Practice Resource

Emerging Duties Under Unsettled Disability Law: Web Access and Service Animals in Health Care

Anne Ruff and Adriana Fortune

What is the issue? Hospitals and health care entities are being challenged over the scope of their emerging responsibilities with respect to providing reasonable accommodation to persons with disabilities who may require the assistance of a service or comfort animal, or who may require assistance accessing a health care entity's website services.

What is at stake? Noncompliance with disability law can interfere with quality patient care, and can result in burdensome and costly administrative investigations and proceedings, bad publicity, economic damages and, in some instances, loss of federal funding (including Medicare reimbursement).

What do you need to know? Health care entities have a legal obligation to accommodate disabled patients and members of the public. That obligation includes ensuring web services are accessible to individuals with disabilities and, in some instances, allowing service animals on site at a health care facility as a reasonable accommodation.

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Ruff and Fortune: Disability Accommodations

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Introduction

Hospitals and other health care providers are obligated under federal and state law to provide individuals with disabilities—i.e., patients, companions, visitors, and others accessing the facilities and services—equal access to the health care and other services they provide. Given the increasing incidents of disability in the growing population[1] and the ongoing evolution of federal and state law in the area of disability protection, health care providers should regularly assess their compliance obligations and efforts to ensure they are providing individuals with disabilities with equal access to health care services.

This Practice Resource will: (i) provide a high level overview of the laws addressing the provision of accessible care to individuals with disabilities, (ii) identify current trends regarding health care accessibility that providers should be aware of, and (iii) provide some recommendations and best practices for ensuring accessibility of health care services.

The Growing Population of Individuals with Disabilities

The elderly population in the United States is growing, which is coinciding with the increasing number of individuals with disabilities in this country.[2] According to the most recent United States Census, approximately 56.7 million people—19 percent of the population—were living with a disability in 2010.[3] Medical innovation is helping Americans live longer, but because disability rates increase with age, longer life spans are resulting in an increasing number of disabled individuals.[4] Statutory changes in recent years also have identified additional impairments that are now treated as a disability under the law,

1 Press Release, U.S. Census Bureau, Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports Report Released to Coincide with 22nd Anniversary of the ADA (July 25, 2012), *available at* www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

2 *Id.*

3 *Id.*

4 Robert Preidt, *Americans are Living Longer but More Disabled*, CBS News, Apr. 20, 2016, *available at* www.cbsnews.com/news/americans-are-living-longer-but-more-disabled/; Eileen M. Crimmins et al., *Trends Over 4 Decades in Disability-Free Life Expectancy in the United States*, 106 Am. J. Pub. Health 1287 (Apr. 14, 2017), *available at* www.ncbi.nlm.nih.gov/pubmed/27077352.

adding to the already increasing number of individuals who may require accommodation in the health care setting. For example, following the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) and its accompanying regulations, a physical or mental impairment may meet the legal definition of "disability" even if the impairment is temporary,[5] is in remission,[6] or can be controlled with medication.[7]

As the number of individuals with disabilities grows, so will their utilization of health care services. Federal and state laws require health care providers to accommodate persons with disabilities and take proactive steps to ensure equal and non-discriminatory access to their services. In light of these obligations, health care providers should properly document information about their efforts to provide good care to patients—including efforts to accommodate disabilities—so that should the need arise, they will be prepared to defend any potential claims of discriminatory provision of services.

The Legal Obligations of Health Care Providers

Health care providers, from large health systems to independent physicians who see patients out of a single office location, are subject to laws that prohibit discriminating on the basis of disability and, with only limited exceptions, create an affirmative legal duty to accommodate the needs of disabled individuals. Protections for individuals with disabilities are addressed in numerous federal statutes, including Section 1557 of the Patient Protection and Affordable Care Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act, as well as in state statutes.[8]

5 29 C.F.R. § 1630.2(j)(1)(ix).
6 *Id*. § 1630.2(j)(1)(vii).
7 *Id*. § 1630.2(j)(1)(vi).
8 As state laws vary widely, a detailed analysis of state statutes pertaining to disability discrimination exceeds the scope of this Practice Resource. Health care entities and providers are strongly encouraged to review applicable state laws and consult with legal counsel as needed when disability accommodation issues arise.

The Patient Protection and Affordable Care Act

Section 1557 of the Patient Protection and Affordable Care Act (ACA)[9] prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.[10] The protections provided under Section 1557 apply to any health program or activity that receives federal financial assistance from the U.S. Department of Health and Human Services (HHS), which includes Medicare;[11] any health program administered by HHS; and Health Insurance Marketplaces and insurers that participate in them.[12] To prevent discrimination against individuals with disabilities, the Final Rule implementing Section 1557 requires covered entities to ensure:

1. All programs and activities, including those provided through electronic and information technology, are accessible to persons with disabilities.
2. Newly constructed or altered facilities are physically accessible to persons with disabilities.
3. Appropriate auxiliary aids and services are available for individuals with disabilities.[13]

With regard to the provision of auxiliary aids and services, Section 1557 holds health care providers to a higher standard as compared to other entities who also are generally subject to the Americans with Disabilities Act (ADA). For example, most health care providers are subject to Title III of the ADA as

9 Despite almost daily threats of repeal, at the time this Practice Resource was submitted for publication in July 2017, the ACA and Section 1557 remained in effect; Patient Protection and Affordable Care Act, 42 U.S.C. § 18116.

10 *Id.*

11 HHS stated in the commentary that the obligations of Section 1557 do not apply to those providers that only accept Medicare Part B; however, HHS noted that the requirements would "likely cover almost all licensed physicians because they accept Federal financial assistance from sources other than Medicare Part B." Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31445 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) [hereinafter *Nondiscrimination in Health Programs and Activities*].

