

August 17, 2008

U.S. Department of Justice
1425 New York Avenue, NW. Suite 4039
Washington DC 20005

Through: Janet L. Blizard, Deputy Chief
Disability Rights Section
Civil Rights Division
U.S. Department of Justice

Re: 28 C.F.R. Pt. 35 and 36, DOJ-CRT, Docket No. 106, Att'y. Gen. Order No. 2968-2008

To Whom It May Concern:

This is to furnish the timely comments of the National Council for the Support of Disability Issues. NCSD is a cross-disability, non-partisan education and advocacy non-profit who possesses a keen interest on increased accessibility of people with disabilities. NCSD hopes that its comments will be of assistance on this vital matter.

Access to the Courts

One of the key ways in which most Americans directly participate in government and in the rule of law is through the courts. Equal access to the courts either as a member of the jury or as a witness in an action is a core component of our democracy and of overall fairness to the judicial process. In order for citizens to have faith in their court system, meaningful access to the courts must exist for all people. People with disabilities, like their fellow able-bodied citizens, should enjoy the same level of joy and even frustration to the courts. NCSD agrees with the Department on its dicta regarding the importance of ensuring that disabled jurors and witnesses are able to access jury boxes and witness stands. NCSD will proceed to answer the query propounded by the Department, as is contained below.

Q. 4 The Department welcomes comment on how to measure or quantify the intangible benefits that would accrue from accessible witness stands, especially, inviting anecdotal accounts of the courtroom experiences of individuals with disabilities who have encountered inaccessible witness stands, as well as the experiences of state and local governments in making witness stands accessible, either in the new construction or alteration context.

Existing provisions of Title II of the ADA at Pt. 35 prohibit discrimination, based on disability or on the record of a disability, in the provision of programs and services by state and local government agencies, including, courts.¹ Whenever a public entity covered by title II undertakes an alteration to a facility, the altered area must be brought into compliance with certain accessibility standards for architectural design contained at

28 C.F.R. Pt. 36, App. A.ⁱⁱ Yet, despite these requirements, advocates of people with disabilities know that many courts across the United States still need improvement on ensuring access to judicial services.

This continued lack of accessibility to judicial services is seemingly at the heart of the action filed by the plaintiffs in *Tennessee v. Lane*.ⁱⁱⁱ

NCSD agrees with the comments filed by Disability Rights Education and Defense Fund (DREDF) that a lack of meaningful access to the judicial system not only stigmatizes the aggrieved party with a disability but impugns justice as a whole.^{iv} As the *Lane* Court indicated, access to judicial services implicates certain fundamental rights guaranteed by the Due Process Clause of the United States Constitution.^v Most certainly, to the extent not covered by the United States Constitution, a lack of accessibility to the courts call universal notions of fundamental fairness into play as well.

Men and women have certain infallible and unalienable rights, which are guaranteed by nature; those being to life, liberty and the pursuit of happiness or property.^{vi}

The knights who ensure that the state does not trample on these rights, and those who serve as third party neutrals to umpire, as it were, the actions, arguments, filings, matters and pleadings of the public, are lawyers and judges. With these professionals and with them alone, working through an accessible, open and transparent court system, there is a check on both the state and on the evils of the mob.

In lines that have been misinterpreted by those who demonstrate their ignorance by casting aspirations on legal professionals, William Shakespeare complimented the role of lawyers in society. Through his character, Dick the Butcher, the playwright stated in *Henry VI*, Pt. II, act IV, Scene II, Line 73 that, “The first thing we do, let's kill all the lawyers.”^{vii}

As an article that appeared in a 2003 edition of a Maryland daily legal newspaper called the *Daily Record* emphasized, these words were spoken by malcontents who sought to kill lawyers as means of committing a *coup d'état*.^{viii}

Therefore, for citizens to possess faith in both the knightly lawyer and the stoic judge, and in the judicial system as a whole, they must be able to know that the court system is fair and open to all. If the court system is not accessible, as *Lane* demonstrates has historically been the circumstance for people with disabilities, then the integrity of the aforesaid is compromised.

