

Section 35.136 Service Animals

The Department's title II regulation now states that, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR 35.130(b)(7). In the proposed title II language, the Department intends to provide the broadest feasible access to individuals with disabilities who use service animals, unless a public entity can demonstrate that making the modifications would fundamentally alter the nature of the public entity's service, program, or activity.

The proposed section regarding service animals would incorporate the Department's policy interpretations as outlined in its published technical assistance Commonly Asked Questions about Service Animals (1996) (available at <http://www.ada.gov/qasrvc.htm>), and ADA Business Brief: Service Animals (2002) (available at <http://www.ada.gov/svcanimb.htm>), as well as make changes based on public comment.

Proposed § 35.136 would:

1. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity may ask an individual with a disability to remove a service animal from the premises if: (i) The animal is out of control and the animal's handler does not take effective action to control it; (ii) the animal is not housebroken; (iii) the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (e.g., repeated barking); or (iv) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications in § 35.136(b);
2. Add in § 35.136(c) that if a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to participate in or benefit from the services, programs, or activities without having the service animal on the premises;
3. Add in § 35.136(d) requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a public entity's facility must be individually trained to do work or perform a task, be housebroken, and be

- under the control of its owner; and that a service animal must have a harness, leash, or other tether;
4. Add in § 35.136(e) specific language clarifying that "[a] public entity is not responsible for caring for or supervising a service animal." This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability. This provision is a variation on the existing title III language in § 36.302(c)(2), which states, "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The Department is proposing similar modifications to the title III requirements on service animals in the NPRM for title III, published concurrently with this NPRM.
 5. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance that a public entity must not ask what the person's disability is or about the nature of the person's disability, nor require proof of service animal certification or licensing, but that a public entity may ask (i) if the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform in § 35.136(f);
 6. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity must not require an individual with a disability to pay a fee or surcharge or post a deposit as a condition of permitting a service animal to accompany its handler in a public entity's facility, even if such deposits are required for pets, and that if a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal in § 35.136(h).

These changes will respond to the following concerns raised by individuals and organizations that commented in response to the ANPRM.

Proposed behavior or training standards.

Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service animals. Because of the variety of

individual training that a service animal can receive--from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures--the Department is not inclined to establish a standard that all service animals must meet. Some of the behavioral standards that the Department is proposing actually relate to suitability for public access, such as being housebroken and under the control of its handler.

Hospital and healthcare settings.

Public entities, including public hospitals, must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 35.130(b)(7). The exception to this requirement is if making the modification would fundamentally alter the nature of the service, program, or activity. The Department generally follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting.

As required by the ADA, a healthcare facility must permit a person with a disability to be accompanied by his or her service animal in all areas of the facility in which that person would otherwise be allowed, with some exceptions. Zoonotic diseases can be transmitted to humans through trauma (e.g., bites or scratches). Although there is no evidence that most service animals pose a significant risk of transmitting infectious agents to humans, animals can serve as a reservoir for a significant number of diseases that could potentially be transmitted to humans in the healthcare setting. A service animal may accompany its owner to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, rest rooms, and all other areas of the facility where visitors are permitted, except those listed below.

Under the ADA, the only circumstances under which a person with a disability may not be entitled to be accompanied by his or her service animal are those rare circumstances in which it has been determined that the animal poses a direct threat to the health or safety of others. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated or mitigated by a modification of policies, practices, or procedures. Based on CDC guidance, it is generally appropriate to exclude a service animal from areas that require a protected environment, including operating rooms, holding and recovery areas, labor and delivery suites, newborn intensive care nurseries,

and sterile processing departments. See Centers for Disease Control, Guidelines for Environmental Infection Control in Health Care Facilities (June 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm>.