12 HHS, Summary: Final Rule Implementing Section 1557 of the Affordable Care Act, *available at* www.hhs.gov/sites/default/files/2016-06-07-section-1557-final-rule-summary-508.pdf (last visited July 17, 2017).

13 45 C.F.R. § 92.202-.204.

further discussed below; however, those subject to Section 1557 must meet the more stringent Title II ADA standards that generally apply only to state and governmental entities.[14] Title II requires covered entities to give "primary consideration" to the person with a disability's choice of auxiliary aid, except in limited circumstances.[15]

While the current administration has expressed its intent to repeal the ACA, presumably including Section 1557, a repeal would not necessarily eliminate the obligations to prevent disability discrimination and provide the aids identified in Section 1557. Section 1557 is based on longstanding statutes and regulations that independently prohibit discrimination and require health care providers to provide reasonable accommodation to disabled individuals to ensure equal access to available health care services. While the ACA is the most recent law and the subject of considerable publicity and debate, it was not the first federal law to prohibit discrimination in health care facilities on the basis of disability. Those obligations were previously set forth in the ADA and Section 504 of the Rehabilitation Act. Thus, a repeal of the ACA will not eliminate the pre-existing legal obligations imposed by these federal laws or by state disability law.

The Americans with Disabilities Act

With limited exceptions, most health care providers fall under the jurisdiction of the ADA.[16] Title III of the ADA prohibits discrimination on the basis of disability in the operations and activities of places of public accommodations such as hospitals and health care facilities.[17] Health care entities subject to Title III of the ADA must take steps to provide equal access to health care services, including but not limited to:

- providing goods and services in an integrated setting (a setting that enables individuals with disabilities to interact with nondisabled

14 *Nondiscrimination in Health Programs and Activities*, at 31421.
15 28 C.F.R. § 35.160(b)(2).
16 42 U.S.C. § 12101; *id.* § 12187.
17 42 U.S.C. § 12182; 28 C.F.R. § 36.

persons to the fullest extent possible), unless separate or different measures are necessary to ensure equal opportunity;

- eliminating unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation;
- making reasonable modifications to policies, practices, and procedures that would deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of the goods and services provided;
- furnishing auxiliary aids when necessary to ensure effective communication, unless an undue burden or fundamental alteration of services would result; and
- maintaining accessible features of facilities and equipment.[18]

Hospitals and clinics operated by state or local government are subject to Title II of the ADA.[19] While many of the Title II standards parallel those set forth in Title III for places of public accommodation, Title II standards are more stringent and require covered entities to give "primary consideration" to the person with a disability's choice of an auxiliary aid.[20] Thus, under Title II, the disabled individual's choice must be honored unless the covered entity can prove that (i) an alternative auxiliary aid or service provides communication that is "as effective" as that provided to others; (ii) the requested aid or service would result in a fundamental alteration of the nature of the program, service or activity; or (iii) the requested aid or service would result in an undue financial and administrative burden.[21]

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act applies to employers and organizations that receive federal financial assistance from any federal department or agency,

18 *Id.*
19 28 C.F.R. § 35.
20 *Id.* § 35.160(b)(2).
21 *Id.* § 35.164.

including HHS. Covered employers and organizations include "hospitals, nursing homes, mental health centers, and human service programs."[22] Section 504 provides that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives federal financial assistance or is conducted by any executive agency.[23] Like the ADA, Section 504 requires health care providers to provide individuals with disabilities full and equal access to health care services and facilities and reasonable modification to policies, practices, and procedures when necessary to make health care services fully available to individuals with disabilities, unless the modifications would fundamentally alter the nature of the services.

State laws

In addition to the federal laws discussed above, many states have disability rights laws that are intended to complement the ADA. Health care providers should be aware of any obligations they may have under such state laws, many of which address issues such as ensuring proper building access and allowing service animals in a health care facility, as well as the consequences of failing to provide necessary access and accommodations.

Despite the longstanding protections afforded by both federal and state laws, new accommodation issues continue to arise. Two of the many emerging examples facing health care providers today involve the increasing use of and dependence on the internet, and increasing requests for service or comfort animals on site in hospitals and health care facilities. These two specific circumstances are discussed at length below.

Emerging Disability Accommodation Issues in Health Care

The remainder of this Practice Resource provides a legal analysis of two newly emerging accommodation issues and provides recommendations for health

22 *See* HHS, OCR, Fact Sheet: Your Rights Under Section 504 of the Rehabilitation Act (June 2006), *available at* https://archive.hhs.gov/ocr/504.pdf.

23 29 U.S.C. § 794.

care providers to minimize potential disability discrimination claims in each of these areas. These areas, which are experiencing a significant increase in disability discrimination complaints and lawsuits in the health care context (as well as in other industries such as retail, housing, and travel), concern website accessibility[24] and access to facilities by support animals.[25]

The general basis of web accessibility claims is that the individual has been denied the services of, the ability to participate in, or the benefits of a program available on or through a website because the individual was unable, due to a disability, to access the website.[26] For example, an individual who is deaf or hard of hearing may claim that he or she has been denied the services or benefits of a program if the program is provided through videos on a hospital's website, but the videos on the website do not contain closed-captions.

Many hospitals and health systems are also struggling with requests from disabled patients or visitors who want to bring an animal with them to health care facilities. While many people, including health care providers, understand the role and rights of identified service animals and their ability to accompany the individuals they serve almost anywhere, an increasing number of requests by individuals wishing to bring their "comfort" or "emotional support" animals onto public transportation, into housing situations that do not generally

24 *See generally* Lewis Wiener & Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, Law360, Dec. 15, 2016.

