federal Regulations explicitly provides that “[n]othing in this part requires a public accommodation to supervise or care for a service animal.” 28 C.F.R. § 26.302(c)(2). That is, the facility is not required to walk, feed, or toilet the animal while the patient is indisposed. Likewise, a facility need not provide a special area for the animal to relieve itself. See Service Animal CAQ; Service Animal Business Brief. It is the responsibility of the patient to make arrangements for a handler.

If a facility feels that it would be beneficial to exceed the requirements and support the presence of its disabled patients’ service animals, it may provide for emergency stewardship of a service animal while a patient is indisposed and unaccompanied by a handler. Some facilities have implemented programs wherein volunteers from the community or from within the hospital take charge of the animal while the patient is being treated. See Susan L. Duncan, et al., *APIC State-of-the-Art Report: The implications of service animals in health care settings*, 28 AM. J. INFECTION CONTROL 170, 176-77 (2000). However, there are legal implications to taking custody of a service animal and consent and waiver forms should be obtained from the owner. Specific language would be dependant upon the kind of program a facility elects to implement; legal counsel should be obtained on a case-by-case basis to formulate appropriate policies and procedures.

The presence of a service animal may raise damage and cleanliness concerns. It should be noted that, while a facility may not charge a disabled individual a maintenance or cleaning fee simply because he/she brings a service animal on the premises, the facility does have the right to bill the animal’s owner for any damage it does *as long as* it is the facility’s regular practice to charge non-disabled individuals for the same kind of damage. For example, if a service animal scratches a chair in the dialysis unit, the facility would only be able to bill its owner for the repair/replacement costs if it would bill a non-disabled individual for causing the same damage.

C. In certain, limited instances, a facility may exclude a service animal.

i. The “Fundamental Alteration” Provision

There are a few provisions in the Act which excuse a facility from accommodating a service animal. First, a facility may be excused from modifying its policies to accommodate an animal if it can show clearly that the animal’s presence would fundamentally alter the nature of the facility or services it provides. 42 U.S.C. § 12182(b)(2)(A)(ii). For instance, there may be clearly identifiable areas where it would be unreasonable to expect a service animal to be admitted. Operating rooms or other sterile areas where gowns, masks, and gloves are required are good examples; if anti-

contamination precautions must be observed by all who enter an area, it would be a fundamental alteration to the nature of the facility to allow an animal to enter. Another instance might be a small area through which personnel must pass in order to exercise their duties where the animal's presence would prevent them from passing. (For example, if a nurse must walk back and forth in a narrow aisle to administer care, a large dog blocking her way might be viewed as a fundamental alteration of the area and the nature of services she is able to provide.) In general though, most areas of a hospital should be open to a service animal. As one article notes, "if persons are allowed to be present without being required to observe special precautions...it would be difficult to argue that a clean, healthy, well-behaved service animal should be denied entrance." See Duncan et al., *supra*, at 173. It would appear that a dialysis unit would not fall within the limited class of areas from which a service animal can automatically be excluded.

A hospital should invoke the "fundamental alteration" rationale sparingly to deny admission of service animals; the Act is generally construed liberally in favor of disabled individuals.⁴ Rather than formulating blanket policies, it is wise to make case-by-case determinations based on the environment, circumstances, and service animal. The Ninth Circuit echoed this sentiment in a 2004 opinion, stating that whether an accommodation causes a fundamental alteration is an "intensively fact-based inquiry" and mere speculation of a disturbance or alteration is insufficient; there must be substantial underlying evidence. See *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 844 (9th Cir. 2004) (citing *Crowder v. Kitagawa*, 81 F.3d. 1480, 1486 (9th Cir. 1996)).

ii. The "Safety" Provision

The regulation at Section 26.301 provides that a public accommodation "may impose legitimate safety requirements that are necessary for safe operation." 28 C.F.R. § 26.301(b). In a hospital setting, "safety" might be a more appropriate basis for excluding a service animal than "fundamental alteration" because jeopardy to health falls within the category of safety risks. However, similar limitations apply to the safety provision as to the fundamental alterations provision; the regulation states that safety assessments "must be based on actual risks and not on mere speculation, stereotypes, or generalizations...." *Id.* Generally, hospitals should not assume automatically that an animal will present a threat to hygiene, health, or safety. An Illinois court found that an animal could not be excluded for generalized concerns about health and safety; rather exclusion had to be supported by a qualified medical professional's opinion that the animal presented a threat to the hospital's health and safety that a human being would not. *Branson v. West*, 1999 WL 1129598 (N. D. Ill. 1999), amended memorandum opinion and order at 1999 WL 1186420 (N.D. Ill. 1999).

⁴ In fact, the preamble to the relevant C.F.R. section states that "[i]t is intended that the **broadest feasible access** be provided to service animals in all places of public accommodation, including...hospitals...." 28 C.F.R. pt. 36, app. B (citing Education and Labor report at 106; Judiciary report at 59) (emphasis added).