As has been discussed in a manual or treatise on accommodations to people with disabilities in the context of housing, a violation of civil rights has certain intangible value above and beyond any actual damages that a plaintiff may have incurred from unlawful discriminatory treatment.^{ix}

The logical deduction is that, by implication, the Department, in propounding the question supra, acknowledges that access of people with disabilities to the courts possesses intangible and tangible value. NCSD agrees with the comments filed by DREDF that this intangible value is not derogated by the fact that an individual with a disability might gainsay visit a local grocer more often than such individual draws forth before a judge. NCSD also holds that the intangible or tangible value of access to the courts outweighs and counterbalances any specious argument about accommodations causing undue burdens to the contrary. NCSD consequently posits that, in most circumstances, and but on few occasions, a court should not be able to shirk its obligations as an arbiter of justice.

NCSD consequently applauds work that has been undertaken in recent years by groups, such as, the Federal Advisory Committee on Courthouse Access, on judicial services and programs accessibility.^x NCSD posits the urgency for the Department to utilize this platform to implement and/or follow-up on the efforts of groups, such as, the Federal Advisory Committee on Courthouse Access, or programs like the Courtroom 21 Project at the William and Mary School of Law.^{xi} But, in any event, in no circumstance, should the Department parlay the instant docket to lessen any existing accessibility protections to the courts. The social contract, notions of natural law and fundamental fairness demand the Department increase, and, not, derogate any such accessibility protections through the instant docket.

Access to Prisons

As was reflected in *U.S. v. Georgia*, accessibility of people with disabilities to prison or detention facilities can implicate fundamental rights.^{xii}

People with disabilities not only deserve enjoying the fruits of accessibility mandates when they are free, but should also enjoy overall accessibility, should they have to reap the consequences of a nefarious action. Obviously, the accessibility concerns of inmates with disabilities pose issues not only for the particular inmate with a disability but for the corrections system as a whole. NCSD thusly agrees with all of the comments filed by DREDF on this issue.^{xiii}

Access to Medical Institutions

As Voltaire once wrote, "Doctors pour drugs of which they know little, to cure diseases of which they know less, into human beings of whom they know nothing."^{xiv}

The Department proposes a new regulation for accessibility in medical care facilities operated by both state and local governments and public accommodations. The proposed regulation requires the dispersion of accessible patient bedrooms, but declines to impose new and specific requirements on accessible medical equipment. Seemingly fitting to mention in this portion of NCSD's comment for purposes of clarity, the Department also mentions the access of service animals at medical institutions.

Significant health disparities plague people with disabilities.^{xv} They exist in as equal degree as disparities among other minority populations.^{xvi} As research demonstrates, this is especially due to the non-compliance on the part of providers with affirmative accessibility obligations as well as a lack of accessible medical equipment and health promotion activities and resources.^{xvii} For instance, Medical facilities consistently fail to provide accessible equipment, resulting in the delivery of incomplete or inferior health care services. Moreover, this is notable, for example, in the context of women with disabilities who do not have equal access to equipment that other able-bodied women have for annual breast and other female related screening exams.^{xviii} In addition, women with disabilities may be less likely to receive breast and cervical cancer screening, are diagnosed at later stages and experience limitations in treatment options compared to non-disabled women.^{xix} Increased educational and advocacy efforts of organizations, such as, the Center for Disability Issues in the Health Professions, in the area of access to medical institutions and the health profession as a whole, are only achieving slow, if steady results. Without guidance, hospitals are likely to continue with their current overall lack of accessibility for people with disabilities.

NCSD, like DREDF, supports the decision of the Department to include a dispersion requirement.^{xx} NCSD recommends that the regulations specify that the 10% of rooms that are mandated to be accessible must be dispersed proportionally throughout each specialty unit.