25 *See* Rebecca F. Wisch, *Summary of Cases Dealing with Emotional Support Animals (ESAs)*, Mich. State Univ. Coll. of Law Animal Legal & Historical Ctr. (2015), www.animallaw.info/article/summary-emotional-support-animal-cases (last visited July 29, 2017).

26 *See* Meredith Mays Espino, *Website Accessibility for Persons with Disabilities: The Why & How*, ABA Bus. Law Today (Dec. 2016), www.americanbar.org/publications/blt/2016/12/07_espino.html (last visited July 29, 2017); *see* Press Release, U.S. Dep't of Educ., Settlements Reached in Seven States, One Territory to Ensure Website Accessibility for People with Disabilities, June 29, 2016, *available at* www.ed.gov/news/press-releases/settlements-reached-seven-states-one-territory-ensure-website-accessibility-people-disabilities; *see* Susan Ryan, *ADA Lawsuits up 63% from 2015*, JD Supra, July 27, 2016, www.jdsupra.com/legalnews/ada-title-iii-lawsuits-up-63-from-2015-22227/ (noting "a steady increase in lawsuits about websites that are allegedly not accessible to individuals with disabilities.").

permit animals, and to hospitals and health care centers[27] is creating new issues that need to be addressed.

Web Accessibility Issues

As identified above, the ACA, the ADA, and Section 504 all require that health care programs and their operations and activities be accessible to individuals with disabilities. They do not, however, provide explicit guidance on how those regulations apply to websites and online content. For example, Title III of the ADA requires that individuals with a disability be offered the "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation . . . ."[28] Places of public accommodation must make reasonable efforts to enable disabled individuals to equally utilize the place of public accommodation.[29] At the time the ADA was passed in 1990, however, internet use was nonexistent. The statute itself does not contain any express references to websites and certainly does not contemplate a website being a place of public accommodation. In recent guidance, HHS has recommended that "All entities subject to Section 504, Section 1557, and Title II of the ADA should review their EIT [Electronic Information Technology] systems to ensure accessibility of their health programs for all persons with disabilities."[30] Unfortunately, this guidance does not specify any standard that can be adopted to ensure accessibility.

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27 The authors have personally observed this trend. *See also* Press Release, U.S. DOJ, Justice Department Reaches Settlement with Kent State University to Resolve Allegations of Discrimination in University-Operated Student Housing (Jan. 4, 2016), *available at* www.justice.gov/opa/pr/justice-department-reaches-settlement-kent-state-university-resolve-allegations; *see* A. Pawlowski, *Pig on a Plane? The Era of Emotional Support Animals on Flights May be Ending*, Today, Sept. 21, 2016, www.today.com/health/pig-plane-era-emotional-support-animals-flights-may-be-ending-t103065 (last visited July 29, 2017).

28 42 U.S.C. § 12182(a).

29 28 C.F.R. § 36.

30 HHS, OCR, Guidance and Resources For Electronic Information Technology: Ensuring Equal Access To All Health Services and Benefits Provided Through Electronic Means 3 (2016), *available at* www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf [hereinafter Guidance and Resources For Electronic Information Technology].

While no concrete guidance has been uniformly adopted to define what is considered "accessible technology," technology—and particularly the internet—is becoming a necessary component of providing health care in the United States.[31] Increasingly, health care is provided and coordinated through websites that contain electronic health records, billing services, scheduling services, and e-message communication with health care professionals. Individuals who are unable to utilize websites or access online content that connects them to their health care services or providers are at a disadvantage and may be unable to participate in the health and wellness programs and services electronically available to those without a disability.

If website content or features are not accessible by all intended user populations, these inadvertent barriers may create legal risk if alternatives that can provide equal access are unavailable. Web accessibility issues are wide-ranging and health care providers should consider a variety of accessibility needs when developing website content and platforms.

Scenarios Involving Potential Accessibility Issues When Using Web-based Technology

Scenario 1: An individual with impaired or compromised vision cannot read small text on a computer screen.

Possible Solution: Ensure your website provides the user with the option to enlarge the font size or ensure that the text is compatible with a screen reader.

31 *See E-Health General Information*, CMS, www.cms.gov/Medicare/E-Health/EHealthGenInfo/index.html (last visited July 29, 2017); Agency for Healthcare Research & Quality, The CAHPS Ambulatory Care Improvement Guide: Practical Strategies for Improving Patient Experience: Section 6: Strategies for Improving Patient Experience with Ambulatory Care, 6.D Internet Access for Health Information and Advice (July 2015), *available at* www.ahrq.gov/cahps/quality-improvement/improvement-guide/6-strategies-for-improving/access/strategy6d-internet.html; John Glaser, *How the Internet of Things Will Affect Health Care*, Hosps. & Health Networks, June 4, 2015, www.hhnmag.com/articles/3438-how-the-internet-of-things-will-affect-health-care (last visited July 29, 2017); *Technology is Becoming Essential to the Health Care Field*, Connected Nation (Jan. 23, 2012), http://www.connectednation.org/BlogPost/technology-becoming-essential-healthcare-field (last visited July 29, 2017).

Scenario 2: An individual who is deaf or hard of hearing cannot listen to and/or obtain information from an online video.

Possible Solution: Ensure your website provide closed captioning or other audio transcription.

Scenario 3: An individual with impaired manual dexterity cannot access a website by manipulating a computer mouse.

