

1-1-2009

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### **Recommended Citation**

Dawinder S. Sidhu, *Cujo Goes to College: On the Use of Animals by Individuals with Disabilities in Postsecondary Institutions*, 38 *University of Baltimore Law Review* 267 (2009).

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# CUJO GOES TO COLLEGE: ON THE USE OF ANIMALS BY INDIVIDUALS WITH DISABILITIES IN POSTSECONDARY INSTITUTIONS

Dawinder S. Sidhu†

## I. INTRODUCTION

### A. Factual Background

Animals provide critical support to individuals with disabilities, enabling them to, among many other things, navigate streets, receive assistance in case of a medical emergency, and obtain necessary items, such as prescription drugs.<sup>1</sup> Indeed, but for these animals, the lives of some individuals with disabilities would be subject to restriction and vulnerability.<sup>2</sup> The broad mandate of federal antidiscrimination laws generally ensure that individuals with disabilities are not subject to unlawful practices<sup>3</sup> and, in particular,

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† J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. I am grateful to Raj Gupta for his research assistance, and to my parents for their guidance, encouragement, and love. The views expressed herein, and any errors, are solely my own.

1. See *Pool v. Riverside Health Servs., Inc.*, No. 94-1430-PFK, 1995 WL 519129, at \*5 (D. Kan. Aug. 25, 1995) (“Service animals provide to thousands of Americans a critical means of access to the world.”); AMERICANS WITH DISABILITIES ACT: ADA TITLE III TECHNICAL ASSISTANCE MANUAL (U.S. Dep’t of Justice, D.C.), 1994, available at <http://www.usdoj.gov/crt/ada/taman3up.html> [hereinafter TITLE III MANUAL] (“Tasks typically performed by service animals include guiding people with impaired vision, alerting individuals with impaired hearing to the presence of intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or retrieving dropped items.”).
2. See Beth A. Danon, *Emotional Support Animal or Service Animal for ADA and Vermont’s Public Accommodations Law Purposes: Does It Make a Difference?*, VT. B. J., Summer 2006, at 1-2 (“[S]ome psychiatric disabilities are such that the disabled individual is literally unable to leave his or her home unless accompanied by the emotional support animal.”); Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 158 (2004) (“Often, their owners depend upon [service animals] in virtually every aspect of life.”).
3. See, e.g., 42 U.S.C. § 12101(b)(1) (2000) (“It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . .”).

reflect the vital contribution that animals can have for individuals with disabilities.<sup>4</sup>

This Article examines the extent to which animals may be used by individuals with disabilities in a particular setting—postsecondary institutions.

While an individual with a disability may use an animal in various contexts and the animal in turn provides assistance irrespective of its user's location,<sup>5</sup> federal laws prohibiting discrimination against individuals with disabilities do not provide universal or uniform protection to individuals with disabilities using animals.<sup>6</sup> Instead, the federal laws addressing the use of animals by disabled individuals are setting-specific.<sup>7</sup> For instance, Title III of the Americans with Disabilities Act of 1990 (Title III) governs places of public accommodation.<sup>8</sup> That is, federal antidiscrimination laws on this subject speak only to the particular area within which it has jurisdiction (e.g., public accommodations or air travel).<sup>9</sup> These laws differ in material respects, providing disparate rules to the use of animals by the disabled.<sup>10</sup> Furthermore, the degree to which the use of animals by individuals with disabilities is regulated may also depend on the given statute and regulation, specifically with some providing clearer guidance than others. Title III, for example, contains a clear provision regarding the use of a service animal by an individual with a disability.<sup>11</sup> However, the primary laws governing discrimination in colleges and universities—Title II of the Americans with Disabilities Act of 1990 (Title II)<sup>12</sup> and Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>13</sup>—are essentially silent on

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4. See, e.g., 28 C.F.R. § 36.302(c)(1) (2008) (requiring a public accommodation to “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability”).

5. See e.g., U.S. DEPT OF JUSTICE, ADA BUSINESS BRIEF: SERVICE ANIMALS (Apr. 2002), available at <http://www.ada.gov/svcabrpt.pdf> [hereinafter ADA BUSINESS BRIEF: SERVICE ANIMALS] (“This federal law applies to all businesses open to the public, including restaurants, hotels, taxis and shuttles, grocery and department stores, hospitals and medical offices, theaters, health clubs, parks, and zoos.”).

6. See *infra* Part III.A.

7. See TITLE III MANUAL, *supra* note 1 (outlining the specific settings governed by federal laws, including the distinction between private entities and “places of public accommodation” under Title III).

8. 42 U.S.C. § 12101.

9. See 28 C.F.R. § 36.302(c) (showing legal requirements specifically for public accommodations).

10. See *infra* Part II.A.

11. See 28 C.F.R. § 36.302(c).

12. 42 U.S.C. § 12131.

13. 29 U.S.C. § 794(b)(2)(A) (2000).

the treatment that covered entities must afford to individuals with disabilities in need of the use of an animal.

The U.S. Department of Education, Office for Civil Rights (OCR) was compelled to enter this relatively barren legal landscape after receiving complaints challenging the service animal policies of over fifty postsecondary institutions.<sup>14</sup> In December of 2006, OCR issued comprehensive internal guidance in an effort to resolve the aforementioned complaints.<sup>15</sup> Of importance, the guidance provides that the anti-discrimination protections of Title II and Section 504 extend only to the use of “service animals” as defined by Title III.<sup>16</sup> In other words, while Title II and Section 504 statutes and their regulations do not mention service animals, the guidance essentially imports the Title III service animal framework.<sup>17</sup> The notion that postsecondary institutions subject to Title II and Section 504 must accommodate only service animals is what is meant by the term the “OCR approach.”

In June of 2008, the Department of Justice (DOJ) issued a notice of proposed rulemaking to amend the Title II regulations.<sup>18</sup> The proposed regulations would provide that Title II protect only service animals (which require individual training to qualify as such), adopt the Title III service animal definition, clarify that service animals can assist individuals with psychiatric, cognitive, or mental disabilities, and exclude from the ambit of service animals certain exotic, non-domestic species of animals.<sup>19</sup> As the proposed Title II regulations would cover only service animals, DOJ has confirmed that the OCR approach is the federal government’s adopted position with respect to Title II and the use of animals by individuals with disabilities.<sup>20</sup>

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14. E-mail from Sandra Battle, Program Legal Group Director, OCR, to OCR Office Directors and Chief Attorneys (Dec. 19, 2006, 19:34 EST) (on file with author) [hereinafter Battle E-mail].

15. Memorandum from OCR Program Legal Group on Service Animal Guidance to OCR Office Directors and Chief Attorneys (Oct. 25, 2006) (on file with author) [hereinafter OCR Guidance].

16. *Id.* at 3–4.

17. *Id.*

18. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

19. *Id.* at 34,472–73.

20. *See id.* at 34,477 (“Although there is no specific language in the current title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the service, program, or activity. . . . The [DOJ] is proposing to add to the title II

## B. Overview

Part I of this Article provides an introduction to Section 504, Title II, and Title III. It also summarizes the OCR guidance, which adopts the Title III service animal standards for Title II and Section 504 purposes. Further, this section examines proposed amendments to the Title II regulations, which are materially consistent with the OCR approach of grafting the Title III service animal standards onto Title II.

Part II analyzes the text and purpose of Title II and Section 504, as well as the practical realities associated with the postsecondary setting, and argues that all animals, not just the service animals of Title III, may be permissibly used by individuals with disabilities under Title II and Section 504. The OCR guidance and Title II regulations do not require postsecondary institutions to consider requests by individuals with disabilities to use non-service animals even if the non-service animals may provide direct and material benefits to those individuals with disabilities, especially individuals with mental or emotional disabilities.<sup>21</sup> In short, these two legal sources lack legal support and, as a practical matter, limit the rights of individuals with disabilities who may need the use of non-service animals. The same may be said of postsecondary policies or rules that similarly restrict the use of animals by individuals with disabilities to service animals.

This section will also offer an alternative approach that postsecondary institutions may implement in order to determine if a given individual with a disability requesting the use of an animal on campus can be permitted, under Title II and Section 504, to use that animal. All animals—regardless of breed, individual training, or appearance—would be amenable to this framework. It affirms what has been medically established, namely that non-service animals can ameliorate an individual with a disability's disability.<sup>22</sup> It will hold that the proper focus of an inquiry into whether an animal can be used by an individual with a disability under these two statutes is not individual training, as Title III mandates, but the benefits that the animal provides to alleviate an individual with a disability's disability. The burden to show the causal link between the individual's disability and the animal's benefits may be greater with

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regulation the same definition of 'service animal' that it will propose for the title III regulation.”).