NCSD agrees with DREDF that an accessible room dispersal requirement would not be onerous in this context.^{xxi} To fall pray to the specious monetary arguments of medical institutions would inhibit the opportunity the instant docket furnishes for the Department to force medical institutions to increase the access of people with disabilities to health care, thereby, working a positive affect on a critical national issue regarding medical utilization and outcomes. Like DREDF, NCSD believes that imposing these requirements will compose a favorable cost-savings on the front end for medical institutions as such accommodations will be factored-in during the design and construction phases.^{xxii} As opposed to medical institutions needing, through one way or another, such as, litigation, to reconfigure inaccessible treatment areas and rooms to ensure that they are accessible, medical institutions can comply with increased accessibility mandates in the first place. As DREDF points out, accessible areas and/or rooms can be utilized by an individual not requiring such enhanced features and equipment, but that is not the circumstance with the disabled patient who presents for medical care services but cannot receive as an equal physical examination because the examination table or medical equipment is not suited to that patient's disability.^{xxiii}

NCSD opposes the decision of the Department not to add specific regulatory guidance or clarify requirements for accessible equipment and furniture. The failure to list explicit examples of accessible medical equipment will further perpetuate existing unequal access to health care services for people with disabilities. NCSD joins DREDF in recommending that medical care facilities be provided with more concrete guidance to determine their legal obligation to provide equipment that assists or accommodates persons with disabilities.^{xxiv} And when medical institutions fail to comply with these

more specific requirements, as they do from time to time, then the Department will have a stronger basis on which to file litigation against them. In addition, arguments that hint non-compliance should be tolerated because accessible medical equipment may not exist or because providers lack control over the design and production of medical equipment are also invalid.

According to the NPRM, some facilities have expressed concern that they lack control of the design or manufacturing of accessible equipment.

In passing the ADA, Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination.^{xxv} Like its cousins in the context of anti-racial discrimination, The Olmstead decision of the United States Supreme Court reinforced that “unjustified institutional isolation of persons with disabilities is a form of discrimination...”^{xxvi} Segregation not only causes inequities by stereotyping and stigmatizing, but also harms by enabling environments for lesser standards of goods, programs, services, and in the context of medical care, treatment.

Yet, again, another invalid argument from those who are supposedly instructed “to do no harm” and for whom the following oath of their progenitor instructs that:

I swear by Apollo by Physician, by Asclepius, by health by Panacea and by all the gods and goddesses, making them my witnesses that I will carry out, according to my ability and judgment, this oath and this indenture. To hold my teacher in this art equal to my own parents; to make him partner in my livelihood, when he is in need of money to share mine with him; to consider his family as my own brothers, and to teach them this art, if they indenture; to impart precept, oral instruction, and all other instruction to my own sons, the sons of my teacher, and to indentured pupils who have taken the Physician's oath, but to nobody else. I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrongdoing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly I will not give to a woman a peccary to cause abortion. But I will keep pure and holy both my life and my art. I will not use the knife, not even, verily, on sufferers from stone, but I will give place to such as be craftsmen therein. Into whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrong-doing and harm, especially from abusing the bodies of man or woman, bond or free. And whatsoever I shall see or hear in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets. Now if I carry out this oath, and break it not, may I gain forever reputation among all men for my life and for my art, but if I transgress it and foreswear myself, may the opposite befall me.^{xxvii}

NCSd agrees with DREDF that, per requirements set forth at, for example, 42 U.S.C. § 12182(b)(1), the production of equipment does not justify or excuse a failure to provide accessible services and goods.^{xxviii} Monetary arguments are straw persons erected as a means of avoiding additional obligations. Ncsd agrees with DREDF that, by explicitly listing high priority equipment commonly used in health care settings, covered entities will have more incentive to budget for and acquire this necessary equipment.^{xxix}

Ensuring accessible medical services, inclusive of using accessible medical equipment will, during the course of time, also engender good will with people with disabilities, thereby producing a new market for providers who do so.

The Department indicates that it intends to conduct an economic impact analysis of regulations governing specific types of free-standing equipment, presumably out of concern for the financial impact new regulatory language will supposedly impose on medical institutions. As DREDF points out and as the Department is aware, covered entities need not comply with reasonable accommodation mandates, if doing so would pose an undue burden or fundamental alteration.