Possible Solution: Ensure your website allows the user to navigate the content using a combination of computer key strokes.

Scenario 4: A color-blind individual cannot read color-coded charts or other such graphical information that relies on color to communicate a report's findings.

Possible Solution: Ensure your website enables the user to modify the colors or otherwise have the report/charts describe the color-coded information in text format.

The use of health care kiosks poses another challenge to health care providers in terms of making web content accessible. "Healthcare kiosks include, but are not limited to, self-check-in kiosks, physician videoconferencing systems, diagnostic kiosks, health/medication information dispensaries, donor registry kiosks, kiosks that assist patients in taking their vital signs, insurance enrollment kiosks, and pharmacy dispensary kiosks."[32] Achieving kiosk accessibility may include the "installation of tactile interfaces or screen readers, repositioning of kiosks to be within reach of wheelchair users, and options which allow individuals with motor difficulties to independently operate the kiosks, including voice dictation technology."[33] With equal access, people with disabilities can equally take advantage of the benefits offered by new technologies.[34]

Because the laws have not contemplated and have not yet caught up with new technologies, the issue of what must be accessible is open to interpretation by the courts. Some courts have found that places of public accommodation

32 Guidance and Resources For Electronic Information Technology, at 3.
33 *Id.*
34 *Id.*

are not limited to physical places, explaining that the ADA should be read broadly to accomplish the goals and intent of Congress when it passed the ADA.[35] If website accessibility is expected, how can health care providers create websites that are accessible—and what standards will those websites be held to?

WCAG 2.0

No formal standard currently exists to help determine whether a particular website is or is not accessible to disabled users, but the Web Content Accessibility Standards 2.0 (WCAG 2.0) continues to be referenced by courts, administrative agencies, and regulations.[36] The WCAG 2.0 are voluntary international guidelines developed by the Website Accessibility Initiative of the World Wide Web Consortium with the goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally.[37]

WCAG 2.0 is described as a stable, reference-able technical standard with twelve guidelines[38] organized under the four principles of being perceivable, operable, understandable, and robust:[39]

35 *See, e.g.*, Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999) (holding that websites are covered by Title III of the ADA); Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12 (1st Cir. 1994) (holding that insurance offerings fall under Title III of the ADA).

36 *See Nondiscrimination in Health Programs and Activities*, at 31425; Press Release, U.S. DOJ, Justice Department Reaches Settlement with edX Inc., Provider of Massive Open Online Courses, to Make its Website, Online Platform and Mobile Applications Accessible Under the Americans with Disabilities Act (Apr. 2, 2015), *available at* www.justice.gov/opa/pr/justice-department-reaches-settlement-edx-inc-provider-massive-open-online-courses-make-its; Verdict and Order following Non-Jury Trial, Juan Carlos Gil v. Winn-Dixie Stores, Inc., No. 16-23020 (S.D. Fla. June 12, 2017).

37 *Web Content Accessibility Guidelines (WCAG Overview)*, Web Accessibility Initiative, www.w3.org/WAI/intro/wcag (last visited July 29, 2017) [hereinafter *WCAG Overview*].

38 *WCAG 2 at a Glance*, Web Accessibility Initiative, www.w3.org/WAI/WCAG20/glance/ (last visited July 29, 2017).

39 *Introduction to Understanding WCAG 2.0*, Web Accessibility Initiative, www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html#introduction-fourprincs-head (last visited July 29, 2017).

WCAG 2.0 Principles

Perceivable. Information must be presented to users in ways they can perceive (i.e., information cannot be invisible to all of their senses). Guidelines include:

- Providing text alternatives for non-text content
- Providing captions and other alternatives for multimedia
- Creating content that can be presented in different ways without losing meaning
- Making it easier for users to see and hear content

Operable. Users must be able to operate the interface for a webpage to be considered accessible. Guidelines include:

- Making all functionality available from a keyboard
- Giving users enough time to read and use content
- Not using content that causes seizures
- Helping users navigate and find content

Understandable. Users must be able to understand the information and the operation. Guidelines include:

- Making text readable and understandable
- Making content appear and operate in predictable ways
- Helping users avoid and correct mistakes

Robust. Users must be able to access web page content with a wide variety of user agents, including evolving assistive technologies. Guideline includes:

- Maximizing compatibility with current and future user tools

Each of the twelve guidelines has testable success criteria, which are classified as one of three levels: A, AA, and AAA.[40] WCAG 2.0 Level AA deals with the

40 *WCAG Overview*.

most significant and most common barriers for disabled users.[41] Level A (the minimum), meets the most basic web accessibility features, whereas Level AAA (the highest level), provides the highest level of web accessibility.[42]

To be classified as "conforming" to WCAG 2.0 standards, five criteria[43] must be satisfied. While technical in nature, the conformance criteria essentially hinges on being able to demonstrate that the complete web page, including all of the information and applicable processes, is available to users in an accessible or otherwise usable format.[44]

Department of Justice rule making and enforcement efforts

The U.S. Department of Justice (DOJ), the enforcement agency with respect to Titles II and III of the ADA, has made some effort to provide formal guidance on a covered entity's obligation to make websites accessible, but the process has been slow to start and has not yet resulted in any definitive guidance.