21. See OCR Guidance, *supra* note 15, at 1, 36; see also 42 U.S.C. §§ 12131–12132 (2000).

22. See *infra* Part III.B (discussing the medical value of non-service animals).

respect to the use of a non-service animal; however, the non-service animal may still be considered rather than wholly removed from the interactive process that generally accompanies a disabled student's attempt to obtain a disability-related accommodation in school. A sliding-scale—with the burden of proof rising with regard to the nature of the animal—is not only consonant with Title II and Section 504, but is, practically speaking, a more preferable outcome to one in which non-service animals are absolutely prohibited from use on campus by individuals with disabilities.

The OCR guidance may be applied to the complaints challenging the animal policies of over fifty postsecondary institutions, and the OCR guidance and the proposed DOJ regulations may ostensibly be used against countless others subject to Title II and/or Section 504. Accordingly, a critical examination of the guidance and regulations and an explanation as to why they are legally suspect are patently necessary. Moreover, it is already the case that postsecondary institutions subject to these laws have implemented varying policies with respect to the use of animals by individuals with disabilities,<sup>23</sup> further indicating that the state of the law is uncertain and in need of reliable guidance.<sup>24</sup> Since over “one million students with disabilities are now enrolled in American colleges and universities,”<sup>25</sup> the potential effect of such policies is indeed significant. This area of law is also emerging, as evident by the recent issuance of the internal guidance and the proposed amendments to Title II<sup>26</sup> and with more

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23. Compare Amarillo College, Service Animal Policy, <http://www.actx.edu/disability/index.php?module=article&id=148> (last visited Oct. 16, 2008) (“Amarillo College does NOT allow an animal that is not a Service Animal on campus.”), with University of Illinois at Urbana-Champaign, Service Animals Policy For Current University of Illinois Students with Disabilities, <http://www.disability.uiuc.edu/page.php?id=26> (last visited Mar. 15, 2008) (“An animal used as a therapy tool, and [that] is incorporated into the treatment process of an individual who is undergoing counseling and treatment for a psychologically-related disability” may be an accommodation depending on the verification provided.).
  24. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,472 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35) (“[DOJ] continues to receive a large number of complaints from individuals with service animals. It appears, therefore, that many covered entities are confused about their obligations under the ADA in this area.”); see also *infra* Part III.A (discussing other legal pronouncements).
  25. AM. ASSOC. FOR THE ADVANCEMENT OF SCI., NEW CAREER PATHS FOR STUDENTS WITH DISABILITIES 9 (2002), available at <http://ehrweb.aaas.org/PDF/Disabil.pdf>.
  26. See *supra* notes 15–20 and accompanying text.

individuals with disabilities seeking the use of non-service animals.<sup>27</sup> It is also misunderstood, if not marginalized. Indeed, one of the leading legal articles on the use of service animals is entitled, "When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century," which reflects the apparent ridiculousness of the federal law permitting a pig to join an individual with a disability on a plane.<sup>28</sup>

As noted above, the proposed regulations were promulgated in 2008. Therefore and unsurprisingly, President Barack Obama's subsequently empowered administration deferred publication of the proposed regulations in order that it may have an opportunity to review them prior to publication.<sup>29</sup> It is anticipated that this Article may help guide the administration's considerations regarding whether to approve the existing proposed regulations, or whether alternatively it should develop a different, more protective set of Title II rules with respect to the use of animals by individuals with disabilities.

### *C. Preliminary Considerations*

Two cautionary notes are in order. First, this Article is limited in scope. There are a number of complex and interrelated issues regarding the use of animals by post-secondary students with disabilities that necessarily present themselves and are worthy of serious consideration, such as vaccination requirements. This Article addresses only the threshold question of whether the universe of animals that may be used by individuals with disabilities in postsecondary institutions under Title II and Section 504 should be restricted to service animals or, alternatively, should encompass non-service animals. More detailed policies, such as leashing or vaccination requirements, are second-order inquiries that are beyond the purview of this Article and will require more definitive resolution elsewhere.

Second, ethical considerations urge me to disclose that I served as an attorney at OCR during the time in which the internal guidance in question was under development and I worked specifically on its

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27. See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 71 (2005) ("A growing number of people claim that their companion animals act as 'emotional support' animals.").

28. See Susan D. Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 BARRY L. REV. 39, 39-40 (2002).

29. See Proposed ADA Regulations Withdrawn from OMB Review, available at <http://www.ada.gov/ADAREgswithdraw09.htm> ("President's Chief of Staff direct[ed] the Executive Branch agencies to defer publication of any new regulations until the rules are reviewed and approved by officials appointed by President Obama.")

preparation.<sup>30</sup> Many of the concerns that I raise here in this Article regarding the legal propriety of the guidance were explicitly raised with superiors. Remonstrating with the senior staff proved unsuccessful. One staff member appreciated my objections, but informed me that the guidance would be useful in starting a dialogue between federal agencies on the proper formal policies that OCR should issue on the subject. Now, having departed from OCR in 2007 and obtained the guidance document in question as a regular citizen by way of the Freedom of Information Act,<sup>31</sup> I write this Article in the same spirit, to enrich the existing conversation about the use of animals by individuals with disabilities in the postsecondary context.

## II. THE OCR APPROACH: IMPORTING TITLE III SERVICE ANIMAL STANDARDS INTO TITLE II AND SECTION 504

### A. *Relevant Legal Provisions*

Section 504 prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance, including educational programs or activities.<sup>32</sup> The statute generally provides that, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

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30. As a result, I am intimately aware of the work that several staff members put into the guidance document. The purpose of this Article is not to criticize the agency or belittle the efforts of its employees. It is to advance our legal understanding of this emerging and important area of civil rights and education law so as to ensure that individuals with disabilities are receiving the maximum protection afforded to them under the law.

31. See E-mail from author to OCR Customer Service Team (Oct. 7, 2007, 16:44 MST) (on file with author) (FOIA request); E-mail from author to OCR Customer Service Team (Dec. 6, 2007, 02:36 MST) (on file with author) (follow-up); Letter from Maria-Teresa Cueva, FOIA Public Liaison, U.S. Dep’t of Educ., to author (Feb. 28, 2008) (on file with author) (FOIA response).

32. See 42 U.S.C. § 12131(1)(B) (2000) (applying Title II to all public colleges as instrumentalities of the state); Section 504 applies to all operations of a recipient institution if any part receives federal financial assistance. 29 U.S.C. § 794(a)–(b)(2)(A) (2000). Section 504’s protections are institution-wide, not program-specific. See *Grove City Coll. v. Bell*, 465 U.S. 555, 574–75 (1984) (holding that section 504 reaches only programs that received federal financial assistance), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).



Federal financial assistance . . . .”<sup>33</sup> Similarly, the Section 504 implementing regulation provides that “[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”<sup>34</sup>

Title II was enacted to extend the substantive protections of Section 504 to all public entities, including public colleges and universities, regardless of whether they receive federal financial assistance.<sup>35</sup> According to the Title II statute, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>36</sup> The Title II implementing regulation likewise states that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”<sup>37</sup> The regulations also require public entities to “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.”<sup>38</sup> Title II is considered to be materially identical to Section 504—their essential differences concern the entities covered by their provisions rather than the substantive protections they afford.<sup>39</sup>

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33. 29 U.S.C. § 794(a).

34. 34 C.F.R. § 104.4(a) (2008). Section 504 uses the term “handicapped,” however this Article will use the term “disabled,” as the terms are essentially synonymous. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

35. See U.S. DEP’T OF JUSTICE, TITLE II HIGHLIGHTS <http://www.ada.gov/t2hlt95.htm> (“Unlike Section 504 . . . , which only covers programs receiving Federal financial assistance, [T]itle II extends to all the activities of State and local governments whether or not they receive Federal funds.”).

36. 42 U.S.C. § 12132.

37. 28 C.F.R. § 35.130(a) (2008).

38. *Id.* § 35.130(b)(7).

39. See *Americans with Disabilities Act: Title II Technical Assistance Manual* (U.S. Dep’t of Justice, D.C.), 1993, available at <http://www.ada.gov/taman2.html> (“As mandated by the ADA, the requirements for public entities under Title II are consistent with and, in many areas, identical to the requirements of the Section 504 regulations.”).

Title III prohibits discrimination on the basis of disability by public accommodations, which include restaurants, hotels, and shops.<sup>40</sup> While it also covers private postsecondary institutions,<sup>41</sup> virtually all colleges and universities are subject to Section 504 and/or Title II.<sup>42</sup> In other words, as almost all colleges and universities receive some federal financial assistance or are public entities, the number of postsecondary institutions subject only to Title III is extremely limited.