There may be areas of a hospital where an animal necessarily presents a safety risk.⁵ In a technical assistance letter to U.S. Senator John C. Danforth⁶, the Department of Justice expressed the view that is best to tailor safety-based exclusions of service animals to as few areas within the premises as possible. Specifically,

[A] health care facility, such as a hospital is covered by...the ADA. [] A showing by appropriate medical personnel that the presence or use of a service animal would pose a significant health risk in certain areas of a hospital may serve as a basis for excluding service animals in those areas. In developing a list of areas from which service animals may be excluded, a hospital facility must designate only the exact areas where exclusion is appropriate.

As a whole, it is best to make as few wholesale determinations as possible. Aside from a very narrow class of areas (like operating rooms), there should be very few places from which service animals are automatically excluded. Rather, facilities should try to evaluate safety risks case-by-case, taking into account: (1) the area to be entered; (2) the type of service animal; and (3) the individual animal's characteristics. Courts have held that, under the safety provision, it is reasonable to require an animal has been vaccinated⁷ and to require that an animal not be "dangerous" or "poisonous."⁸ Hospital personnel may also take into account exceptionally strong odors emanating from an animal and whether an animal causes allergic reactions in patients and staff.⁹ As an Oregon court noted, "[a] hospital is charged with keeping *all* of its patients safe, providing quality health care to *all*, and providing a safe workplace for its staff."¹⁰

The Service Animal CAQ also adds that an animal may be excluded if it displays any threatening behavior (i.e.-growling, snapping, biting) towards other patients or personnel. The animal must actually display vicious behavior; it is insufficient to base a "threat to safety" decision upon past experiences or beliefs about the innate tendencies of certain breeds.

iii. The "Direct Threat" Defense

The Act also provides the so-called "direct threat" affirmative defense, stating that a facility is not required to provide a disabled individual access to its services and facilities

⁵ This is parallel to the "fundamental alteration" situation, where admitting a service animal in an operating room would fundamentally alter the sterile nature of the facility. Essentially, this is a second, separate basis for upholding the exclusion.

⁶ Technical Assistance Letter from the U.S. Dept. of Justice to John C. Danforth, U.S. Senator (May 10, 1993).

⁷ See *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996).

⁸ See *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006).

⁹ See *Roe v. Providence Health Systems-Oregon*, 655 F.Supp.2d. 1164, 1167-68 (D. Or. 2009).

¹⁰ *Id.* at 1168.

if that individual “poses a direct threat to the health or safety of others.” 42 U.S.C. § 12182(b)(3). “Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures....” *Id.*

The direct threat defense follows naturally from the fundamental alteration and safety provisions and often supplements those provisions as a basis for service animal exclusion. In *Roe v. Providence Health System-Oregon*, the court provided the elements necessary for a hospital to establish a direct threat affirmative defense. They are:

- (1) the animal’s presence creates a risk to the health or safety of patients, staff, and/or visitors;
- (2) the hospital can prove with clear evidence that the risk is significant and;
- (3) the direct threat cannot be eliminated by modifying the hospital’s policies, practices, or procedures.¹¹

With respect to the second element, “clear evidence” might include testimony from health professionals as to the risk presented by the animal, visible signs that an animal has a disease or infection, or instances of the animal’s vicious conduct.

With respect to the third element, it is important that the hospital evaluate whether a reasonable modification could be made to accommodate the animal and eliminate the perceived risk. For example, if another patient’s allergic reaction could be avoided simply by shutting the door between his room and the service animal’s owner’s room, the hospital would need to do so.

D. Conclusion

In sum, it is very difficult to exclude a service animal from a hospital or health care setting because the ADA is construed very broadly and with great deference to disabled individuals. There are very few areas from which a service animal may be excluded automatically and a case-by-case determination generally needs to be made. With respect to dialysis units, it is very unlikely that a service animal can be excluded unless it presents an individual threat to health and/or safety.

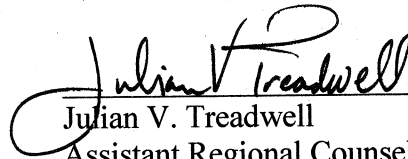
Although the hospital must admit service animals, it is under no obligation to supervise or care for the animals. For example, while a patient is receiving dialysis and is unavailable to move about to walk or toilet the animal, the hospital is not required to take stewardship of the animal. It is the responsibility of the patient to arrange for a handler. If a hospital decides to provide disabled patients with the services of a handler, it should seek the assistance of counsel to formulate clear policies and procedures, specific to the structure of the program it elects to implement. Please feel free to contact Julian Treadwell if you have any questions at (214) 767-2919.

¹¹ *Id.*

Sincerely,

Mark B. Childress
Acting General Counsel

Delores "Dee" Thompson
Chief Counsel


Julian V. Treadwell
Assistant Regional Counsel
Department of Health and Human
Services
Office of the General Counsel
1301 Young Street, Suite 1138
Dallas, Texas 75202
(214) 767-2919
(214) 767-4663 (Fax)
e-mail julian.treadwell@hhs.gov