

The Americans with Disabilities Act and the Fair Housing Act: a Campus Housing Perspective*

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The U.S. Department of Justice (DOJ) recently revised its regulations regarding Title II and Title III of the Americans with Disabilities Act (ADA). Title II governs state and local government services, including public institutions; Title III applies to public accommodations and commercial facilities, including nonprofit institutions. The two sets of rules largely parallel one another and in several areas affect colleges, universities and non-profit institutions such as foundations, regarding obligations toward individuals defined as having disabilities.

The timetable for implementation included a phased approach that began March 15, 2011, when all newly constructed and altered facilities had the option to comply either with the 1991 or the 2010 accessibility standards. Then, beginning on March 15, 2012, all newly constructed and altered facilities must comply with the 2010 accessibility standards. The following highlights some of the more significant changes that impact campus housing operations.

Housing at a Place of Education

The previous ADA standards did not specifically address dormitories or other types of residential housing on campus. The DOJ has now added a new definition to § 36.104, "housing at a place of education," to clarify the types of educational housing programs that are covered. This section defines "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence."

Housing that is subject to this section must comply with the provisions of the 2010 Standards applicable to "transient lodging," including but not limited to the requirements for transient-lodging guest rooms. In the application of this section, the term "sleeping room" is used interchangeably with the term "guest room" under the transient lodging standards.

This section mandates that in facilities with at least 25 beds, a minimum of five percent of the sleeping rooms must have clear floor space for individuals with mobility impairments; at least two percent must be accessible to individuals with communications-related disabilities. Facilities with over 50 beds covered by this section that provide common-use bathing facilities must provide at least one roll-in shower with a seat. Transfer-type showers are not permitted in lieu of a roll-in shower. When separate shower facilities are provided for men and for women in an affected facility, at least one roll-in shower must be provided for each group.

Further, kitchens must also be accessible if located within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing

accessible sleeping rooms with mobility features. Turning spaces in accessible kitchens must comply with the 2010 standards. Finally, in each multi-bedroom housing unit containing one or more accessible sleeping rooms with mobility features, there must be an accessible route throughout the unit in accordance with the 2010 standards. Notably, apartments or townhouse facilities that are operated by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty and which do not contain any public use or common use areas available for educational programming, are *not* subject to the transient lodging standards and instead must comply with the requirements of the 2010 standards for residential facilities.

Service Animals

Most educational institutions have sought to modify policies, practices and procedures (including occupancy of residential units) to comply with ADA rules governing the use of service animals by individuals with disabilities. Under the new regulations, a "service animal" is more narrowly defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability ..." Except for miniature horses, other species of animals – whether trained or untrained – are not covered by the definition, nor are animals that serve any other purpose such as emotional support, protection or companionship. Campuses should be careful, however, about applying this standard in housing operations, as addressed in the Fair Housing Act section below.

Further, it is not permissible to ask about the nature or extent of a person's disability, but up to two inquiries to determine whether an animal qualifies as a service animal is allowed. Questions about whether the animal is required because of a disability and what task the animal performs are allowed, but it is prohibited to require proof that the animal has been certified, trained, or licensed as a service animal. Generally, inquiries about a service animal when it is readily apparent that an animal is trained to perform tasks for an individual with a disability are not allowed (e.g., if a dog is observed guiding an individual with a vision impairment).

Local, State and other Relevant Federal Laws

The DOJ specifically points out that some states' laws also impose additional requirements in regard to the use of service animals and recognizes that public entities and accommodations are subject to other Federal statutes, including but not limited to § 504 of the Rehabilitation Act of 1973 and the Fair Housing Act. The DOJ cautions that compliance with the Department's new Title II and Title III regulations does not necessarily ensure compliance with other Federal or state statutes.

The Fair Housing Act (FHA)

The FHA prohibits discrimination by direct providers of housing whose practices make housing unavailable to persons because of disability. Race, color, religion, national origin, sex and familial status are additional federally protected classes.