Title III requires a public accommodation to reasonably modify its policies, practices, or procedures to avoid discrimination.<sup>43</sup> If the public accommodation can demonstrate, however, that a modification would fundamentally alter the nature of the goods, services, facilities,

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40. According to the Title III regulation:

Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories—(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor; (2) A restaurant, bar, or other establishment serving food or drink; (3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) An auditorium, convention center, lecture hall, or other place of public gathering; (5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (7) A terminal, depot, or other station used for specified public transportation; (8) A museum, library, gallery, or other place of public display or collection; (9) A park, zoo, amusement park, or other place of recreation; (10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

28 C.F.R. § 36.104 (emphasis omitted).

41. *Id.*

42. See Robert Perkins, *Provision of Services for Students with Visual Impairments: A Case Study*, 7 INFO. TECH. AND DISABILITIES ¶ 18 (Apr. 2001), <http://people.rit.edu/easi/itd/itdv07n2/perkins.htm>.

43. 28 C.F.R. § 36.302(a).

privileges, advantages, or accommodations it provides, the public accommodation is not required to make the modification.<sup>44</sup>

With respect to animals, the Section 504 statute contains no mention of animals and the regulations reference them only a single time in a limited fashion. Specifically, the regulations prohibit recipient postsecondary institutions from imposing rules, "such as the prohibition . . . of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity."<sup>45</sup> The Title II statute and its implementing regulations are completely silent as to animals.

In contrast, the Title III regulation has two provisions pertaining exclusively to animals. To wit, the Title III regulations require a public accommodation to "modify [its] policies, practices, or procedures to permit the use of a *service animal* by an individual with a disability."<sup>46</sup> A public accommodation, however, is not required "to supervise or care for a *service animal*."<sup>47</sup> Emphases on the term *service animal* have been added to highlight that Title III requires public accommodations to modify its policies, practices, or procedures only for certain animals, service animals, and not all animals. Title III defines a service animal as:

any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.<sup>48</sup>

Individual training is the one feature that helps distinguish between the service animals protected by Title III and other animals that fall beyond its reach.<sup>49</sup> For example, a federal district court noted that "[t]here must . . . be something—evidence of individual training—to set the service animal apart from the ordinary pet."<sup>50</sup>

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44. See *id.* § 36.303(f).

45. 34 C.F.R. § 104.44(b).

46. 28 C.F.R. § 36.302(c)(1) (emphasis added).

47. *Id.* § 36.302(c)(2) (emphasis added).

48. *Id.* § 36.104.

49. See Huss, *supra* note 27, at 75 ("The only requirements in the federal regulations for classification as a service animal are that the animal (1) be individually trained, and (2) work for the benefit of a disabled individual.").

50. *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003) (citations omitted).

### B. *The OCR Guidance*

In July of 2005, OCR received complaints challenging the service animal usage policies of over fifty postsecondary institutions throughout the country.<sup>51</sup> According to an internal OCR communication, “[t]he complainant alleged that information gleaned from the websites of postsecondary institutions established that these institutions’ policies and practices regarding service animals violated Section 504 and Title II . . . .”<sup>52</sup> OCR therefore developed an “internal case processing tool . . . to aid in the analysis and resolution of the July 2005 service animal complaints.”<sup>53</sup> In December of 2006, the guidance was provided to the OCR enforcement offices, which were charged with the responsibility of applying the guidance to the complaints.<sup>54</sup>

According to the guidance, a postsecondary institution subject to Section 504 and/or Title II “must make reasonable modifications to [its] policy to allow use of [a] *service animal*, unless the modification requires a fundamental alteration or undue burden, or if the animal poses a direct threat to the health or safety of other individuals.”<sup>55</sup> In other words, the guidance requires a postsecondary institution to modify its policy for the use of a service animal only and not any other type of animal. In explaining this conclusion, the guidance acknowledges that “Section 504 and Title II regulations do not specifically define the term ‘service animal[,]’” but goes on to note that this definition is supplied by the Title III regulation at 28 C.F.R. § 36.104.<sup>56</sup> In elaborating on service animals, the guidance also refers to the relationship between the service animal and the individual with a disability—a service animal must “affirmatively . . . ameliorat[e] the effects of the [individual’s] disability,” be “peculiarly suited to ameliorate the unique problems of the specific individual with a disability,” and “actually aid in the daily functions of an individual with a disability.”<sup>57</sup>

In perhaps a passing reference to non-service animals, the guidance states in a footnote that it “focuses primarily on the application of

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51. Battle E-mail, *supra* note 14.

52. *Id.*

53. *Id.*

54. *See id.*; E-mail from Sandra Battle, OCR, to OCR Office Directors (Jan. 26, 2007, 19:17 EST) (on file with author) (explaining that the cases are being returned “to the field offices for processing and resolution in accord with the approved internal tool”).

55. OCR Guidance, *supra* note 15, at 1 (emphasis added).

56. *Id.* at 3. This definition is provided in Part II.A., *supra*.

57. OCR Guidance, *supra* note 15, at 4 (internal quotes and citations omitted).

Section 504 and Title II principles to postsecondary school policies that restrict the presence of service animals. A postsecondary institution is free, however, to provide more expansive access to individuals with disabilities who use service animals.”<sup>58</sup> The cover letter to the guidance states explicitly that the “[internal case processing] tool is limited to service animals as defined by Title III . . . and does not address ‘comfort animals,’ a category of animals that may provide some benefit to individuals with disabilities but have not been trained to do work or perform tasks.”<sup>59</sup> The cover letter further notes that OCR is “aware of the lack of clarity regarding ‘comfort animals’ in case law and the policy of other agencies.”<sup>60</sup>

However, the OCR guidance devotes only two paragraphs to discussing the definition and characteristics of service animals in a document that spans twenty-four dense, footnote-ridden pages.<sup>61</sup> The rest of the document addresses other broad issues, such as a postsecondary institution’s right not to accommodate a service animal that fundamentally alters the institution’s programs or activities<sup>62</sup> or that poses a direct threat to the health and safety of others,<sup>63</sup> and more intricate matters, such as the vaccination requirements of a service animal used on campus.<sup>64</sup> The notion that Section 504 and Title II provide protection to service animals is thus an afterthought, worthy only of cursory (and incomplete) consideration.

Of relevance, the guidance permits a postsecondary institution to require an individual with a disability requesting the use of a service animal to furnish documentation regarding the individual’s disability, the functions performed by the animal, and the nexus between the disability and the functions.<sup>65</sup> Certain documentation may not be required, however, where the disability or the functions of the service animal are obvious.<sup>66</sup> Moreover, the extensiveness of this interaction is flexible—for example it may be brief where the individual’s

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58. *Id.* at 8 n.32.

59. Battle E-mail, *supra* note 14.

60. *Id.*

61. See OCR Guidance, *supra* note 15, at 3–4.

62. See *id.* at 11 (“If use or presence of an animal would fundamentally alter a program, then the institution is not required to allow the animal.”).

63. See *id.* at 12 (“Modification need not be provided if the service animal poses a direct threat to the health or safety of others.”).

64. See *id.* at 19. Vaccination requirements mandated by state and local laws are permissible “[a]s long as these laws do not have the effect of denying or limiting the access of a qualified individual with a disability’s access to education programs or activities.” *Id.*

65. *Id.* at 7.

66. *Id.*

disability or the animal's function is obvious, and it may depend on the "scope and duration" of the individual with a disability's requested use of the animal.<sup>67</sup>

### C. *Proposed Amendments to the Title II Regulations*

While the OCR guidance adopts the Title III service animal standards for Section 504 and Title II without any obvious connection between the former and the latter, the DOJ's proposed regulations would provide a legal bridge that firmly binds Title III to Title II. In other words, the proposed regulations would (albeit after the fact) provide some legal basis for OCR's Title II guidance.

The most relevant proposed regulation would be to make explicit that entities subject to Title II are legally obligated to only protect service animals as defined by Title III: "Title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary to avoid discrimination . . . ."<sup>68</sup> In other words, the proposed regulations expressly place the definition of a service animal in Title II as well.<sup>69</sup>

The amendments proposed to revise the definition of a service animal are applicable to Title II and Title III. Under this proposal, a service animal would mean:

any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term *service animal* includes individually trained animals that do work or perform tasks for the benefit of individuals with

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67. *Id.*

68. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,477 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

69. *See id.* ("[DOJ] is proposing to add to the Title II regulation the same definition of 'service animal' that it will propose for the Title III regulation.").

disabilities, including psychiatric, cognitive, and mental disabilities.<sup>70</sup>

The modified (and more extensive) definition of a service animal contains some important differences. For example, currently a service animal can be of any species.<sup>71</sup> But DOJ notes that “[d]ue to the proliferation of animal types that have been used as ‘service animals,’ including wild animals, [DOJ] believes that this area needs established parameters.”<sup>72</sup> As a result, the amended regulations would require service animals to be “domestic” animals and conversely would eliminate certain “wild” species from the ambit of service animals even if they otherwise satisfy the elements of the definition.<sup>73</sup> Those animals “include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents.”<sup>74</sup>

The revised definition also rejects the mistaken view that the animal of “any person with a psychiatric condition” that “provide[s] comfort to him or her” is per se covered by Title II.<sup>75</sup> Instead, DOJ notes that “psychiatric service animals that are trained to do work or perform a task (e.g., reminding its owner to take medicine) for persons whose disability is covered by the [Americans with Disabilities Act (ADA)] are protected by the Department’s present regulatory approach.”<sup>76</sup> The regulations thus seem to emphasize two notions—individuals with psychiatric disabilities can use a cognizable service animal,<sup>77</sup> but the service animal must be trained to affirmatively do something for the benefit of the individual with a

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70. *Id.* at 34,503.

