

## **Assistance Animals In Housing – New HUD Guidance Regarding Assistance Animals**

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Recently, the U.S. Department of Housing & Urban Development (HUD) issued a final rule<sup>i</sup> amending HUD’s existing regulations governing the requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities<sup>ii</sup>.

The rule amends these pet ownership requirements to be consistent with the regulations for HUD’s other public housing programs.<sup>iii</sup> Both regulations now provide that pet rules do not apply to “animals that assist, support, or provide service to persons with disabilities” or animals that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities. The rule applies to both animals owned by tenants in the housing projects as well as animals that visit the projects. Key in the new rule is the removal of the requirement that a tenant certify in writing that an animal has been trained to assist with a specific disability. While these regulations address public housing, HUD’s commentary published with the rule provides vital guidance on HUD’s fair housing enforcement stance on assistance animals. At least one federal Court has found HUD’s guidance persuasive, and held that animals needed for disabilities in housing need not be trained,<sup>iv</sup> and both HUD and DOJ are actively pursuing enforcement actions based on this position.<sup>v</sup>

### **What is an assistance animal?**

Certain animals provide assistance or perform tasks for the benefit of a person with a disability. Such animals are often referred to as “service animals,” “assistance animals,” “support animals,” “therapy animals,” “companion animals,” or “emotional support animals”. HUD regulations do not use or define any of these terms. Instead, in its amended public housing rule<sup>vi</sup>, HUD makes clear that the use of assistive animals in the housing context is governed by reasonable accommodation law.<sup>vii</sup>

### **When must a landlord or manager allow a tenant to have a service animal?**

Under both the Fair Housing Act and Section 504, in order for a requested accommodation to qualify as a reasonable accommodation, the requester must (1) have a disability, and (2) the accommodation must be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the person’s disability.<sup>viii</sup> In the case of assistance/service animals, an individual with a disability must demonstrate a nexus between his or her disability and the function the service animal provides. Examples of disability-related functions, include, but are not limited to:

- guiding individuals who are blind or have low vision,
- alerting individuals who are deaf or hard of hearing to sounds,
- providing protection or rescue assistance,
- pulling a wheelchair,
- fetching items,
- alerting persons to impending seizures, or
- providing emotional support to persons with disabilities who have a disability-related need for such support.

### **Does an assistance animal need to be trained?**

It is HUD's position that animals that are necessary as a reasonable accommodation do not necessarily need to be trained or meet certification requirements.<sup>ix</sup> While many animals are trained to perform certain tasks for persons with disabilities, others do not need training to provide the needed assistance. There are animals that have an innate ability to detect that a person with a seizure disorder is about to have a seizure and can let the individual know ahead of time so that the person can prepare. This ability is not the result of training, and a person with a seizure disorder might need such an animal as a reasonable accommodation to his/her disability. Emotional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities. Emotional support animals by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress.

Under the Americans with Disabilities Act (ADA) regulations, a service animal is defined as an animal "individually trained" to do work or perform tasks for the benefit of an individual with a disability.<sup>x</sup> However, HUD has advised that the ADA term "service animal" should not be applied to the Fair Housing Act and Section 504.<sup>xi</sup>

### **What verification can a landlord require?**

Housing providers are entitled to verify the existence of the disability, and the need for the accommodation—if either is not readily apparent. Persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.

### **When can a request for an assistance animal be denied?**

Housing providers are not required to provide any reasonable accommodation that would:

- (1) pose a direct threat to the health or safety of others
- (2) result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by a reasonable accommodation
- (3) pose an undue financial and administrative burden; or
- (4) fundamentally alter the nature of the provider's operations.

A housing provider may exclude an assistance animal from a housing complex when that animal's behavior poses a direct threat and its owner takes no effective action to control the animal's behavior so that the threat is mitigated or eliminated. The determination of whether an assistance animal poses a direct threat must rely on an individualized assessment that is based on objective evidence about the specific animal in question, such as the animal's current conduct or a recent history of overt acts. The assessment must consider the nature, duration, and severity of the risk of injury; the probability that the potential injury will actually occur; and whether reasonable modifications of rules, policies, practices, procedures, or services will reduce the risk. In evaluating a recent history of overt acts, a provider must take into account whether the assistance animal's owner has taken any action that has reduced or eliminated the risk. Examples would include obtaining specific training, medication, or equipment for the animal. This direct threat provision of the Fair Housing Act requires the existence of a significant risk—not a remote or speculative risk. Accordingly, the determination cannot be the result of fear or speculation about the types of harm or damage an animal may cause, or evidence about harm or damage caused by other animals.<sup>xii</sup>



### **Can a landlord deny a reasonable accommodation request because their insurance carrier prohibits certain “dangerous breeds”?**

If a housing provider's insurance carrier would cancel, substantially increase the costs of the insurance policy, or adversely change the policy terms because of the presence of a certain breed of dog or a certain animal, HUD will find that this imposes an undue financial and administrative burden on the housing provider.<sup>xiii</sup> However, the investigator must substantiate the housing provider's claim regarding the potential loss of or adverse change to the insurance coverage, by verifying such a claim with the insurance company directly and considering whether comparable insurance, without the restriction, is available in the market.<sup>xiv</sup> If the investigator finds evidence that an insurance provider has a policy of refusing to insure any housing that has animals, without exception for assistance animals, it may refer that information to the Department of Justice for investigation to determine whether the insurance provider has violated federal civil rights laws prohibiting discrimination based upon disability.

