

# HUD Clarifies Definition of Assistance Animals Under FHA and Section 504

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On April 25, 2013, HUD issued a notice distinguishing the obligation of housing providers to accommodate people with disabilities who rely on assistance animals<sup>1</sup> under the Fair Housing Act (FHA),<sup>2</sup> Section 504 of the Rehabilitation Act of 1973 (Section 504),<sup>3</sup> and the Americans with Disabilities Act (ADA).<sup>4</sup> The notice was issued in part as a result of the Department of Justice's (DOJ) 2010 amendments to the ADA regulations. While expanding the rights of individuals with disabilities<sup>5</sup> overall, the 2010 amendments simultaneously limited the definition of service animal in the public accommodation context. This created some confusion for housing advocates in deciding what definition to apply when requesting an assistance animal accommodation<sup>6</sup> because courts usually interpret all three federal laws as interchangeable.<sup>7</sup>

This article will summarize HUD's rule and provide guidance on key differences in coverage for people with disabilities under the laws with respect to assistance animals. The article will also provide tips for advocates when requesting accommodations, particularly when multiple anti-discrimination laws apply.

## Overview of FHEO-2013-01

First, the notice specifically defines "assistance animal" under the FHA and Section 504 and describes the

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<sup>1</sup>HUD FHEO-2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (Apr. 25, 2013). Both the notice and this article will use the term "assistance animal" to include certified service animals, therapy animals, and emotional support animals.

<sup>2</sup>42 U.S.C. § 3601 *et seq.* (2013).

<sup>3</sup>29 U.S.C. § 794 (2013).

<sup>4</sup>42 U.S.C. § 12101 (2013).

<sup>5</sup>Among other changes, the DOJ revised its regulations implementing Title II and Title III of the ADA with respect to ensuring effective communication with individuals with disabilities, establishing a new category of mobile devices used by people with disabilities, and expanding access in correctional facilities.

<sup>6</sup>A resident or applicant may request an exception to a housing provider's no-pet policy to accommodate the need for a service or emotional support animal. *See, e.g.,* Overlook Mutual Homes, Inc. v. Spencer, 666 F. Supp. 2d 850 (S.D. Ohio 2009); Echeverria v. Krystie Manor, LP, 2009 WL 857629 (E.D.N.Y. Mar. 30, 2009) (denying housing provider's motion for summary judgment on applicant's FHA claim when application was denied after tenant requested exception to pet policy for her service animal).

<sup>7</sup>*See* Oconowoc Residential Progs. v. City of Milwaukee, 300 F.3d 775, 782-83 (7th Cir. 2002) (noting the substantive similarities between the FHAA and the ADA).

factors that housing providers must consider when evaluating an accommodation request under these federal laws.<sup>8</sup> The notice then defines and differentiates what qualifies as a service animal under the ADA and provides guidance on an analysis under the revised regulations.<sup>9</sup> Finally, the notice describes how a housing provider should analyze a request to modify a no-pets policy when multiple anti-discrimination laws apply.<sup>10</sup> HUD suggests that the covered entity first apply a more narrow ADA inquiry before deciding whether the assistance animal meets the FHA definition.<sup>11</sup>

## Notable Differences in Definition of "Assistance Animal"

There are several important distinctions as to what qualifies as an assistance animal under the FHA, Section 504 and the ADA. First, HUD's notice intentionally uses the inclusive term "assistance animal" with respect to the FHA and Section 504 to help distinguish it from the ADA's narrower term, "service animal." An assistance animal under the FHA and Section 504 may be a certified service animal, an emotional support animal, or any other animal that "works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability."<sup>12</sup> Not only dogs, but other animals may qualify as assistance animals. In fact, there appears to be no limit as to the type of animal that may provide assistance to a disabled individual, so long as the animal lessens the symptoms of the person's disability and does not pose a threat to public health and safety. This far-reaching definition is aligned with how most housing advocates interpret "assistance animal" for purposes of a reasonable accommodation request in the housing context. Courts have not further restricted this interpretation but employ the same analysis as to health and safety.<sup>13</sup>

The HUD notice further clarifies that under the FHA and Section 504, a housing provider cannot apply breed, size, or weight restrictions to assistance animals.<sup>14</sup> In fact, the housing provider must show that the specific animal

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<sup>8</sup>HUD FEHO-2013-01 at 2.

<sup>9</sup>*Id.* at 4.

<sup>10</sup>*Id.* at 6.

<sup>11</sup>*Id.*

<sup>12</sup>HUD FEHO-2013-01 at 2.

<sup>13</sup>*Janush v. Charities Hous. Dev.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000) (refusing to dismiss former tenant's reasonable accommodation claim regarding possession of two birds and two cats in face of no-pet policy); *Assenberg v. Anacortes Hous. Auth.*, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (holding that PHA had not violated its reasonable accommodation duty under the FHAA where it sought eviction of tenant who failed to keep companion snakes caged when PHA staff were present or when being transported), *aff'd*, 268 F. App'x 643 (9th Cir. 2008).