71. *See* 28 C.F.R. § 36.104 (2008) (stating that the term service animal presently means “any guide dog, signal dog, or other animal” and is not qualified by type of animal).

72. Nondiscrimination on the Basis of Disabilities in State and Local Government Services, 73 Fed. Reg. at 34,472.

73. *See id.* at 34,503.

74. *Id.*

75. *Id.* at 34,473.

76. *Id.* (rejecting the notion that requiring service animals to be individually trained to do work or carry out tasks excludes all persons with mental disabilities from having service animals).

77. *See id.* (“[DOJ] wishes to underscore that the exclusion of emotional support animals from [Title II and Title III] coverage does not mean that persons with psychiatric, cognitive, or mental disabilities cannot use service animals. . . . [T]he term service animal includes individually trained animals that *do work or perform tasks* for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities.”) (emphasis added).

disability.<sup>78</sup> That is, an animal that only provides comfort with its presence is insufficient to qualify as a service animal. Accordingly, the proposed regulations explicitly exclude such animals from what may be considered a service animal: “Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.”<sup>79</sup>

In justifying the principle that only service animals individually trained to do something for an individual with a psychiatric disability are recognized by Title II, DOJ notes that Title II and Title III are unique contexts and that different settings subject to other federal pronouncements may cover non-service animals, including emotional support animals:

[DOJ’s] rule is based on the assumption that the Title II and Title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the Title II and Title III regulations, particularly in the context of residential settings and employment where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.<sup>80</sup>

Responding to public comments, DOJ notes that it would not use the term “assistance animal” instead of “service animal.”<sup>81</sup> DOJ states that the term “assistance animal . . . is used to denote a broader

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78. See *id.* (“Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects.”) (emphasis added). For example, psychiatric service animals may be trained to do the following tasks: “reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.” *Id.* “The difference between an emotional support animal and a psychiatric service animal is the service that is provided, *i.e.*, the actual work or task performed by the service animal.” *Id.* at 34,479. The “crux” of the service animal definition is “individual training to do work or perform tasks . . .” *Id.* at 34,478.

79. *Id.* at 34,473, 34,503.

80. *Id.* at 34,473.

81. See *id.* at 34,479.



category of animals than is covered by the ADA. [DOJ] believes that changing the term used under the ADA would create confusion . . . .”<sup>82</sup> The proposed regulations then cite to the use of assistance animal by the Department of Housing and Urban Development’s (HUD’s) policies under the Fair Housing Act (FHA), which define an assistance animal as “animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or *animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability.*”<sup>83</sup> The italicized portion of this definition clearly shows that, according to HUD, the universe of animals that may be used by covered entities is more extensive than that acknowledged by DOJ. With the latter’s emphasis on individual training of affirmative work or tasks, animals that simply provide emotional support are not part of DOJ’s service animal definition.

The proposed regulations also decline the invitation of certain advocacy groups to specify the type of individual training that may be sufficient for Title II purposes or to require certification in order for an animal to be deemed individually trained.<sup>84</sup>

The proposed regulations also address the initial interaction between the individual with a disability and the postsecondary institution—that is, how a postsecondary institution may approach an individual with a disability who may want to use a service animal. The proposed regulations contain a specific section, entitled “inquiries,” on this very issue.<sup>85</sup> It provides that “[a] public entity shall not ask about the nature or extent of a person’s disability.”<sup>86</sup> A public entity can, however, “determine whether an animal qualifies as a service animal. For example, a public entity may ask: If the animal is required because of a disability; and what work or task the animal has been trained to perform.”<sup>87</sup> Importantly, a postsecondary

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82. *Id.*

83. U.S. DEP’T OF HOUS. AND URBAN DEV., HUD OCCUPANCY HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, GLOSSARY 4 (2004), *available at* <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/index.cfm> [hereinafter HUD HANDBOOK].

84. *See* 73 Fed. Reg. at 34,473 (“The [DOJ] has always required that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process. While some advocacy groups have urged the Department to modify its position, the Department does not believe that such a modification would serve the array of individuals with disabilities who use service animals.”).

85. *See id.* at 34, 504.

86. *Id.*

87. *Id.*

institution is not permitted to “require documentation, such as proof that the animal has been certified or licensed as a service animal.”<sup>88</sup>

This prohibition mimics the Title III public accommodations setting in which documentation cannot be asked of an individual with a disability in part because it is unlikely that an individual with a disability would be carrying such information when he goes to any restaurant, shop, or movie theater.<sup>89</sup>

It also may be contrasted with the OCR guidance, which enables a postsecondary institution to request documentation on the individual’s disability, the services provided by the animal (if they are not obvious), and the nexus between the two.<sup>90</sup> The proposed Title II regulations would scrap this difference between the OCR’s understanding of Section 504 and Title II and the actual Title II regulations.

The proposed regulations also address other aspects of the service animal requirements for public entities, such as when a public entity may refuse to allow a service animal.<sup>91</sup> These additional aspects of the proposed regulations will be discussed, as appropriate, in Part III below.

### III. AN ALTERNATIVE FRAMEWORK

That the proposed regulations have made explicit OCR’s use of the Title III service animal standards does not mean that the Title III regime is legally sound or practically suited to Title II settings, particularly postsecondary institutions. This part of the Article will argue that Title III does not provide the legally compelling standards for use of animals by individuals with disabilities in the postsecondary environment. It also offers an alternative framework that will be shown to be more consonant with the Title II statute and existing regulations, and with the practical realities associated with individuals with disabilities in postsecondary institutions.

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88. *Id.*

89. See U.S. Dep’t of Justice, Commonly Asked Questions about Service Animals in Places of Business, <http://www.ada.gov/gasrvc.htm> (last visited Mar. 7, 2009) (“[A]n individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability.”).

90. OCR Guidance, *supra* note 15, at 7.

91. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. at 34,472.

*A. Other Legal Statements*

The OCR guidance and the DOJ proposed regulations are obviously not the only documents addressing the subject of whether Title II embraces service animals only or a broader set of animals. These two federal entities have not been the only authorities to speak on the subject. Therefore, before addressing the OCR guidance and proposed amendments to the Title II regulations, it would be helpful to very briefly note how the question of the scope of Title II's protections with respect to animals has been answered by other sources.

The OCR/DOJ view that Title II and Section 504 protections only extend to service animals, as defined by Title III, finds support in various circles. For example, at least two federal courts, including one circuit court, have upheld the bright-line view separating covered service animals from unprotected non-service animals.<sup>92</sup> Similarly, a federal district court, noted under the FHA that:

Plaintiffs' counsel suggested canines (as a species) possess the ability to give unconditional love, which simply makes people feel better. Although this may well be true, counsel's reasoning permits no identifiable stopping point: every person with a handicap or illness that caused or brought about feelings of depression, anxiety or low self esteem would be entitled to the dog of their choice, without regard to individual training or ability . . . . The test would devolve from "individually trained to do work or perform tasks" to "of some comfort." The FHA—a sweeping enactment—is not quite so broad.<sup>93</sup>

Similarly, a state court ruled that "[p]alliative care and the ordinary comfort of a pet are not sufficient to justify a request for a service animal . . . ."<sup>94</sup> These judicial pronouncements yield three principles: first, the use of an ordinary pet does not deserve the protection of federal discrimination laws; second, there has to be some logical way to distinguish between a protected animal and an ordinary pet; and third, that "stopping point" is the requirements of individual training

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92. See *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 839 (9th Cir. 2004); *Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973, 980 (E.D. Tenn. 2003).

93. *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1257 n.25 (2003) (internal citations omitted).

