

## Service Animals



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## Agenda

- Service Animals
- Fry and IDEA Exhaustion

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## Service Animals

- Public school districts are legally required to modify their "policies, practices, or procedures to permit the use of a service animal by an individual with a disability."
  - 28 C.F.R. § 35.136(a).
- Modification of Policy. (Not services/FAPE)

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## Service Animals

- If it's a service animal, you **MUST** permit a student to bring it to school.
- If it's **NOT** a service animal, you are **NOT** automatically required to allow it in school
  - (but you may have to under other laws).

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## Qualified Service Animal

- Any **dog** that is
    - individually trained to
    - do work or perform tasks
    - for the benefit of an **individual with a disability**,
    - including a physical, sensory, psychiatric, intellectual, or other mental disability.
- 28 C.F.R. § 35.104

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## Qualified Service Animal

- So, only dogs, right?
  - Kind of:
  - Other species of animals are not “service animals” for purposes of the federal regulations. 28 C.F.R. § 35.104
- BUT....
  - In some circumstances, miniature horses may also *serve as service animals*. 28 C.F.R. § 136(i)
  - Why?

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## Qualified Service Animal

- The dogs (and miniature horses) **MUST**
  - Perform work or tasks **directly related** to the individual's disability. 28 C.F.R. § 35.104

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### Examples of Valid Service Animals Tasks

- Assisting individuals who are blind or have low vision with navigation and other tasks,
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds,
- Providing non-violent protection or rescue work,
- Pulling a wheelchair,
- Assisting an individual during a seizure,

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### Examples of Valid Service Animals Tasks

- Alerting individuals to the presence of allergens,
- Retrieving items such as medicine or the telephone,
- Providing **physical** support and assistance with balance and stability to individuals with mobility disabilities,
- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

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### Service Animal Work or Tasks DO NOT INCLUDE:

- Crime deterrent effects of an animal's presence.
- The provision of
  - emotional support,
  - well-being,
  - comfort, or
  - companionship.

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### Example of a Close Call: Anxiety

- Q4: If someone's dog calms them when having an anxiety attack, does this qualify it as a service animal?
- A: It depends...doesn't turn on anxiety-related disability alone.
  - ADA distinguishes between psychiatric service animals and emotional support animals.

U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Frequently Asked Questions about Service Animals and the ADA*, at 2 (July 20, 2015) (last visited June 12, 2019).

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### Example of a Close Call: Anxiety

- If the dog has been *trained*
  - (1) to sense that an anxiety attack is about to happen and
  - (2) take a specific action to help avoid the attack or lessen its impact
  - Then, that would qualify as a service animal.
- However, if the dog's mere presence provides comfort, that would not be considered a service animal under the ADA.

U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Frequently Asked Questions about Service Animals and the ADA*, at 2 (July 20, 2015) (last visited June 12, 2019).

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### Limited Questions

- District can't ask about the nature or extent of a person's disability. 28 C.F.R. § 35.136(f)
- Two Permissible Questions:
  - (1) Is the animal required because of a disability?
  - (2) What work or task has the animal been trained to perform?
- And, maybe not even those....

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## Limited Questions

- District can't ask these questions when:
  - It is readily apparent that an animal is trained to do work or perform tasks for an IwD
    - e.g., the dog is observed guiding an individual who is blind or has low vision,
    - pulling a person's wheelchair,
    - or providing assistance with stability or balance to an individual with an observable mobility disability.

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## Vaccinations? Licensing?

- District can't "*require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.*"
  - 28 C.F.R. § 35.136(f)
- So, service animals are exempt from vaccination, registration, and licensing requirements, right?
  - WRONG!

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## Vaccinations? Licensing?

**Q18:** My city requires all dogs to be vaccinated. Does this apply to my service animal?

A: Yes. Individuals who have service animals are not exempt from local animal control or public health requirements.

**Q19:** My city requires all dogs to be registered and licensed. Does this apply to my service animal?

A: Yes. Service animals are subject to local dog licensing and registration requirements.

U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Frequently Asked Questions about Service Animals and the ADA*, at 4 (July 20, 2015) (last visited June 12, 2019).

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## Vaccinations? Licensing?