On July 26, 2010, the DOJ issued an Advance Notice of Proposed Rulemaking (July 2010 NPRM) on the accessibility of website information and services.[45] In the July 2010 NPRM, the DOJ proposed that state and local governments subject to Title II, including places of public accommodation subject to Title III, must make their websites and related services accessible to individuals with disabilities to comply with the ADA's stated purpose of providing disabled individuals with an equal opportunity to participate in, and benefit from, all aspects of life.[46] The DOJ sought public comment on the proposed adoption of the WCAG 2.0's Level AA Success Criteria as its standard for website accessibility for entities subject to Titles II and III of the ADA.[47]

41 *WCAG 2.0 Conformance*, GSA Section 508.gov, www.section508.gov/content/build/website-accessibility-improvement/WCAG-conformance (last visited July 29, 2017).
42 *Id.*
43 *Understanding Conformance*, W3C, www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html (last visited July 29, 2017).
44 *Id.*
45 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).
46 *Id.*
47 *Id.*

Interestingly, the DOJ did not finalize the July 2010 NPRM guidance with respect to web accessibility. In 2015, the agency stated it would publish separate NPRMs, with the Title II NPRM expected early in fiscal year 2016 and the Title III NPRM scheduled for some time in fiscal year 2018.[48]

In May 2016, the DOJ issued a Supplemental Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities.[49] The initial comment period deadline was extended from August to October 2016 in an effort to provide more time for the public to submit their comments,[50] but as of the DOJ's Fall 2016 Statement on Regulatory Priorities, there is no further update and no final rule has been forthcoming.[51]

As we await definitive regulations regarding web accessibility standards for Title II state and governmental entities, we can expect additional delays (likely beyond 2018) for any final rule concerning Title III places of public accommodation based on prior DOJ commentary that "The Department believes that the Title II web site accessibility rule will facilitate the creation of an important infrastructure for web accessibility that will be very important in the Department's preparation of the Title III web site accessibility NPRM."[52]

Despite the lack of clear regulatory standards, the DOJ seems to embrace the position that websites must be accessible. In 2014, the DOJ entered into a settlement agreement with Ahold U.S.A. and Peapod, the owners and operators of the internet grocery delivery service, to resolve the agency's allegations that Peapod's website, www.peapod.com, "is not accessible to some individuals with disabilities, including individuals who are blind or have low vision, individuals who are deaf or hard of hearing, and individuals who have physical

48 *DOJ – Fall 2015: Statement of Regulatory Priorities*, www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html (last visited July 29, 2017).

49 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28657 (proposed May 9, 2016).

50 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 49908 (July 29, 2016).

51 *DOJ – Fall 2016* Statement of Regulatory Priorities, www.reginfo.gov/public/jsp/eAgenda/StaticContent/201610/Statement_1100.html (last visited July 29, 2017).

52 *Id*.

disabilities affecting manual dexterity."[53] In its statement about the settlement, the DOJ identified WCAG 2.0 AA as "well-established industry guidelines," and as part of the settlement, the DOJ required that www.peapod.com and its mobile applications "conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0 AA) . . . ."[54]

The DOJ also prepared a Statement of Interest in the case of *National Association of the Deaf v. Harvard University* supporting the use of the WCAG standards.[55] In that case, individuals who were deaf and hard of hearing filed a lawsuit against Harvard University claiming the school violated the ADA and Section 504 by denying them meaningful access to the University's online curricula by not providing closed captioning to online audio and audiovisual content.[56] Harvard argued the case should be dismissed or the court should stay the action until the promulgation of a final Title III rule on web accessibility by the DOJ.[57] The DOJ was not convinced and explained in its Statement of Interest that "both the ADA and Section 504 *currently* obligate Harvard to provide effective communication to ensure equal access to its online programming services."[58]

Other website regulatory efforts

Outside of the DOJ's enforcement position with respect to the ADA, the federal government has taken more definitive action to embrace the WCAG 2.0 standards. In January 2017, the Architectural and Transportation Barriers Compliance Board (referred to as the Access Board) published the Final Rule updating requirements for information and communication technology covered by Section 508 of the Rehabilitation Act (dubbed the Section 508

53 Press Release, DOJ, Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities (Nov. 17, 2014), *available at* www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website.

54 *Id*.

55 Statement of Interest of the United States of America, Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-cv-30023-MGM (D. Mass. Nov. 2, 2016), *available at* www.ada.gov/briefs/harvard_soi.pdf.

56 *Id*.

57 *Id*.

58 *Id*. at 3.

Refresh).[59] It provides an outline of web accessibility standards for information and communication technology in the federal sector.[60] Under the Section 508 Refresh, according to digital accessibility consultant Kevin Rydberg, "essentially anything posted onto your website must be accessible to users who need aids and assistive technology to go online."[61] The Section 508 Refresh incorporates the WCAG 2.0 AA guidelines by reference.[62]

Section 1557 of the ACA also advocates for use of the WCAG 2.0 standards. Section 1557's implementing regulations specifically state that health programs or activities provided by covered entities through electronic or information technology must be accessible to individuals with disabilities unless doing so would result in undue financial and administrative burdens or fundamental alteration of the health program.[63] In the preamble to the Final Rule implementing Section 1557, the Office of Civil Rights (OCR) specifically used a website as an example of the expectation that electronic or information technology be accessible. The OCR states that "a Health Insurance Marketplace [] creating a Web site for application for health insurance coverage must ensure that individuals with disabilities have an equal opportunity to benefit from the Web site's tool . . . ."[64]

While the ACA may ultimately be repealed or replaced, the obligations imposed by the ADA and Section 504, as well as existing precedent established

59 *About the ICT Refresh*, United States Access Board, www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh (last visited July 29, 2017).

60 Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed Reg. 5790 (Jan. 18, 2017) (to be codified at 36 C.F.R. pts. 1193 & 1194); Kevin Rydberg, *Explaining the Section 508 Refresh Web Accessibility Regulations*, Tech Decisions, May 1, 2017, https://techdecisions.co/compliance/explaining-section-508-refresh-web-accessibility-regulations/ (last visited July 29, 2017).