94. *In re Kenna Homes Coop.*, 557 S.E.2d 787, 800 (W. Va. 2001).

and doing something affirmatively for the individual with a disability.<sup>95</sup>

DOJ's current position in the proposed regulations is also consistent with previous statements made on the subject. For example, in a complaint asserting discrimination under Title II, DOJ indicated that the statute only reached service animals, further defining a service animal as "an animal [that] includes guide dogs, signal dogs, and any other animal individually trained to do work or perform tasks for the benefit of an individual with a disability."<sup>96</sup>

Moreover, as part of an informal call-in, question-and-answer session, the then-Chief of DOJ's Disability Rights Section rejected any notion that non-service animals are afforded rights under Title II—"the bottom line there is if it is a pet or companion animal they are not protected . . . ."<sup>97</sup> "[U]nder Title II and III," he continued, "those animals are not given the protection that service animals are given . . . ."<sup>98</sup> Acknowledging that other federal agencies, such as HUD, recognize non-service animals under their governing statutes, the former chief stated bluntly, "[w]e do not do that under the ADA."<sup>99</sup> In fact, he noted, this firm rule has been criticized but it also enjoys the support of some disability advocacy groups that wish to see legitimate service animal use receive protection and the simultaneously curbing of any temptation by those who are not qualified individuals with disabilities to abuse the system—"a lot of the blind groups and the canines companions for independence and others are very much interested in having us follow this line, and even maybe take a harder line because of the backlash that is occurring against the use of service animals by non-traditional users . . . ."<sup>100</sup>

The proposition that only service animals are permissible under federal discrimination law is not limited to the four corners of the OCR guidance and the proposed amendments—non-executive

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95. See Huss, *supra* note 27, at 74–75 ("The only requirements in the federal regulations for classification as a service animal are that the animal (1) be individually trained, and (2) work for the benefit of a disabled individual.").

96. Settlement Agreement, United States and the County of Newaygo, Mich., U.S. Dep't of Justice, Complaint No. 204-38-25, *available at* [http://www.usdoj.gov/crt/foia/michnewaygo\\_mi.php](http://www.usdoj.gov/crt/foia/michnewaygo_mi.php).

97. Audio file: Ask the Department of Justice, held by Great Lakes ADA & Accessible IT Center (Feb. 15, 2005), <http://www.ada-audio.org/Archives/?type=transcript&id=2005-02-15>.

98. *Id.*

99. *Id.*

100. *Id.*

agency and other DOJ statements also hold this perspective in regard to disability rights and animal usage.<sup>101</sup> But this proposition is not universally shared.

With respect to federal rulings, a U.S. Court of Appeals overturned an order granting summary judgment for a housing authority in a suit brought under Section 504 by a mentally impaired individual requesting the use of a companion dog.<sup>102</sup> The court noted, "nothing in the record rebuts the reasonable inference that the [housing authority] could easily make a limited exception for that narrow group of persons who are handicapped and whose handicap requires (as has been stipulated) the companionship of a dog."<sup>103</sup> The court remanded the case for further proceedings, stating that additional factual development would be required to resolve the issues at hand.<sup>104</sup>

Importantly, whether the defendant was obligated to accommodate the use of the dog was a question of fact precluding summary judgment; it could not be adjudicated as a matter of law.<sup>105</sup> The OCR approach and the Title II amendments would, by contrast, categorically rule out such companion dogs irrespective of the actual benefits they provide to an individual with a mental disability, which may be revealed in the course of some fact development process.<sup>106</sup>

Other courts have similarly been unconvinced that there is no obligation under federal law to allow for the use of a non-service animal. For example, a district court observed that "[e]ven if plaintiff's animals do not qualify as service animals, defendants have not established that there is no duty to reasonably accommodate non-service animals."<sup>107</sup> In addition, a state court noted that "[r]esearch has shown that a companion pet can in some cases materially improve the quality of life of such persons" and that "[n]othing in this opinion would bar the balanced consideration of a well-documented request for approval of a companion pet in such a case."<sup>108</sup>

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101. *See id.*

102. *See Majors v. Hous. Auth. of DeKalb, Ga.*, 652 F.2d 454, 455 (5th Cir. 1981).

103. *Id.* at 458 (alteration in original) (emphasis omitted).

104. *See id.* ("[T]he case is remanded for a trial on the questions of whether [the plaintiff] suffers from a handicap, whether the handicap requires the companionship of the dog and what, if any, reasonable accommodations can be made.").

105. *See id.*

106. *See supra* Part II.B.

107. *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133, 1136 (N.D. Cal. 2000) (Fair Housing Act action).

108. *In re Kenna Homes Coop.*, 557 S.E.2d 787, 800 n.15 (W. Va. 2001) (Fair Housing Act action).

As noted above, HUD requires entities subject to the FHA to accommodate animals that “work, provide assistance, or perform tasks for the benefit of a person with a disability” as well as “animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability.”<sup>109</sup> The agency has ensured, through its administrative judgments, that housing authorities accommodate emotional support animals.<sup>110</sup> Consistent with HUD’s determinations, DOJ has held that “emotional support animals” are protected by the FHA.<sup>111</sup> Similarly, the Department of Transportation (DOT) promulgated the policy that animals protected by the Air Carrier Access Act include an animal that has been “individually trained” and “emotional support animals” that may not have such training.<sup>112</sup>

From this discussion it is evident that the Title III definition of a service animal is not universally applied—federal courts and other federal agencies have embraced a broader concept of the type of animals that an individual with a disability may need to use. These animals may be ones that provide some emotional assistance to individuals with mental disabilities in addition to animals that affirmatively perform functions for an individual with a disability.

### *B. The Problematic Nature of the OCR Approach*

There are several difficulties with the proposition that postsecondary institutions subject to Title II and Section 504 do not have to accommodate animals other than service animals, as defined by Title III. At the outset, it appears that both OCR and DOJ have committed the mistake of using Title III as the starting point for their conclusions rather than looking specifically at Title II and Section 504 themselves. While Title II and Section 504 are largely silent as to animals and thus it is expedient to borrow Title III’s standards to fill that void, Title II and Section 504 have principles that should be

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109. See HUD HANDBOOK, *supra* note 83, at 4.

110. See, e.g., HUD v. Bayberry Condo. Ass’n, No. 02-00-0504-8, 2002 WL 475240 (Mar. 21, 2002) (granting “the Complainant’s request for a reasonable accommodation that includes [her] being allowed to keep her emotional support pet . . .”).

111. See Complaint of the United States, United States v. Kenna Homes Coop., No. 2:04-0783 (S.D. W. Va. 2004), available at <http://www.usdoj.gov/crt/housing/documents/kennacomp.php>; Consent Decree & Dismissal Order, United States v. Kenna Homes Coop., No. 2:04-0783 (S.D. W. Va. 2004), available at <http://www.usdoj.gov/crt/housing/documents/Kennasettle.php>.

112. Policy Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24,874, 24,875 (May 9, 2003) (to be codified at 14 C.F.R. pt. 382) (“[A]n animal used for emotional support need not have specific training for that function.”).

the proper guide for rules on the use of animals by individuals with disabilities.

In particular, Title II and Section 504 have broad mandates to protect individuals with disabilities. The ADA, for example, was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ."<sup>113</sup> The statute specifically notes that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices . . . ."<sup>114</sup>

Title II and Section 504 were passed into law in order to combat such discrimination. Accordingly, Title II contains a general prohibition against discrimination on the basis of disability: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>115</sup> The Title II regulations similarly provide that "[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."<sup>116</sup> Section 504 also has such general prohibitions: — "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"<sup>117</sup> and "[n]o qualified handicapped person shall . . . on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."<sup>118</sup>

The general prohibitions against discrimination remain the postsecondary institutions primary and overarching obligations.

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113. 42 U.S.C. § 12101(b)(1) (2000).

114. *Id.* § 12101(a)(5).

115. *Id.* § 12132.

116. 28 C.F.R. § 35.130(a) (2008).

117. 29 U.S.C. § 794(a) (2006).

118. 34 C.F.R. § 104.4(a); *see Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

They do not give any suggestion that the universe of animals that may be protected is statutorily limited.

Relatedly, the universe of animals that are able to provide benefits to an individual with a disability are not restricted to service animals.<sup>119</sup> Non-service animals are also able to provide assistance to individual's with disabilities.<sup>120</sup> A mental health law center noted, for example, that "[e]motional support animals have been proven *extremely effective* at ameliorating the symptoms of these disabilities, such as depression and post traumatic stress disorder, by providing therapeutic nurture and support."<sup>121</sup> A report from a law school's animal legal center recently noted that:

In recent years, medical professionals researching human-animal relationships have discovered *profound benefits* that animals can also provide for persons with mental disabilities. According to the American Psychiatric Association, psychiatrists and psychotherapists now use animals to treat a patient's mental illness when other remedies have failed. For example, when provided with an emotional support animal, depressed patients show an increased socialization and decreased depression, children with severe attention deficit hyperactivity disorder and conduct disorder show decreased aggressive behavior and improved attention, and patients with autism or developmental disabilities have an increased socialization and attention span. As one psychiatrist aptly stated: "Psychiatry has become biologically based, less attuned to social environment. This is unfortunate because there is so much evidence that social support is a critical variable in the recovery from many serious biological disorders including psychiatric illnesses."<sup>122</sup>

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119. See The Bazelon Center for Mental Health Law, Fair Housing Information Sheet #6 Right to Emotional Support Animals in "No Pet" Housing, <http://www.bazelon.org/issues/housing/infosheets/fhinfosheet6.html> (last visited Mar. 7, 2009).