<sup>14</sup>HUD FHEO-2013-01 at 3.

will cause a threat to the health and safety of others or damage the housing provider's property, in order to deny the accommodation request.

In contrast, the DOJ definition of service animal includes only animals that are "individually trained to do work or perform tasks for the benefit of an individual with a disability, including physical, sensory, psychiatric, intellectual, or other mental disability."<sup>15</sup> Emotional support animals are specifically excluded from the definition. Further, only dogs and in some rare instances, miniature horses, may qualify as service animals under the ADA. An entity may deny access to a qualifying service animal only if it poses a direct threat to health and safety, the animal is out of control, or the animal is not housebroken.

### When Do Multiple Anti-discrimination Laws Apply in the Housing Context?

The FHA applies to most housing providers, both public and private, and prohibits discrimination on the basis of "handicap" or disability with limited exceptions.<sup>16</sup> Section 504 covers housing providers that receive financial assistance from any federal department or agency, such as public housing authorities (PHAs) and owners of project-based Section 8 buildings.<sup>17</sup> Title II of the ADA prohibits discrimination by state and local governments in its programs, activities, or services.<sup>18</sup> Title III of the ADA covers public and common use areas of housing developments when these public areas are, by their nature, open to the general public.<sup>19</sup> Many public entities are covered by the ADA as well as the FHA and/or Section 504, including PHAs and some rental offices, homeless shelters, transitional housing, assisted living facilities, and housing at places of education.<sup>20</sup>

It is "the housing provider's responsibility to know the applicable laws" when deciding whether to modify its practices to permit the use of an assistance animal.<sup>21</sup> In a facility where only the ADA applies, a full reasonable accommodation analysis is not necessary: the animal need only meet the "service animal" definition and not fall into any of the exceptions. However, "an entity that is subject to both the ADA and the FHA or Section 504 must permit access to ADA-covered 'service animals' and additionally, apply the more expansive assistance animal standard when considering reasonable accommodations

for persons with disabilities who need assistance animals that fall outside the ADA's 'service animal' definition."<sup>22</sup>

### Tips for Advocates in Analyzing a Housing Provider's Obligation to Accommodate Assistance Animals

First, when drafting a request for an assistance animal accommodation, housing advocates should be sure to apply the proper federal anti-discrimination law and corresponding definition of assistance animal. For FHA and Section 504-covered facilities, advocates must also satisfy all the elements of a reasonable accommodation claim by providing facts about the client's disability or symptoms of the disability and the nexus between the disability and the need for an assistance animal.<sup>23</sup>

In addition, housing advocates should argue that the FHA and Section 504 apply whenever possible, to invoke the broadest definition of assistance animal under federal law. Advocates should be aware that housing providers may argue that they are covered by the ADA, and therefore the narrower definition of service animal applies, even if they are a housing provider. When appropriate, advocates should cite the FHA and Section 504 as well as the recent HUD notice when negotiating with such entities because all housing providers, whether public or private, are covered by the FHA, with limited exceptions.<sup>24</sup>

One gray area for advocates is often the application of fair housing laws to homeless shelters. Too often, owners and managers of these entities argue the program is not covered by the FHA and therefore it need not accommodate an individual's emotional support animal. Of course this presents a problem for the many people with disabilities that access emergency shelters.

While some courts have decided that shelters are included in the definition of "dwelling" under the FHA, it is an unsettled area of law.<sup>25</sup> Nonetheless, advocates can argue that, based on the facts of the case, shelters are covered entities and the FHA applies. Or, if the shelter receives federal funding, cite Section 504 to access HUD's

<sup>15</sup>*Id.* at 5 (italics added).

<sup>16</sup>42 U.S.C.A § 3601 *et seq.*; 24 C.F.R. § 100.10; the act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members.

<sup>17</sup>29 U.S.C. § 794.

<sup>18</sup>42 U.S.C. § 12101 *et seq.*

<sup>19</sup>42 U.S.C. § 12101 *et seq.* See DEP'T OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL, § III-1.2000 (1993), available at <http://www.ada.gov/taman3.html>.

<sup>20</sup>HUD FEHO-2013-01 at 5.

<sup>21</sup>*Id.* at 6.

<sup>22</sup>Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enforcement & Programs, HUD, to FEHO Reg'l Dirs., Re *New ADA Regulations and Assistance Animals as Reasonable Accommodations under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973* (Feb. 17, 2011) (stating that definition of "service animal" in ADA regulations, which excludes emotional support animals in places of public accommodation, does not apply to reasonable accommodation requests under either the FHA or Section 504).

<sup>23</sup>*Giebler v. M & B Assocs.*, 343 F.3d 1143 (9th Cir. 2003) (providing a road map for evaluating a housing provider's obligation to grant a reasonable accommodation request).

<sup>24</sup>42 U.S.C.A § 3601 *et seq.*; 24 C.F.R. § 100.10.

