



Ohio Legal Rights Service

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August 15, 2008

Americans with Disabilities Act
Notice of Proposed Rulemaking
P.O. Box 2846
Fairfax, VA 22031-0846

Re: Proposed Rules to revise 28 C.F.R. Parts 35 and 36
Americans with Disabilities Act, Title II- Nondiscrimination on the Basis of
Disability in State and Local Government Services;
Americans with Disabilities Act, Title III- Nondiscrimination on the Basis of
Disability by Public Accommodations and in Commercial Facilities

To whom it may concern:

Ohio Legal Rights Service (OLRS) is an independent state agency and the federally and state designated Protection and Advocacy (P&A) system and Client Assistance Program for people with disabilities in the state of Ohio. The mission of OLRS is to protect and advocate, in partnership with people with disabilities, for their human, civil and legal rights. OLRS submits these comments in response to the Notice of Proposed Rulemaking published in the Federal Register on June 17, 2008 by the Department of Justice (DOJ), which proposes major revisions to its regulations implementing Titles II and III of the Americans with Disabilities Act (ADA).

This agency has determined that the individuals whom it serves are most affected by revisions in the areas of service animals, prisons, mobility devices, and interpreters.

I. Service animals

The proposed regulations under both Title II and Title III of the ADA clarify many important issues surrounding the use of service animals by individuals with disabilities. Many of these revisions are commendable, including the explicit confirmation that a public entity or place of public accommodation generally cannot prohibit persons with psychiatric, cognitive, or mental disabilities from utilizing service animals. Also, the proscription of special fees or surcharges for the use of service animals, the restrictions on inquiries about the nature or extent of a person's disability, and the expanded list of work and task examples are all laudable improvements.¹ Furthermore, the proposed regulations appropriately regard formal training requirements or a formal certification process as unwarranted.

However, this agency has concerns regarding several other aspects of the proposed regulations. First, "service animal" is defined more narrowly under the proposed regulations as "any dog or other common

¹ The revised definition of "service animal" within 28 C.F.R. § 35.104, which includes additional examples of the types of work or tasks service animals perform, is particularly desirable to reinforce the notion that service animals can be utilized in a broad set of circumstances. For example, this agency assisted a child who suffers from diabetes and whose doctor recommended the use of a service dog to alert the child to dangerous blood sugar levels. The child's school initially refused to allow the presence of the service animal but, after negotiation, agreed to yield in its position.

domestic animal" and specifically excludes "wild animals (including nonhuman primates born in captivity)" as well as "farm animals (including any breed of horse, miniature horse, pony, pig, or goat)" and several other species. The exclusion of miniature horses and service monkeys, even if they are "trained to do work or perform tasks for the benefit of individuals with disabilities," can be housebroken, and pose no threat to the health and safety of others, unnecessarily impacts individuals who rely on such animals (for example, because the individual is allergic to dogs). At least one individual served by this agency has benefitted from the use of a miniature horse. Indeed, unless a species can be determined to violate the exceptions contained in §§36.136(b) and 36.302(c)(2) under all circumstances, the exclusion of a specific service animal should be decided only after an individualized inquiry.

Also, the DOJ observes that it generally follows the guidance of the Centers for Disease Control on issues relating to service animals in healthcare facilities. Therefore, "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." This agency believes that, rather than a blanket exclusion, service animals may be prohibited from areas of a hospital only after an individualized inquiry and only after the exclusion is justified as a direct threat to the health and safety of others or as a fundamental alteration. Nevertheless, according to the DOJ, 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... ." This particular language is important so that the broadest feasible access for the use of service animals in hospitals is permitted.

This agency recently assisted an individual who is blind and who was admitted to a hospital in Columbus, Ohio, though he was not permitted the use of his service animal in his room or in most other areas of the hospital. Had the hospital not eventually relented, he would have suffered substantial distress and hardship without his service animal. Furthermore, upon subsequent review of the hospital's policy regarding service animals, it was discovered that it permitted service animals only in the main lobby, cafeteria, visitor lounges, and private offices. Service animals were excluded from virtually all other areas of the hospital, and the policy even stated that a patient's service animal "should be left with a responsible individual outside the hospital during the patient's in-house stay." The DOJ's clarifications therefore are much needed in this context.

II. Prisons

This agency applauds the provisions contained within 28 C.F.R. § 35.152 as proposed, which applies to "public entities that are responsible for the operation or management of detention and correctional facilities, either directly or through contracts or other arrangements." Such facilities would be required to ensure that qualified inmates or detainees with disabilities shall not be subject to discrimination or be excluded from participation in or denied the benefits of any services, programs, or activities because the facility is "inaccessible to or unusable by individuals with disabilities," unless a fundamental alteration or undue burden is demonstrated.

