

PROPOSED REGULATIONS FROM THE DEPARTMENT OF JUSTICE¹

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 Sec. 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 Sec. 35.136(b);
2. Add in Sec. 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 Sec. 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 Sec. 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

¹ The proposed regulations can be found at http://www.ada.gov/NPRM2008/t2NPRM_federalreg.htm. On January 21, 2009, the Department of Justice notified the Office of Management and Budget (OMB) that the Department had withdrawn its draft final rules to amend the Department's regulations. This action was taken in response to a memorandum from President Obama's Chief of Staff directing Executive Branch agencies to defer publication of any new regulations until incoming officials have had the opportunity to review the rulemaking record.

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 Sec. 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 Sec. 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 Sec. 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.