The new ADA rules governing the use of service animals by individuals with disabilities are less prescriptive toward housing providers than the FHA; compliance with the ADA rules would not necessarily mean a housing operator is FHA-compliant. The Act entitles individuals with a disability to reasonable accommodations in policies and services (and reasonable facility modifications) in order to provide an equal opportunity to access and enjoy housing. The Department of Housing and Urban Development (HUD) references "assistance animals" (as opposed to DOJ's more narrowly defined "service animals"), does *not* define specific species of qualifying animals, does *not* distinguish among certified or non-certified animals and encompasses animals that provide psychological support.

According to the DOJ, entities that operate housing facilities must ensure that they apply the "reasonable accommodation" requirements of the Fair Housing Act in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their Fair Housing obligations. Further, nothing in the ADA prevents an owner or operator subject to one statute from modifying its policies to provide greater access to individuals with disabilities and/or to maintain compliance with other statutes.

Case Study: Millikin University

In *United States v. Millikin University*, a recent case concerning university housing and a student with disabilities, the fair housing protections for persons with disabilities were enforced by HUD and DOJ on campus. According to Bryan Greene, HUD General Deputy Assistant Secretary, in the February 28, 2011 Disability Blog, "this case makes clear that the fair housing protections of persons with disabilities do not end at the university gates."

There were no judicial findings or final judgment, as the case was resolved through settlement. It involved a student with legal blindness and epilepsy at Millikin University – a coed, independent four-year university in Decatur, Illinois – in 2004. On her housing application, the student requested a "quiet" dormitory because noisy environments worsened her epileptic seizures. The University assigned her a room in a small residence hall known to be quiet. The complaint alleged she also informed the housing office that she planned to obtain a specially-trained, seizure-alert dog to live with her on campus. The University claimed to have learned of the service dog, however, the day before it arrived on campus.

The student was assigned to a room in a noisy area and her seizures worsened. In Fall 2005, Millikin transferred her to Oakland, a residence hall which met her disability-related needs, and her seizures lessened. In January 2006, the student informed the housing supervisor that her dog would be delivered the following day. The University would not allow her to remain in Oakland because the dog might adversely affect other students with medical conditions.

An alternative residence hall was then offered but did not appear to meet the student's needs, so she remained in Oakland while her dog was transported back and forth daily from her parents' home to campus. A month later, however, the student brought her dog to her room and University staff quickly forced her and the dog to leave and wait outside until her parents arrived to take the animal. After commuting to classes for three weeks, mediation resulted in another campus building for the student and the dog. The student shortly found that room also unsuitable, claiming concerns with noise that allegedly caused her seizures to worsen. She then filed a fair housing complaint with HUD.

Following a three-year investigation, HUD charged Millikin University with violating the Fair Housing Act on the grounds that the University made a dwelling unavailable because of her disability and refused to make a reasonable accommodation in its rules and practices when it was necessary to afford the student an equal opportunity for housing. The DOJ filed an action against Millikin in November 2009; a settlement was recorded in federal district court in January 2011.

Under the settlement, the University denied any liability. It did agree, however, to include in all of its training materials for housing employees that it is unlawful to discriminate in the rental of housing to any student with a disability, unless the tenancy would pose a danger to the health or safety of others or result in substantial damage to property. The training materials must also state that it is unlawful to refuse reasonable accommodations when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling. As part of the settlement, Millikin agreed to reimburse the student \$4,437 in personal expenses. The case highlights the principle that under the FHA, "housing at a place of education" must be available to persons with disabilities in a non-discriminatory manner.

Sources:

<http://edocket.access.gpo.gov/2010/2010-21821.htm>
<http://edocket.access.gpo.gov/2010/2010-21824.htm>
http://www.hud.gov/offices/fheo/enforcement/09_HUD_v_Millikin_University.pdf
<http://www.justice.gov/crt/about/hce/documents/millikinsettle.pdf>

About the Author

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