61 Kevin Rydberg, *Explaining the Section 508 Refresh Web Accessibility Regulations*, Tech Decisions, May 1, 2017, https://techdecisions.co/compliance/explaining-section-508-refresh-web-accessibility-regulations/ (last visited July 29, 2017).

62 *About the Update of the Section 508 Standards and Section 255 Guidelines for Information and Commnication Technology*, United States Access Board, www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule (last visited July 29, 2017).

63 45 C.F.R. § 92.204.

64 *Nondiscrimination in Health Programs and Activities*, at 31424.

by the DOJ and the courts (which have turned to the WCAG 2.0 standards for website accessibility) will continue.

Reducing risks relating to web accessibility

Despite the lack of formalized regulation, the DOJ continues to pursue consent decrees mandating compliance with WCAG 2.0 standards[65] while letters from prospective plaintiffs' attorneys continue to demand compensation from health care providers for inaccessible web content. Conforming a provider's website to WCAG 2.0 standards will help reduce the risk of claims alleging inaccessibility. While WCAG 2.0 (including A, AA, or AAA) has not been formally adopted, it does appear that the DOJ defers to WCAG 2.0 as the DOJ's preferred standard, rendering it critical for a provider to be able to demonstrate at least some level of conformance, even where the WCAG is not legally required.

When WCAG 2.0 compliance is not economically feasible, or where it would otherwise result in a major revision to existing websites, health care providers may be able to reduce their risks by taking additional steps to demonstrate accessibility. For example, health care providers can:

- Consider adding an Accessibility Statement or link to the organization's web page which sets forth the organization's commitment to ensuring information is accessible to all users, including users with disabilities.
- Include the name and contact information for a user to call or email if additional assistance is required in accessing website information or services.
- Provide training to all individuals who may receive web access inquiries to ensure they do not turn away disabled users and are prepared to respond to accessibility questions.

65 The DOJ's position on web accessibility dates back more than 20 years and is not expected to change. *See, e.g.*, Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to The Honorable Tom Harkin, U.S. Senate (Sept. 9, 1996), www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt (last visited May 14, 2017) ("Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.").

- Be cautious about making any statement on your website that presumes the site is a place of public accommodation or implies the entity is covered by or compliant with any particular law, statute, or guideline, including WCAG 2.0.
- Review your website for obvious usability concerns, with a particular focus on potential users who may have visual, hearing, or mobility (e.g., manual dexterity issues) impairments that may inhibit use of a computer mouse.
- Consult your website designer to discuss building alternate formats for non-accessible information, such as alternative text for photographs and transcripts of audio files and movies. Many of these changes can be implemented for minimal costs.
- Consult counsel immediately if you are contacted by the DOJ or otherwise receive a demand letter claiming your website is inaccessible.

In addition to the above compliance considerations, HHS offers to help entities determine whether their EIT is accessible and what can be done if their EIT is determined inaccessible.[66]

Some Resources to Help Determine EIT Accessibility

- W3C's Web Content Accessibility Guidelines (WCAG) 2.0
- Guidance for Exchange and Medicaid Information Technology (IT) Systems
- ADA Best Practices Tool Kit for State and Local Governments: Chapter 5, Website Accessibility under Title II of the ADA

66 HHS, OCR, Guidance and Resources For Electronic Information Technology: Ensuring Equal Access To All Health Services and Benefits Provided Through Electronic Means (2016), *available at* www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf.

Service and support animals

Another area in which accommodation issues need to be addressed involves the use of assistive animals.[67] Service and support animals are increasingly being used to assist individuals with a variety of conditions that go beyond visual and mobility issues. Evidence has shown that animals can help individuals with autism, post-traumatic stress disorder, and anxiety. [68] Some animals that assist individuals with mental health issues are highly trained psychiatric-service animals. For example, a psychiatric-service animal may help a patient with autism improve her social skills and daily interactions. Other animals may not be specifically trained to assist an individual in a specialized way but rather serve as an emotional support to help relieve, for example, anxiety. Emotional-support animals do not and are not required to receive special training.[69] To be designated an emotional support animal, a physician must document that the animal assists the patient in this way. Some states designate a separate category of "therapy animals," which are used to provide therapeutic contact, and to improve an individual's level of social, emotional, or cognitive function.[70] It can be difficult, however, for health care providers to identify and categorize whether an animal is a service animal or a comfort/emotional support animal. Correctly identifying the animal's function is important

67 *See* Mariko Yamamoto et al., *Registration of Assistance Dogs in California for Identification Tags: 1999-2012*, PLOS One 1 (Aug. 19, 2015), *available at* http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0132820&type=printable (finding that the number of dogs registered for service and emotional support increased significantly from 1999 to 2009 with minor decreases from 2009-2012); Phil Rogers, *Emotional Support Animals 'Growing Problem' on U.S. Flights*, NBC Chicago, July 27, 2015 (complaints related to animals on flights increased 1000% from 2004 to 2011).

68 Shirley S. Wang, *Rise in Pets as Therapy for Mental Conditions: Animals Help People with Autism, PTSD, Other Conditions Function Day-to-Day*, Wall Street J., Nov. 4, 2013, www.wsj.com/articles/rise-in-pets-as-therapy-for-mental-conditions-1383609937; Rick A. Yount et al., *Service Dog Training Program for Treatment of Posttraumatic Stress in Service Members*, Army Med. Dep't J. 63 (Apr.– June 2012); *Service Dog or Therapy Dog: Which is Best for A Child with Autism?*, Autism Speaks, www.autismspeaks.org/blog/2016/07/15/service-dog-or-therapy-dog-which-best-child-autism (last visited July 29, 2017).