<sup>25</sup>*Jenkins v. New York City Dept. of Homeless Services*, 643 F.Supp.2d 507 (S.D.N.Y. 2009) (determined that temporary shelter is a "dwelling" under the FHA because plaintiff intended to stay at the shelter and had no other home); *but see Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1109 (D.Idaho 2010) (holding that a homeless shelter was not a dwelling subject to the FHA).

broad interpretation of assistance animal. In either case, advocates should argue that residents of shelters have the right to keep assistance animals with them as a reasonable accommodation of their disability, including emotional support animals.

The varying definitions of assistance animal under the major federal anti-discrimination laws have no doubt created confusion for advocates and their clients alike. In the federally subsidized housing context, the law is clear: Housing providers are covered by the FHA and/or Section 504 and must accommodate people with disabilities to allow assistance animals, emotional support animals, and therapy animals in the home. ■

### **New Classification for DHS Systematic Alien Verification for Entitlements (SAVE) System**

HUD has recently received notification that, in June 2012, the Department of Homeland Security (DHS) adopted a new category code for the DHS Systematic Alien Verification for Entitlements (SAVE) system to describe certain undocumented immigrants. Multifamily properties check the SAVE system to determine applicant eligibility for housing assistance. HUD recently publicized the utilization of Code 33 in a June 2013 message to its multifamily Rental Housing Integrity Improvement Project (RHIIP) listserv.

Termed “Code 33” or “Deferred Action for Childhood Arrivals” (DACA), this category represents those immigrants whose removal actions have been deferred for a period of 2 years, with the possibility of renewal. These individuals meet the following requirements, among others: (1) no criminal record; (2) current enrollment in school, completion of high school/GED, or honorable discharge from the armed forces; (3) being under 31 years old as of June 15, 2012; and (4) arriving in the United States before age 16. The deferred action does not confer any lawful status. Thus, persons classified under Code 33 do not possess the required legal status to receive housing assistance under Section 214 of the Housing and Community Development Act, 42 U.S.C. § 1436a, and its accompanying regulations.

The federal programs covered by Section 214 include Section 8 (project-based and tenant-based) assistance, public housing, Section 236 housing, the Section 101 Rent Supplement Program, the Section 235 homeownership program, and the Housing Development Grant Programs. See 24 C.F.R. § 5.500.

## **HUD Approves Agreement with Wells Fargo Regarding Post-Foreclosure Properties**

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The National Fair Housing Alliance (NFHA) and Wells Fargo recently entered into a groundbreaking Conciliation Agreement (Agreement)<sup>1</sup> to address the manner in which Wells Fargo has maintained its post-foreclosure properties, called Real Estate Owned or “REO” properties. An REO property is one that has been foreclosed upon or repossessed by a bank or lender and, as a result, has returned to bank (or lender) ownership.<sup>2</sup> Without occupants or appropriate maintenance, such properties can fall into disrepair—proving detrimental to the surrounding neighborhood over time. Given the number of foreclosures stemming from the recent financial crisis, the issues surrounding REO properties are of increasing importance for communities nationwide. As NFHA’s recent work indicates, the manner in which banks and lenders administer their REO properties is of particular concern for communities of color.

NFHA and several of its member organizations (collectively known as “Complainants”) filed a complaint with HUD, accusing Wells Fargo of failing to market or maintain its REO properties in minority communities in the same way as it had done in white communities.<sup>3</sup> The complaint, filed with HUD’s Office of Fair Housing and Equal Opportunity, resulted in the Agreement discussed in this article. As this is the first such settlement of its kind, advocates should familiarize themselves with the Agreement’s provisions.

### **The NFHA Complaint**

Filed in June 2012, NFHA’s second amended complaint to HUD described Wells Fargo as having a “systemic and particularized practice of engaging in differential treatment” when marketing and maintaining its REO properties.<sup>4</sup> The complaint asserted that Wells Fargo

<sup>1</sup>See generally Conciliation Agreement (“Agreement”), National Fair Housing Alliance, et al. v. Wells Fargo Bank, N.A., HUD Case No. 09-12-0708-8 (June 5, 2013) available at: [http://www.nationalfairhousing.org/Portals/33/2013-06-06\\_NFHA\\_Wells\\_Fargo\\_conciliation\\_agreement.PDF](http://www.nationalfairhousing.org/Portals/33/2013-06-06_NFHA_Wells_Fargo_conciliation_agreement.PDF).

<sup>2</sup>See Second Amended Fair Housing Complaint (“NFHA Complaint”), National Fair Housing Alliance, et al. v. Wells Fargo Bank, N.A., HUD Case No. 09-12-0708-8 (June 2012) available at: <http://nationalfairhousing.org/Portals/33/Wells%20Fargo%20Second%20Amended%20Complaint%2006%2027%202012.pdf>, at 2.

<sup>3</sup>See generally, NFHA Complaint.

<sup>4</sup>*Id.* at 1.