120. See *id.*

121. *Id.* (emphasis added).

122. KATE A. BREWER, EMOTIONAL SUPPORT ANIMALS EXCEPTED FROM "NO PETS" LEASE PROVISIONS UNDER FEDERAL LAW (2005), *available at* <http://www.animallaw.info/articles/dduspetsandhousinglaws.htm#fn1> (quoting Liz Lipton, *Some Patients Petting Their Way to Improved Mental Health*, PSYCHIATRIC



For example, *The New York Times* profiled a girl who suffers from post traumatic stress disorder stemming from the September 11, 2001, terrorist attacks and uses an emotional support animal as part of her regimen to cope.<sup>123</sup> Her building enforced a no-pets policy, forbidding the use of the animal.<sup>124</sup> Therapists noted that “the animal does not simply comfort the child but functions as a surrogate to help the child express difficult emotions. The animal may also help the child express certain needs.”<sup>125</sup> Indeed, the girl’s father “cited the time a fuse blew in a building they occupied . . . For [the child], the power failure apparently set off memories of the attack. But this time she petted the dog, saying, ‘Everything’s O.K., the building is not going to fall.’”<sup>126</sup>

The article, aptly entitled, “A Frightened Child Versus a Rule,” concludes with a pointed comment from a tenant in the building: “one would wonder why the [building’s] board won’t allow this as an exception, considering they’ve all been affected by 9/11. What’s more important, stringent rules in a building or protecting and taking care of one another?”<sup>127</sup> One can imagine a parent of a student posing the same sort of question to OCR and DOJ.

Other examples are just as telling. In complaining about an airline’s refusal to permit the use of a non-service animal, a person writes:

I am an Afghanistan/Iraq war veteran with diagnosed bipolar and post traumatic stress syndrome. My dog is an emotional support dog [that] not only helps me with flying but from reoccurring [sic] night terrors and panic attacks. He has, on one very serious occasion, saved my life. This dog is NOT A PET, he is my life line.<sup>128</sup>

It is therefore unsurprising that the Job Accommodation Network (a service of the Office of Disability Employment Policy, U.S. Department of Labor) recommends that, for service members and

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NEWS, Feb. 2, 2001, at 17, available at <http://pn.psychiatryonline.org/cgi/content/full/36/3/17> (emphasis added).

123. Seth Kugel, *A Frightened Child Versus a Rule*, N.Y. TIMES, Mar. 2, 2003, at ¶ 14.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Posting of 36 Monsters to Psychiatric Service Dogs & Emotional Support Animals, NeuroTalk, <http://neurotalk.psychcentral.com> (under “General” find “Our Pets;” then select “Sub-Forums: Service and Support Animals;” select “Psychiatric Service Dogs & Emotional Support Animals”) (March 25, 2008, 22:18 EST).

veterans with post traumatic stress disorder, the use of a “support animal” be allowed.<sup>129</sup>

OCR and DOJ do not require postsecondary institutions to accommodate an individual with a disability’s request to use an emotional support animal, despite the medically supported, nationally reported, and Department of Labor view that an emotional support animal can ameliorate the effects of an individual with a disability.<sup>130</sup> OCR and DOJ have thus placed a greater emphasis on compliance with an existing definition of a service animal rather than the benefits that an animal can provide to an individual with a disability.<sup>131</sup> The OCR guidance and DOJ’s proposed regulations seem to have it backwards—to the detriment of individuals with disabilities who may be able to participate equally in a school’s program or activity because he or she receives the assistance of a non-service animal.

As the OCR guidance itself states, a student with a disability and the postsecondary institution must engage in an “interactive process” in order for the student to be able to use a service animal.<sup>132</sup> That process may include, for example, the student identifying himself or herself as an individual with a disability and answering questions regarding the functions the animal performs.<sup>133</sup> Instead of allowing this process to play out and giving a student the opportunity to demonstrate that a non-service animal ameliorates his or her disability, OCR and DOJ have decided that these animals categorically are not entitled to protection under Title II and Section 504.<sup>134</sup> Instead of letting the chips fall where they may in the interactive process, the process in effect does not exist for students with disabilities in need of a non-service animal.

As the law school report indicates, the medical understanding of the benefits an emotional support animal can provide to people with mental impairments is still growing.<sup>135</sup> Indeed, the cover letter to the OCR guidance acknowledges comfort animals “may provide some benefit to individuals with disabilities.”<sup>136</sup> Rather than deferring to

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129. Laura Artman & Kendra Duckworth, *Accommodating Service Members and Veterans with PTSD*, JOB ACCOMMODATION NETWORK, <http://www.jan.wvu.edu/corner/vol03iss02.htm> (last visited Jan. 21, 2009).

130. See *supra* notes 74–78 and accompanying text.

131. See *supra* notes 60, 67–78 and accompanying text.

132. See OCR Guidance, *supra* note 15, at 7–8.

133. See *id.* at 7.

134. See Battle E-mail, *supra* note 14.

135. BREWER, *supra* note 122.

136. Battle E-mail, *supra* note 14.

this area of psychiatry, OCR and DOJ have already held that only service animals are protected by Title II and Section 504.<sup>137</sup> In short, their legal judgments have sealed the fate of individuals with disabilities irrespective of any medical judgments, advancements, or developments. As a general matter, it seems imprudent for legal policy to resolve an issue within the province of the medical community.

Even then, legal judgments arrived at by OCR and DOJ are far from established. As noted above, federal courts and other agencies have found that federal law outlawing discrimination on the basis of disability may require defendants to accommodate non-service animals.<sup>138</sup>

To be sure, those pronouncements were made in different settings, such as housing or air travel.<sup>139</sup> OCR and DOJ contend that the Title III standard is appropriate for the postsecondary institution.<sup>140</sup> This contention is misguided.

In describing the extent to which a public accommodation subject to Title III may ask for documentation from an individual with a disability, DOJ notes, "an individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability."<sup>141</sup> This statement indicates that the legal requirements for Title III are tied specifically to the nature of the public accommodations setting. In other words, context matters.

The question becomes whether the public accommodations generally understood to represent the Title III setting are akin to the postsecondary institutions covered by Title II and Section 504. It is unlikely for an individual with a disability to be carrying documentation while going to a place of public accommodation, including a restaurant or movie theater, precisely because of the transient and temporary nature of places of public accommodation. One can imagine an individual with a disability, walking down a city street after work, deciding to go into a store on a whim after noticing a "for sale" sign in the store's window. Or, similarly, an individual with a disability may run into a friend who then suggests that the

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137. *See id.*

138. *See supra* Part III.A.

139. *See supra* Part III.A (discussing the nature of those court and agency pronouncements).

140. *See* OCR Guidance, *supra* note 15, at 3–4.

141. U.S. Dep't of Justice, *supra* note 89.

individual with a disability join him or her for lunch. The Title III requirements are thus commensurate with these realities.<sup>142</sup>

In contrast, a student with a disability registering for classes may be admitted weeks or months before actually stepping foot on campus—his or her entry into the postsecondary setting is planned and protracted, rather than transient or temporary. One can imagine, for example, a student registering in July for August courses and thus having around a month to prepare any related documentation for the review of a postsecondary institution's disability services office. His or her decision to take courses and stay in a campus dorm is not a decision that may be made on a whim and thus it is not unlikely that he or she will not be able to carry documentation. The postsecondary institution and the Title III context are thus dissimilar. The attempt to transpose standards suited for public accommodations onto the postsecondary setting is thus inappropriate and inconsistent with the practical aspects of the two differing contexts.

The greater probability that individuals with disabilities will have documentation on their person when in the postsecondary setting is significant in light of non-service animals. Whereas service animals may perform tasks or functions that are obvious and that diminish the need for documentation on the part of the place of public accommodation, the benefits provided by a non-service animal, notably an emotional support animal whose very presence may assist an individual with a disability, may not be as obvious and thus the need for documentation may be more pressing. In short, the greater need for such documentation in the postsecondary setting is thus commensurate with the greater likelihood that individuals with disabilities will have such documentation. The OCR and DOJ understanding of the situation is such that only service animals are protected under Title II and Section 504—even though non-service animals may be needed by individuals with disabilities and even though those individuals are more likely to be able to meet the more demanding evidentiary burden of proving that the non-service animal

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142. *Id.* (“[D]ocumentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.”); ADA BUSINESS BRIEF: SERVICE ANIMALS, *supra* note 5 (“Businesses may ask if an animal is a service animal or ask what tasks the animal has been trained to perform, but cannot require special ID cards for the animal or ask about the person’s disability.”).

directly ameliorates a disability. This approach fails to honor the needs of individuals with disabilities or reflect practical realities.