69 DOJ, Civil Rights Div., Disability Rights Section, Frequently Asked Questions about Service Animals and the ADA (July 20, 2015), *available at* www.ada.gov/regs2010/service_animal_qa.pdf [hereinafter Frequently Asked Questions about Service Animals and the ADA].

70 ADA National Network, Service Animals and Emotional Support Animals (2014), *available at* https://adata.org/publication/service-animals-booklet.

because different categories of animals receive different protections under state and federal law.

Service animals under the ADA

The 2010 revised ADA regulations specifically define a service animal as a dog[71] that has been individually trained to do work or perform tasks for an individual with a disability.[72] The task(s) performed by the dog must be directly related to the person's disability.[73] Service animals are commonly used for help with seeing, hearing, walking, detecting seizures, and performing other tasks.[74] As of March 15, 2011, only service dogs are recognized as service animals under Titles II and III of the ADA.[75] The revised ADA regulations also have recognized that, in some instances, an individual with a disability may utilize a miniature horse[76] that has been trained to do work or perform tasks for the individual.[77]

Under the ADA, individuals with service animals have the right to the same service and treatment as any other person. While many places do not permit animals, the ADA specifies that a public entity and place of public accommodation must "modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[78]

State law considerations

While the ADA limits the definition of a "service animal" to a dog or a miniature horse, state law may define a service animal more broadly. The ADA is not intended to displace the rights or remedies provided by other federal laws

71 28 C.F.R. § 35.104; *id.* § 36.104; DOJ, Civil Rights Div., Disability Rights Section, ADA Requirements: Service Animals (July 12, 2011), *available at* www.ada.gov/service_animals_2010.htm [hereinafter Service Animals].

72 *Id.*

73 *Id.*; Frequently Asked Questions about Service Animals and the ADA.

74 *Id.*; Disability Rights N.C., Service Animals at the Doctor's Office (2010), *available at* www.disabilityrightsnc.org/sites/default/files/Service%20Animal-MedicalSettings-Self-Advocacy%20Packet%20DRNC.pdf [hereinafter Service Animals at the Doctor's Office].

75 Service Animals.

76 "Miniature horses generally range in height from 24 inches to 36 inches measured to the shoulders, and generally weigh between 70 and 100 pounds." Service Animals.

77 28 C.F.R. § 35.136; *id.* § 36.302.

78 28 C.F.R. § 35.136(a); *id.* § 36.302. *See also* Service Animals at the Doctor's Office.

(including section 504) or state laws (including common law) that provide greater or equal protection to individuals with disabilities.[79] It is therefore possible that a state law may allow for a category of service animals that the ADA does not (such as cats) and, where the state law offers broader protection, the state law should be followed. For example, Indiana law defines a service animal as an "animal trained as: (1) a hearing animal; (2) a guide animal; (3) an assistance animal; (4) a seizure alert animal; (5) a mobility animal; (6) a psychiatric service animal; or (7) an autism service animal."[80] This means a health care provider may need to permit access to a variety of different animals—in addition to dogs or miniature horses[81]—that would be considered service animals. These broader protections can present unique challenges to the provider and/or health care facility. Under certain circumstances, however, service animals may be prohibited from entering the facility, such as if:

- the service animal is not housebroken;
- the service animal is not under the owner's control;
- (for miniature horses) the facility cannot accommodate the service animal's type, size, and weight; and
- the service animal's presence will compromise legitimate safety requirements necessary for safe operation of the facility.[82]

Identifying a service or support animal

Currently, emotional support animals, comfort animals, and therapy animals are not specifically protected under the public accommodation provision of the ADA. To qualify as a service animal, emotional support, comfort, or therapy animals must be individually trained to assist with an individual's disability.[83] Properly identifying the category of the animal (i.e., emotional

79 28 C.F.R. § 35.103(b); *id.* § 36.103(c)
80 Ind. Code § 16-32-3-1.5.
81 Despite the recent addition of miniature horses to the definition of service animal, there are no published cases to date involving an individual's request to bring a miniature horse to a health care facility as a disability accommodation.
82 Service Animals.
83 *Id.*; Frequently Asked Questions about Service Animals and the ADA; 28 C.F.R. § 35.104; *id.* § 36.104; Service Animals.

support, comfort, therapy, or service) will impact the level of protections allowed for both the animal and the individual under state and federal laws.

While some service animals wear jackets or collars that identify them as service animals, the ADA does not require that they be outfitted with such identifying gear.[84] Neither does the ADA require that service animals be certified or registered as "designated" service animals.[85] Adding to the confusion, if an animal is not visibly identifiable as a service animal, health care providers are not permitted under the ADA to require that the individual show proof that his or her animal is a service animal.[86] Under the ADA, the health care provider may only ask (i) if the animal is required because of a disability and (ii) what work or task the animal has been trained to perform. No other questions are permitted and a hospital cannot require that an individual reveal his or her disability, or provide proof of such disability.[87]

Granting and limiting animal access to health care facilities

Many health care providers understandably have concerns related to disease prevention when considering allowing animals into the health care space. Although there may be some question of bacteria associated with service animals, a report by the Centers for Disease Control and Prevention (CDC) titled *Guidelines for Environmental Infection Control in Health-Care Facilities* found that "[a]lthough animals potentially carry zoonotic pathogens transmissible to man, the risk is minimal with a healthy, clean, vaccinated, well-behaved and well-trained service animal . . . ."[88] The CDC states that "[s]tandard cleaning procedures are sufficient following occupation of an area by a service animal."[89] Of note, the ADA specifies that the place of public accommodation