### **What are the assistance animal's owner's responsibilities?**

A person with a disability who uses an assistance animal is responsible for the animal's care and maintenance. A housing provider may establish reasonable rules in lease provisions requiring a person with a disability to pick up and dispose of his or her assistance animal's waste.

### **What if the animal damages the rental unit?**

A housing provider may not require an applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep assistance animal.<sup>xv</sup> However, if a tenant's assistance animal causes damage to the unit or the common areas of the dwelling, the

housing provider may charge the tenant for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

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Footnotes:

<sup>i</sup> 73 F.R. 63834. Oct. 27, 2008.

<sup>ii</sup> 24 CFR part 5, subpart C (“Pet Ownership for the Elderly or Persons With Disabilities”).

<sup>iii</sup> 24 CFR part 960, subpart G (“Pet Ownership in Public Housing”).

<sup>iv</sup> *Overlook Mutual Homes, Inc. v. Spencer*, Case No. 3:07cv398, Decision and Entry Overruling Plaintiff’s Motion for Summary Judgment, July 16, 2009 (S.D.C. OH).

<sup>v</sup> For example, the U.S. Department of Justice (DOJ), in conjunction with HUD, brought an action against Kenna Homes, a condo association, alleging a violation of the FHA after Kenna Homes implemented a rule which limited the types of dogs residents could keep to dogs that were trained and certified for a particular disability. This rule had the effect of denying a mentally impaired resident the ability to keep a dog which provided emotional support. *United States v. Kenna Homes Cooperative Corp., Case No. 2:04-783 (S.D.W.Va.) at Doc. #1*. Kenna Homes and the Government subsequently entered into a consent decree, under which the former agreed to adopt an exception to any rule preventing residents from keeping pets, by permitting disabled residents to have service animals or emotional support animals. *Id.* at Doc. #7. An emotional support animal was defined as an animal, “the presence of which ameliorates the effects of a mental or emotional disability.” *Id.*

<sup>vi</sup> 24 CFR part 5.

<sup>vii</sup> HUD’s position is consistent with federal cases involving emotional support animals in the housing context, that recognize that whether a particular accommodation is reasonable is a fact-intensive, case-specific determination. *Janush v. Charities Hous. Dev. Corp.*, 159 F. Supp. 2d 1133 (N.D. Cal. 2000); *Majors v. Hous. Auth. of the County of DeKalb, Ga.*, 652 F.2d 454, 457–58 (5th Cir. 1981).

<sup>viii</sup> The HUD/DOJ Joint Statement and HUD’s policy manuals and handbooks, including the Public Housing Occupancy Guidebook and the Multifamily Occupancy Handbook, provide applicable guidance on reasonable accommodation law.

<sup>ix</sup> This position is consistent with HUD Administrative Law Judge decisions, and with HUD handbooks and guidance used by the HUD Office of Housing and Office of Public and Indian Housing. In *Prindable v. Association of Apartment Owners of 2987 Kalakuna*, 304 F. Supp.2d 1245 (D.Hawaii 2003), affirmed on other grounds sub nom., *DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006), cert. denied, 549 U.S. 1216 (2007), the District Court held that an animal did not constitute a reasonable accommodation under the FHA unless it had been individually trained. 304 F. Supp.2d at 1256. The District Court entered summary judgment in favor of the Defendant because the dog had not been individually trained. Upon appeal, the Ninth Circuit affirmed, noting that one of the elements of a claim under 42

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U.S.C. § 3604(f)(3)(B) was that the defendant refused to grant the plaintiff's request for a reasonable accommodation. Since the two had moved out of the unit and the association had not previously required that the dog leave, the Ninth Circuit concluded that the plaintiffs could not establish that essential element of their claim. In addition, the Ninth Circuit explicitly noted that it was not addressing the question of "whether the plaintiffs must prove that [the dog] is an individually trained service animal." 453 F.3d at 1179 n. 2.

<sup>x</sup> 28 CFR 36.104

<sup>xi</sup> The ADA governs the use of animals by persons with disabilities primarily in the public arena while the Fair Housing Act and HUD's Section 504 regulations govern the use of animals needed as a reasonable accommodation in housing, and were enacted prior to the development and implementation of the ADA regulations. There is a distinction between the functions animals provide to persons with disabilities in the public arena (i.e., performing tasks enabling individuals to use public services and public accommodations), as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities. Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress. Conversely, persons with disabilities who use emotional support animals may not need to take them into public spaces covered by the ADA.

<sup>xii</sup> See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "*Reasonable Accommodations Under the Fair Housing Act, 2004*". [www.usdoj.gov/crt/housing/joint\\_statement\\_ra.pdf](http://www.usdoj.gov/crt/housing/joint_statement_ra.pdf) or [www.hud.gov/offices/fheo/library/huddojstatement.pdf](http://www.hud.gov/offices/fheo/library/huddojstatement.pdf)

<sup>xiii</sup> HUD, Greene Memo, 6-12-06, *Re: Insurance Policy Restrictions as a Defense for Refusals to Make a Reasonable Accommodation*. [www.fairhousing.com/include/media/pdf/insuranceguidance.pdf](http://www.fairhousing.com/include/media/pdf/insuranceguidance.pdf)

<sup>xiv</sup> *Id.*

<sup>xv</sup> See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "*Reasonable Accommodations Under the Fair Housing Act, 2004*". [www.usdoj.gov/crt/housing/joint\\_statement\\_ra.pdf](http://www.usdoj.gov/crt/housing/joint_statement_ra.pdf) or [www.hud.gov/offices/fheo/library/huddojstatement.pdf](http://www.hud.gov/offices/fheo/library/huddojstatement.pdf)