Thus, NCSD joins its colleagues, such as, DREDF in proposing language with increased accessibility mandates on medical institutions for Titles II and III:

Sec. --- Accessible Medical Equipment.

a. General. A public accommodation [public or government-funded entity] shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of accessible medical equipment and treatment, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

b. Examples. The term "accessible medical equipment and treatment" includes --

1. Examination tables, (height adjustable, with a minimum height of 15 inches from the floor, extra-wide top and higher weight capacities, adjustable hand rails and adjustable foot/leg supports)
2. Weight scales with accessible features
3. Diagnostic and imaging equipment, including, mammogram machines with accessible features
4. Medical chairs, including, dental chairs with accessible features

c. Equal treatment - A public accommodation [public or government-funded entity] shall furnish accessible medical equipment where necessary to ensure full and equal medical care for individuals with disabilities.

d. Alternatives - If provision of a particular piece of accessible medical equipment by a public accommodation [public or government-funded entity] would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation [public or government-funded entity] shall provide an alternative accommodation, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent

possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation [public or government-funded entity.

e. In accordance with this sub part, to ensure that covered entities comply with these obligations, to ensure that medical providers are trained and sensitized to people with disabilities, a covered entity will appoint and fully staff a department of ADA compliance.^{xxx}

NCSD joins DREDF in proposing that the Department add the following section regarding floor space in the context of medical equipment:

Sec. -- Clear Floor Space. Exam tables, scales, and diagnostic and imaging equipment shall have a clear floor space complying with 305 positioned for transfer or for use by an individual seated in a wheelchair. Clear floor or ground spaces required at diagnostic and imaging equipment shall be permitted to overlap...^{xxx}

NCSD joins DREDF in opposing the proposal of the Department to eliminate existing standards that require a canopy or roof overhang at passenger loading zones.^{xxxii} For some people with disabilities, it is critical they not be exposed to the elements in order to preserve Advance Life Support systems. Furthermore, a long with concepts of universal design and its benefits and cost-savings, as has or will be expressed; medical institutions would be pressed to demonstrate that these requirements should be removed, as even the able-bodied benefit from overhangs.

In final note, NCSD agrees with the sentiments of the Department that service animals deserve the broadest feasible access to medical institutions. As guidance furnished in a 2006 technical assistance document issued by the United States Department of Health and Human Services indicates, except for certain limited circumstances, service animals pose no greater infection risk than the able-bodied public. Service animals and their handlers should thusly enjoy the same level of access as the able-bodied public. As the technical assistance document indicates, service animals should not enjoy access to certain limited critical care areas if it is the policy of the medical institution not to allow similar access to the able-bodied public. To ensure that medical institutions possess clear guidance, because of clearly stated obligations, NCSD recommends that the following additional regulatory language be added:

Sec. --- Service Animals in Health Care Settings

- A. Service animals and their handlers will enjoy equal access to all areas and rooms of medical institutions to the extent that similar access is provided to the able-bodied public.
- B. Medical institutions shall designate a relieving area for service animals that are on its grounds.

C. Exceptions – The only circumstances under which service animals may be denied access are, where—

1. Such service animal is not under control and is causing a disturbance that arises to the level of a direct threat under these regulations, or
2. Where the medical institution similarly denies access to a particular critical care area, such as, an operating room to the able-bodied public.

Service Animals

Whereas the proposals for Titles II and III are similar, they are addressed jointly. NCSD disagrees with the approach proposed by the Department to exclude the words, guide dog and signal dog, from the definition for service animals under Pt. 36. While it is true that since the original promulgation of the definition at existing Pt. 36, other kinds of animals have been employed to provide legitimate assistance to people with disabilities, NCSD posits that these two specific kinds of animals possess the kind of specialized training and historical standing to qualify them as service animals.^{xxxiii} Therefore, retaining them in the definition will serve the public well by specifically intimating, by indirect reference, what kinds of animals are and are not service animals.