84 Frequently Asked Questions about Service Animals and the ADA.
85 *Id.*
86 *Id.*
87 28 C.F.R. § 35.136(f); *id.* § 36.302(c)(6).
88 Lynne Sehulster & Raymond Y.W. Chinn, *Guidelines For Environmental Infection Control In Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee (HICPAC)* (2003), *available at* www.cdc.gov/infectioncontrol/pdf/guidelines/environmental-guidelines.pdf [hereinafter *Guidelines For Environmental Infection Control In Health-Care Facilities*].
89 *Id.*

or the public entity may not "impose a surcharge" on an individual with the disability to cover the costs associated with measures and modifications taken in order to provide the individual with nondiscriminatory treatment. A health care provider cannot, for example, charge a patient a cleaning fee for bringing his or her service animal to an appointment.[90] On the other hand, CDC guidance does identify a larger concern regarding transmission of disease and infection control when it comes to other types of animals and therefore recommends denying access to certain exotic service animals such as reptiles and non-human primates,[91] even if the reptile or non-human primate is a service animal.

While hospitals and health care facilities are required by law to permit service animals in the facility, limiting access to certain areas is permissible where necessary and appropriate in the same way human access is limited. The CDC guidance notes that "[e]xcluding a service animal from an [operating room] or similar special care areas (e.g., burn units, some [intensive care units], [pulmonary embolism] units, and any other area containing equipment critical for life support) is appropriate if these areas are considered to have 'restricted access' with regards to the general public."[92] If for example a patient's husband or mother is not typically allowed in the operating room because of increased risk of infection, a service dog may also be prohibited from entering those areas of the hospital.[93] In *Branson v. West,*[94] a physician's request to use her service animal to pull her wheelchair and perform other tasks for her at the hospital was denied. The physician asked that the service dog "accompany her wherever she went in the hospital, including on her work duties and routine socializing, with the exception of highly sensitive areas such as operating rooms and intensive care units."[95] The court ruled that, absent evidence that this would require any financial expenditure or change to hospital operational policies, no reasonable trier of fact could conclude that the service dog was not a reasonable accommodation.

90 28 C.F.R § 35.130(f); *id.* § 36.301(c); Service Animals at the Doctor's Office.
91 *Guidelines for Environmental Infection Control in Health-Care Facilities.*
92 *Id.*
93 *Id.*
94 Branson v. West, No. 97 C 3538 (N.D. Ill. 1999).
95 *Id.*

Similarly, in *Day v. Sumner Regional Health Systems,*[96] the court recognized one's right to a service animal unless the animal created a significant risk to the health or safety of others that could not be eliminated. In *Day*, the patient asked to have her service animal accompany her into the emergency room. The hospital refused and instead treated the patient in the lobby of the Emergency Department. Unable to hold as a matter of law that "allowing Day's service animal into the treatment area posed an actual risk or direct threat to health and safety," the court refused to dismiss her claim.[97]

In addition to limiting a service animal's access based on infection concerns, hospitals and providers may limit access due to safety concerns. For example, a hospital may ask an individual with a disability to remove his or her service animal from the premises if the owner/handler is unable to control the animal or if the animal is not housetrained.[98] In the case of *Roe v. Providence Health Systems,*[99] the hospital staff requested that a patient remove her service dog because of its putrid odor that may have indicated a risk of infection, the dog's growling and blocking staff access to the patient, and staff allergic reactions. The hospital had tried using a HEPA filter, shutting the door to the patient's room, and assigning allergic staff to alternative duties. The court concluded the hospital did not violate the ADA given the hospital's legitimate concerns about the animal posing a significant risk to the health and safety of patients, visitors, and staff. According to the court, the hospital had proved the elements of its affirmative defense by showing that the direct threat could not be eliminated by modification of policies, practices, or procedures.

If a service animal is properly excluded, the hospital must provide the patient with the opportunity to receive care without the service animal present.[100] These exceptions are particularly challenging in the context of hospital visits because a hospital environment may cause an otherwise well-trained service dog to act out due to anxiety or concern for the patient. Because the hospital is not responsible for handling the service animal, the animal is only

96 Day v. Sumner Reg'l Health Sys., No. 3:07-0595 (M.D. Tenn. 2007).
97 *Id.*
98 Frequently Asked Questions about Service Animals and the ADA.
99 Roe v. Providence Health Sys. – Or., 655 F. Supp. 2d 1164 (D. Or. 2009).
100 28 C.F.R. § 35.136(c); *id*. § 36.302(c)(3).

permitted in the hospital if it remains under the control of the patient or designated handler.[101]

Best practices for bringing an animal into a facility

Generally, a service animal should be allowed to accompany its handler to areas of the facility where health care personnel, patients, and visitors are permitted without taking added precautions. The authors recommend that health care providers develop a service animal policy and provide education to staff on (i) what constitutes a service animal under the law; (ii) what questions may be asked about the service animal; and (iii) when a service animal may be excluded from the facility or certain areas of the facility.

Conclusion

Numerous federal and state laws and regulatory agencies are focused on ensuring that individuals with disabilities can access services, including health care services, in the same manner as those who do not have disabilities. As we continue developing new cultural expectations and norms—whether they be increased utilization of technologies and web-based services or identifying more ways in which animals can support individuals with disabilities—health care providers will need to understand the legal expectations for accessibility and make necessary adaptations to the services offered by their own practices. J

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