This agency is currently assisting visually impaired inmates who have objected that they do not have the same access to various prison programs and services, meals, routes of travel within the facility, library use, and assistive technology (blind canes, service animals, Braille, large print, etc.) as inmates who are not disabled. This has caused them to experience a myriad of problems during their incarceration.

The proposed regulations also require public entities to ensure that inmates or detainees with disabilities "are housed in the most integrated setting appropriate to the needs of the individuals." Unless it is appropriate to make an exception for a particular individual, a public entity

(1) should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification; (2) should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment; (3) should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; (4) should not place inmates or detainees with disabilities in facilities further away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability.

This agency believes, however, that the above-quote language should be phrased in mandatory terms. Thus, the word "should" should be replaced with the word "shall". The ability of a public entity to make an exception when appropriate in an individual situation alleviates any concerns about inflexibility. This would therefore preserve the right to an optimally integrated environment in most circumstances.

Moreover, the exception provided must only be utilized in proper situations where a less restrictive setting is more appropriate for the individual, and should not be used to needlessly segregate inmates or detainees with disabilities. The exception contained in this proposed regulation could be clarified so that it would be applicable if the public entity can demonstrate that the individual poses a direct threat to the health or safety of self or others that cannot be eliminated by reasonable modification or if the public entity and the inmate or detainee agree to the less restrictive setting.

III. Mobility devices

This agency appreciates the efforts of the DOJ to provide detail and clarity in regard to the use of mobility devices under Titles II and III of the ADA. In the past this issue has caused concern for clients of this agency. One client had disputes with a park authority and public building over use of a Segway. Another client is currently at odds with a state park authority over use of a golf cart as a mobility device within the park. This agency hopes that the adoption of these proposed regulations will reduce the number and severity of these disagreements in the future.

This agency does have some concerns about particular aspects of the regulations, however. The first of these involves the definition of *other power-driven mobility device* at Sections 35.104 and 36.104. This term is defined as "devices powered by batteries, fuel, or other engines." The listing of specific examples, however, then includes "bicycles." Since a standard bicycle is not powered by batteries, fuel, or other engines, it does not seem appropriate for it to be included here. Its inclusion will engender needless debate. This agency suggests the term be changed to "motorized bicycle" or omitted entirely.

The second concern involves Sections 35.137 and 36.311, "Mobility devices." The first criterion in determining the reasonableness of permitting the use of a power-driven mobility device is listed as: "The dimensions, weight and operating speed of the mobility device *in relation to a wheelchair.*"

This agency is concerned about the use of the size of a wheelchair as a standard of comparison for other devices. Inevitably some authorities will treat any device larger than a wheelchair as being suspect and

susceptible to exclusion. However, a scooter is generally larger than a wheelchair (since the definition of "wheelchair" includes a power wheelchair, we assume that "scooter" includes a power scooter, though this is not made clear in the definitions) and is among the devices required to be permitted to be used. We suggest first that "scooter" be defined to include power-driven scooter, and second that some thought be given to removing "wheelchair" as a set standard of size comparison.

IV. Auxiliary Aids and Services

This agency supports the proposed regulations that explicitly state that public entities and public accommodations must provide effective communications for the companions, including family members, of persons who are participating in programs, activities and services.

This agency has assisted in several instances where the parties to court cases (both criminal and civil) had family members who were deaf. Although interpreters were necessary in order for these family members to follow and understand the legal proceedings involving their loved ones, the courts had taken the position that the effective communication obligation extended only to the actual parties in the case.

Likewise, this agency has assisted in a number of cases where doctors' offices and hospitals initially refused to provide interpreters for the deaf spouses of patients involved in discussing critical issues of diagnosis, whether to undergo surgery, and course of treatment -- precisely the types of discussions where the participation and input of a spouse is vital. Thus, the Title II and II regulations' clarification on the obligation to provide effective communications for companions is needed.

This agency is concerned, however, about the Title II and III regulations that include "exchange of written notes" as an example of an auxiliary aid or service. It has been this agency's experience that covered entities, doctors' offices in particular, often claim that exchange of notes obviates the need to provide an interpreter for patients who are deaf or hard of hearing, even in situations where written notes are clearly inappropriate. It is not uncommon for this agency to be involved in instances where doctors, in an effort to avoid the expense of providing an interpreter, have scribbled bare-bones notes to deaf patients whose primary language is ASL, American Sign Language, and who have little or no skills in reading or writing English.

Thus, if "exchange of written notes" is to be listed as a form of auxiliary aid or service, the DOJ should also emphasize in the proposed regulations that written notes are not effective for many interactive situations because of the inherent limitations, including necessary literacy skills.

Respectfully submitted,

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