HUD notice on emotional support assistance animals has important implications for institutions

By Michael R. Masinter

On April 25, 2013, the U.S. Department of Housing and Urban Development issued an important Fair Housing Act notice clarifying its interpretation of how that act applies to emotional support animals. The notice answers some, but not all, questions that service providers must consider.

Because more students are requesting assistance animals as disability accommodations, it’s critical that you understand how the FHA defines “assistance animals” and its requirements for colleges and universities.

First, the act applies to campus housing. HUD interprets the FHA to apply to “housing associated with a university or other place of education.” Given that courts already have come to the same conclusion, campus housing providers must be aware of their obligations under the act.

Second, HUD designates emotional support animals as “assistance animals” under the FHA, even though they are not service animals under the Americans with Disabilities Act.

Importantly, Department of Justice regulations for service animals apply to all aspects of campus facilities, including housing, but specifically exclude emotional support animals from the definition of service animals, and limit service animals to dogs.

For that reason, the HUD notice sensibly recommends first determining whether an animal in question is a “service animal,” and if it is, to follow existing service animal rules. If the animal is not a service animal under the ADA, typically because it is an emotional support assistance animal, then the FHA notice and any applicable state laws governing accommodation requests apply but the DOJ service animal regulations do not apply.

Institutions may require students not already known to have a disability who seek the accommodation of an emotional support assistance animal to live in campus housing “to submit reliable documentation of a disability and of their disability-related need for an assistance animal.”

By contrast, DOJ service animal rules specifically forbid asking for documentation of the need for a service animal. The FHA notice specifies that documentation from mental health professionals should suffice if it establishes that students have a disability and that the animals will provide disability-related emotional support.

Emotional support assistance animals may be virtually any species of animal and need not be specifically trained to provide emotional support. Assuming there is documentation of a disability and the disability-related need for an emotional support animal, the HUD notice requires permitting students to live with and use emotional support animals in all areas of the housing where people ordinarily go “unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider’s services.”

HUD offers no new guidance on either determination, but the FHA doesn’t give students the right to take their support animal to class or to other campus facilities, so students are responsible for the behavior of their animals when they are left in campus residences.

Direct threat denials must be based on individualized assessments of a specific animal, not its breed or size or harm caused by other animals. In evaluating direct threats, an institution may take into account threats to the health or safety of others and substantial physical damage to its property.

While students cannot be required to pay a deposit to defer costs attributable to their animals, they can be required to reimburse the institution for any damage their animals cause beyond normal wear and tear, a particular concern likely to arise since students will have to leave their animals behind when attending classes or other campus activities.

Finally, the HUD notice is silent on the question of whether emotional support assistance animals must be under the control of their handlers when the animals are in common areas of student housing.

Although the notice may not have the same binding force as a regulation, it will guide HUD in its enforcement of the Fair Housing Act. Therefore, institutions should adjust their policies accordingly, bearing in mind that reasonable accommodation requests under the FHA require individualized assessments made within the framework of the notice.

If you’d like to read the notice, you may do so at http://portal.hud.gov/hudportal/documents/huddoc?docid=servanimals_ntcfheo2013-01.pdf.