It should be noted that this particular discussion focuses on students and employees with disabilities, who may be more likely to carry documentation because of their planned and prolonged encounters with a college or university. It is not intended, however, to apply to visitors to a college or university, who are similar to the individuals with disabilities that happen to go to a restaurant or other business. One may suggest that there is an incongruity in the critique of the OCR approach, namely that the OCR guidance and proposed Title II amendments are consistent for all individuals with disabilities in postsecondary institutions whereas my criticism of the OCR approach would entail one standard for students and employees and another for visitors—even though students and employees are more likely to prove a non-service animal can ameliorate their disabilities.

While it is true that this discussion would call for a bifurcated system wherein students and employees would be governed by one set of standards and employees another, it would be preferable to the OCR and DOJ approach in that it would provide more expansive protection against discrimination for students and employees, and would be more consistent with the broad mandate of the Title II and Section 504 statutes and regulations. Greater protection for some, based on the practical realities of the context, is a better outcome than less coverage for all simply for the sake of consistency. In any event, federal discrimination law already takes into account the different types of individuals in a statute or regulation.<sup>143</sup> For example, generally Subpart C of the Section 504 regulations pertains to applicants and recruits, Subpart D to students, and Subpart E to employees.<sup>144</sup>

In sum, the OCR guidance and DOJ's proposed amendments to the Title II regulations are problematic for several reasons. They (1) do not fulfill the broad mandate of the Title II and Section 504 regulations to eliminate discrimination on the basis of disability and to ensure equal access to a postsecondary institution's programs and activities, (2) do not recognize that individuals with disabilities may need emotional support animals in order to participate equally in a postsecondary institution's programs and activities, (3) value definitional purity and consistency over medical evidence regarding the value of non-service animals by clinging to the requirement of

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143. See 34 C.F.R. §§ 106.21, 106.31, 106.51 (2008) (prohibiting discrimination based on sex for applicants and recruits, students, and employees, respectively).

144. *Id.*

individual training, (4) do not take into account the nature of an individual with a disability's interaction with a postsecondary institution, which generally is planned and protracted, and (5) fail to comport with the practical realities of the context wherein an individual with a disability is more likely to have documentation and thus is able to show to the postsecondary institution that his or her emotional support animal ameliorates the effects of his or her disability.

If the OCR guidance and the DOJ's proposed Title II amendments have deficiencies, the question becomes what paradigm would be more faithful to the law and the needs of individuals with disabilities in the postsecondary setting.

### *C. The Spectrum Theory*

This section offers an alternative approach to the use of animals by individuals with disabilities in postsecondary institutions subject to Title II and/or Section 504. The starting point for any legal regime under Title II and Section 504 should be the comprehensive mandate of the statutes to eliminate disability-related discrimination and to thereby help ensure that individuals with disabilities are provided with an equal opportunity to participate in the programs or activities of a postsecondary institution.<sup>145</sup> The satisfaction of these dual, intermingled goals should remain the overarching and chief purpose of this alternative. This theory is also guided by the understanding that context matters—what works for Title III may not be appropriate for Title II/Section 504. As DOJ noted in proposing the amended Title II regulations: “The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as libraries or courtrooms.”<sup>146</sup> This is a principle that, regrettably, DOJ itself did not follow in fashioning the Title II amendments.

With respect to the universe of protected animals, a service animal, as understood by Title III, provides affirmative assistance to an individual with a disability, such as by alerting the disabled individual to an impending seizure or by opening doors.<sup>147</sup> There is little doubt that service animals should therefore be protected by Title II and Section 504. Animals that do not fit the Title III definition of a

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145. 42 U.S.C. § 12101(b)(1) (2000).

146. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,478 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

147. OCR Guidance, *supra* note 15, at 3.

service animal may also provide direct and significant benefits to an individual with a disability. For example, an animal whose very presence assists an individual with a mental disability, such as post traumatic stress disorder or severe depression, may enable that individual to speak, leave the house, and be in public space.<sup>148</sup> Accordingly, this theory will deviate from the OCR guidance and DOJ amended regulations and hold that a postsecondary institution governed by Title II and/or Section 504 must accommodate “any . . . animal individually trained to do work or perform tasks for the benefit of an individual with a disability,” or that otherwise ameliorates the effects of an individual with a disability.<sup>149</sup>

With respect to proving that an animal is entitled to protection under Title II or Section 504, the burden rests with the individual with a disability requesting its use. As to how this burden may be met, the first step is for an individual with a disability to approach the postsecondary institution in order to request the use of an animal. Next, the postsecondary institution may seek verbal assurances regarding the animal and the individual with a disability. As a general matter the institution “may request only information that is necessary to evaluate the disability-related need for the accommodation.”<sup>150</sup> But “[i]f a person’s disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information about the requester’s disability or the disability-related need for the accommodation.”<sup>151</sup>

In obtaining verbal assurances, a postsecondary institution cannot ask about the nature or extent of an individual’s disability.<sup>152</sup> Instead, an institution may initially ask whether the individual with a disability seeks to use a service animal. If so, consistent with service animal standards, a school “may ask if an animal is a service animal or ask what tasks [or functions] the animal has been trained to perform,”<sup>153</sup> how the animal performs those tasks or functions for the individual with a disability, and what the animal has been trained to

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148. See *supra* notes 106–13 and accompanying text.

149. 28 C.F.R. § 36.104 (2008).

150. Joint Statement of the Dep’t of Housing and Urban Dev. & the Dep’t of Justice, Reasonable Accommodations Under the Fair Housing Act (May 14, 2004), available at [http://www.usdoj.gov/crt/housing/joint\\_statement\\_ra.pdf](http://www.usdoj.gov/crt/housing/joint_statement_ra.pdf).

151. *Id.*

152. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,504 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

153. See ADA BUSINESS BRIEF: SERVICE ANIMALS, *supra* note 5.

do for the individual with a disability.<sup>154</sup> If such verbal assurances are insufficient to identify the animal as a service animal, the postsecondary institution may ask for, but may not demand, written documentation to substantiate the verbal assurances.<sup>155</sup> Such documentation again must be only that which is necessary to provide such substantiation.<sup>156</sup>

If the individual with a disability seeks to use an animal that is not a service animal, the postsecondary institution may obtain verbal assurances in a manner consistent with those above. Unlike with service animals, an institution may require documentation to substantiate the verbal assurances. The heightened showing confronted by individuals with disabilities attempting to use non-service animals should be contrasted with a minimal showing that would have to be made to use a service animal. This scheme consists of different evidentiary requirements, rather than the exclusion of non-service animals from the process as a whole.

With respect to the type of documentation that may be required by a postsecondary institution when an individual with a disability requests the use of a non-service animal, the Department of Transportation, which recognizes that emotional support animals may be permissibly used by passengers, notes that these written supporting materials may include:

documentation (i.e., not more than one year old) on letterhead from a mental health professional stating (1) that the passenger has a mental health-related disability; (2) that having the animal accompany the passenger is necessary to the passenger's mental health or treatment or to assist the passenger (with his or her disability); and (3) that the individual providing the assessment of the passenger is a

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154. Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24,874, 24,875 (May 9, 2003) (to be codified at 14 C.F.R. pt. 382).

155. *See id.* at 24,876 ("If a passenger cannot provide credible assurances that an animal has been individually trained or is able to perform some task or function to assist the passenger with his or her disability, the animal might not be a service animal. In this case, the airline personnel may require documentation . . . ."); *see also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. at 34,504 ("A public entity shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.").

156. Joint Statement of the Dep't of Housing & Urban Dev. & the Dep't of Justice, *supra* note 150.



licensed mental health professional and the passenger is under his or her professional care.<sup>157</sup>

A federal district court similarly noted that “the need for an [emotional support] animal [must] be documented by a statement from a licensed mental health professional indicating that the applicant has a mental or emotional disability, and that the designated animal would ameliorate the effects of the disability.”<sup>158</sup>

As this framework would mandate that postsecondary institutions accommodate the use of some non-service animals, the concern about potential abuse may arise, particularly providing “pets” federal protection. Requiring documentation would help ensure that animals that do not actually ameliorate an individual with a disability’s disability are not provided federal protection and conversely that “legitimate” animals may accompany individuals with disabilities on campus.<sup>159</sup> Again, the requirement that written documentation substantiate verbal assurances is appropriate for the postsecondary setting, where an individual with a disability is likely to have such documentation on his or her person.<sup>160</sup> A “pet” would be an animal that satisfies neither of the aforementioned interactions—a service animal by way of verbal assurances, or a non-service animal shown to be necessary to ameliorate the individual with a disability’s disability. Pets occupy the remainder of the universe of animals used by individuals with disabilities and all others.