- So, how do we thread this needle?
  - DO NOT condition allowing a service animal on receiving documentation.
  - Request the information, but do not require it.
  - DO NOT go beyond what is required by your state and local laws.
- Policies
- Forms

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## Access to Facilities

- IwDs must be allowed to accompany "their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go."
  - 28 C.F.R. § 35.136(g).

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## Surcharges Prohibited

- District can't require IwD to pay a surcharge
  - True even if people with pets are required to pay fees
- District can't require IwD to comply with other requirements generally not applicable to people without pets.
  - 28 C.F.R. § 35.136(h)

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## Surcharges Prohibited

- BUT, if District normally charges people for damages that they cause, THEN
  - CAN charge an IwD for damages caused by service animal
- Precedent against requiring:
  - Parents to furnish liability insurance, or
  - Parents to execute waivers
  - ....as conditions to allowing service animals.

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## Control of Service Animal

- Service animal required to be under the control of its handler. 28 C.F.R. § 35.136(d)
- Typically, must have a harness, leash, or other tether.
  - BUT,
    - If handler unable to use harness, leash, or tether due to disability; OR
    - Use of the same would interfere with the service animal's performance of work or tasks,
  - THEN can be controls other ways (e.g., voice, signals, etc.)

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## Control of Service Animal

- District "is not responsible for the care or supervisions of a service animal." 28 C.F.R. § 35.136(e)
- BUT, DOJ OCR and court decisions:
  - The provision of an adult handler to assist a student with handling his or her own service dog is a "reasonable accommodation" under Section 504 and Title II of the ADA.

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## Limited Ground for Removal

- (1) The animal is out of control and the animal's handler does not take effective action to control it; or
- (2) The animal is not housebroken.
- BUT, even when removed, must give IwD opportunity to participate in the service, program, or activity w/o have the service animal on the premises.

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## Some Practical Questions

- Other students or staff who are allergic to the service animal?
  - Move to another side of the room, OR
  - Another room in the same facility.
- Limited Questions?
  - More flexibility if considering along other items in Section 504 Meeting

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## Some Practical Questions

- Consider *de facto* policies on all animals
  - Librarian's dog?
  - Classroom pet?
- If not a service animal, then what?
  - Reasonable Accommodation?
    - ADA Title II and Section 504
    - ADA Title I for EEs

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- E.F. was a child with a severe form of cerebral palsy.
- Parents obtained a trained service dog, a goldendoodle named Wonder, to help E.F. live as independently as possible:
  - Retrieved dropped items, helped E.F. balance when she used her walker, opened and closed doors, turned lights on/off, helped her transfer to/from the toilet, etc.

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- School district did not allow E.F. to bring Wonder to school
- Parents filed complaint with OCR, which concluded that the school district violated E.F.'s rights under Title II of the ADA and Section 504.
- Parents filed suit in U.S. Dist. Ct. (E.D. Mich.)

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- District court granted school district's motion to dismiss on the grounds that the Frys were required to exhaust the IDEA's administrative procedures prior to filing suit.
- U.S. Court of Appeals for the Sixth Circuit affirmed.

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- Justice Kagan authored the Court's opinion
- Acknowledged that if a suit seeks relief *that is also available under the IDEA*, then plaintiff must first exhaust the IDEA's administrative procedures.
- Framed the issue before the Court as considering the scope of that exhaustion requirement.

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- Exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education (FAPE).
  - Because that is the only relief available under the IDEA.
- Answered by looking at the substance, or *gravamen*, of the plaintiff's complaint.

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### ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- Justice Kagan suggested two hypothetical questions to use:
  - (1) Could the plaintiff have brought same claim if the alleged conduct had occurred at a public facility that was not a school (e.g., local library)?
  - (2) Could an *adult* at the same school (e.g., employee, visitor) have pressed the same grievance?

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## ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- If YES to both, then the gravamen of the complaint is most likely not the denial of FAPE
- IF NO, then the complaint probably does concern the denial of FAPE

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## ***Fry v. Napoleon Cmty. Sch.* (U.S. 2017)**

- Holding:
  - Exhaustion of administrative procedures is not necessary when the gravamen of the complaint is something other than the denial of the IDEA's guarantee of a free appropriate public education (FAPE).
- Remanded

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## **QUESTIONS?**



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# Service Animals



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