In addition to abuse, some postsecondary institutions may be worried about a flood of requests from individuals with disabilities attempting to use non-service animals. In response, it may be helpful to remember a Supreme Court statement regarding a similar concern: the “contention that the task of assessing requests for modifications will amount to a substantial burden is overstated [and] misplaced, as nowhere in [the statute] does Congress limit the reasonable modification requirement only to requests that are easy to evaluate.”<sup>161</sup> On the same point, a federal district court noted that it

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157. Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. at 24,876.

158. *United States v. Kenna Homes Coop.*, No. 2:04-0783 (S.D. W. Va. 2004), *available at* <http://www.usdoj.gov/crt/housing/documents/kennasettle.php>.

159. *See* 68 Fed. Reg. at 24,876 (“The purpose of this provision is to prevent abuse by passengers that do not have a medical need for an emotional support animal and to ensure that passengers who have a legitimate need for emotional support animals are permitted to travel with their service animals on the aircraft.”).

160. U.S. Dep’t of Justice, *supra* note 89 (“[A]n individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability.”).

161. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 691 n.53 (2001).

“is not unsympathetic to defendants’ concerns regarding a flood of accommodation requests. However, the law imposes on defendants the obligation to consider each request individually and to grant requests that are reasonable. Defendants have no obligation to grant unreasonable requests.”<sup>162</sup> Those possessing these concerns should be reminded that it is the individual with a disability’s responsibility to not only come forward and request an accommodation, but also to meet the burden of showing that he or she is entitled to use an animal. Finally, as with compliance with any federal civil rights law, covered entities would be prudent to include training on the applicable laws, especially the rights and responsibilities of individuals with disabilities.<sup>163</sup> This would be advantageous not only to the individuals with disabilities who may be able to seamlessly traverse through the accommodation process, but also to schools attempting to minimize their exposure to potential legal challenges.

If an animal satisfies either the service animal or non-service animal standard, the animal must still abide by other policies that pertain to animal usage. The proposed Title II regulations explicitly import Title III’s fundamental alteration and direct threat exemptions, two other legal concepts that OCR also borrowed from Title III in developing its guidance.<sup>164</sup> According to the proposed regulations, a public postsecondary institution is not required to make a reasonable modification to allow for the use of a service animal where “the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>165</sup> For example, a service animal may be removed if it is out of control, or if the animal is not housebroken.<sup>166</sup> Moreover, “a person with a disability may not be entitled to be accompanied by his or her service animal [when] it has been determined that the animal poses a direct threat to the health or safety of others.”<sup>167</sup>

Similarly, under the guidance, a postsecondary institution need not permit the use of a service animal if the modification to the no-pets

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162. *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133, 1136–37 (2000).

163. *See, e.g., Dep’t of Hous. & Urban Dev. v. Dutra*, HUDALJ 09-93-1753-8 (Nov. 12, 1996) (agency directing a covered entity, in this case a housing authority, to “inform their agents and employees . . . as to the requirements” of the applicable federal law).

164. *See Nondiscrimination on the Basis of Disability in State and Local Government Services*, 73 Fed. Reg. 34,466, 34,476 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35) (“Direct threat is not defined in title II, but it is defined in . . . the current title III regulation . . .”).

165. *Id.* at 34,477.

166. *Id.* at 34,480.

167. *Id.* at 34,481.

policy “would constitute a fundamental alteration of the [school’s] program or activity being offered or impose an undue burden on the institution[.]”<sup>168</sup> For example, an institution may require “leashes or control devices” or “cleanliness and toileting” requirements provided that they do not have a discriminatory impact and an “institution may require individuals to comply with local ordinances and regulations requiring the animal to have current vaccinations or immunizations common for that type of animal, and to show proof of those vaccinations.”<sup>169</sup> Further, “[m]odification need not be provided if the service animal poses a direct threat to the health or safety of others.”<sup>170</sup>

These aspects of the proposed amendments and the regulations have been pointed out because there is no reason that a non-service animal, once in the door, cannot comply with these policies. If a non-service animal does not comply, it may be removed from the campus or denied usage just as a non-compliant service animal would be. There is no basis, however, by which to conclude that non-service animals are per se unable to satisfy these policies.

As with the process that determines whether or not an individual with a disability can show that the non-service animal is necessary, whether a non-service animal is able to act consistent with these policies, this theory argues that the chips shall fall where they may. How this theory differs from the OCR approach is that it does not categorically exclude non-service animals from that process even if a non-service animal may ameliorate a disability or may comply with policies in the same manner that a service animal can.

Imagining the practical effect of this theory is critical to understanding the limited effect of this more expansive reading of the rights of individuals with disabilities under Title II and Section 504. The process in which an individual with a disability may request an animal takes place as would any other request for an accommodation or modification. Once shown to be necessary, the use of a non-service animal would be indistinguishable from a service animal. A student in a class, for example, would not know if the animal used by the student next to him is a service animal under Title III or a non-service animal as recognized by Title II or Section 504. The legal paradigm covering the animal is irrelevant. Moreover, if the animal acts out, it may be ejected from the campus in the same way as a Title III service animal could—again, at that point the definition of the

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168. OCR Guidance, *supra* note 15, at 6.

169. *Id.* at 19–20.

170. *Id.* at 12.

animal is insignificant. The only differences between service animals and non-service animals have been created and externally imposed—but, as noted above, the service animal definition crafted by the administration does not reflect practical realities in the real world or afford comprehensive protection to individuals with disabilities, particularly individuals with mental disabilities.

Accordingly, it is recommended that a postsecondary institution adopt the alternative rules regarding the use of animals on campus:

Generally, an institution shall modify its policies, practices, or procedures to permit the use of an animal by an individual with a disability. It is the responsibility of the individual with a disability to request the use of an animal. Once the request has been made, the institution may seek to determine that the animal's use is necessary to ensure that the individual with a disability has an equal opportunity to participate in the institution's programs and activities. The institution may not seek more information than is necessary to make this determination. For example, if the disability or the functions provided by the animal are obvious, readily apparent, or otherwise known, information as to what is obvious or readily may not be sought.

If the information is not obvious, readily apparent, or otherwise known, the institution shall first seek to obtain verbal assurances from the individual with a disability. An institution may not, however, ask about the nature or extent of a person's disability. An institution shall ask whether the animal is a "service animal" as defined by Title III.

If the animal is a "service animal," the institution may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. The institution may ask for, but may not require, documentation to make the determination that the modification is necessary to avoid discrimination.

With respect to individuals likely to carry documentation, such as students and employees, if the animal is not a service animal, the institution may ask if the animal is required because of a disability and whether the animal ameliorates the disability. The institution may also require documentation, not more than one year old, from a health care professional stating (1) the individual has a disability, (2) that the animal ameliorates the effects of the disability, and (3) that the individual providing the assessment is a

licensed health care professional and the individual is under his or her professional care.

If an animal satisfies either inquiry, it may nonetheless be removed from the institution if it poses a direct threat to the health or safety of others, or if it would fundamentally alter the institution's programs or activities.

The institution may then insist upon other, more specific requirements regarding vaccination or the control so long as they do not have the effect of discriminating against an individual with a disability. It should be noted that this language is not intended to be exhaustive—it should only serve as a guide in how to develop a policy that provides greater protection to individuals with disabilities and in particular permits the use of non-service animals in addition to service animals. It is contended, though, that this approach would be more consistent with and reflective of the broad mandate of the Title II and Section 504 statute and regulations.

#### IV. CONCLUSION

In the interest of ensuring that the civil rights regulations and policies are as comprehensive as Congress intended them to be, and of safeguarding the rights of individuals with disabilities, this Article has argued that the internal guidance issued by OCR and the proposed amendments to Title II put forth by DOJ have regrettably failed to design legal rules that fulfill the full scope of the rights Congress meant for postsecondary institutions to provide to individuals with disabilities. They fail to sufficiently take into account the unique realities associated with the college and university context.<sup>171</sup> This Article has also sought to fill the void by offering an alternative legal framework that recognizes the benefits that non-service animals may provide to individuals with disabilities and that places proper emphasis on the evidentiary process between an individual requesting the need for an animal and the institution.<sup>172</sup>

The precise contours of the rights of individuals with disabilities using animals and the responsibilities of postsecondary institutions remain unclear and uncertain, especially with medical information on the benefits of animals to disabled individuals still developing.<sup>173</sup> It is anticipated, however, that this Article will help enrich the

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171. See *supra* Part II.

172. See *supra* Part III.

173. See *supra* notes 122–29 and accompanying text.

discussion of how federal agencies should enforce Title II and Section 504, and how postsecondary institutions may implement non-discrimination policies, as this area of law continues to grow and become more defined.