NCSD applauds the efforts of its colleagues in the established, service animal civil rights movement, to formulate a revised definition for 28 CFR §36.104 - Definition of Service Animals.^{xxxiv} Advocacy non-profits with extensive expertise on service animal law and policy, which collaborated through the auspices of a working group named the Coalition of Assistance Dog Organizations (CADO), formulated this revised definition.^{xxxv} Members of CADO, many of whom are the handlers of assistance dogs, presented the proposed revised definition for service animals to management of the Disability Rights Section of the Department.^{xxxvi}

As formulated by CADO, the proposed revised definition reads:

“Assistance animal means an assistance dog, and, may include, other animals specifically trained to perform physical tasks to mitigate an individual's disability. Assistance dogs include: dog guides that guide individuals who are legally blind, signal dogs that alert individuals who are deaf or hard of hearing to specific sounds, and, service dogs for individuals with disabilities other than blindness or deafness.”^{xxxvii}

The revised definition that was formulated by CADO also states:

“Service dogs are trained to perform a variety of physical tasks including but not limited to pulling a wheelchair, lending balance support, picking up dropped objects or providing assistance in a medical crisis.”^{xxxviii}

NCSD believes that CADO is or was clearly on the correct track with its language in its proposed revised definition, which states:

“The presence of an animal for comfort, protection or personal defense does not qualify an animal as being trained to mitigate an individual's disability and therefore does not qualify said animal as an assistance animal.”^{xxxix}

NCSD has been called on in recent years to consult on access issues of individuals who claim they have properly trained and behaved service animals. These requests for assistance in the context of service animals have arisen especially in the circumstance of individuals with mental health disabilities who claim they have performed self-training of service animals.

NCSD disagrees with the definition that has been advocated through correspondence to the Department dated during August, 2007, by advocates of people with mental health disabilities.^{xi} NCSD thusly agrees with the proposal of the Department to exclude animals whose sole functions are furnishing emotional support, comfort and well-being, therapy, companionship and/or therapeutic benefits. NCSD accords with these exclusions because the proposal of the Department on this sub issue appears consistent with the CADO proposed revised definition.

On the other hand, as long as such animals provide task based assistance, there may be instances, where people with mental health and/or cognitive disabilities would benefit from a service animal appropriately trained and placed to mitigate their specific disabilities. Yet, it seems that the demarcation between emotional support and psychiatric related assistance is narrow, indeed. As a prophylactic against animals who provide non-task based assistance, such as, emotional support, and animals who provide task based assistance to people with mental health and/or cognitive related disabilities; NCSD believes it is worth-while for the Department to consider including language for psychiatric dogs, and psychiatric dogs only, that such animals must be proscribed by a licensed and credentialed medical professional as part of a Plan of Care.

The longevity of access rights depends on the reasonableness of all parties involved; both the able-bodied and the disabled. Access rights could be potentially jeopardized by any individual who believes they possess the acumen to provide the kind of specialized training to an animal to cause it to rise to the legal definition of a service animal. On the other hand, NCSD realizes that imposing a specific training and/or accreditation requirement on service animals could impose a true hardship on myriad of its colleagues who serve as the providers of service animals.^{xii} NCSD thusly recommends some additional language be augmented to the fine definition that was formulated by CADO and that has been set forth above. This additional language should be precatory in nature and indicate that a service animal mitigates a disability if it can meet the public behavior standards that have been developed by the International Association of Assistance Dog Partners.^{xiii}

NCSD consequently recommends the following overall new definition for service animals:

Assistance animal means an assistance dog, and, may include, other animals specifically trained to perform physical tasks to mitigate an individual's disability. Assistance dogs include: dog guides that guide individuals who are legally blind, signal dogs that alert individuals who are deaf or hard of hearing to specific sounds, and, service dogs for individuals with disabilities other than blindness or deafness. Service dogs are trained to perform a variety of physical tasks including but not limited to pulling a wheelchair, lending balance support, picking up dropped objects or providing assistance in a medical crisis. A handler can be called on to verbally assure a place of public accommodation, public entity or other setting that such handler's animal has, in the circumstance of dog guides, been trained at a school or provider, or in the circumstance, with many other kinds of Assistance Animals, been trained to meet the public behavior and training standards developed by the International Association of Assistance Dog Partners.

The presence of an animal for comfort, protection or personal defense does not qualify an animal as being trained to mitigate an individual's disability and therefore does not qualify said animal as an assistance animal.^{xliii}

In the proposed revisions to the regulations at Title II of the ADA, the Department indicated that the term, direct threat, is not defined in the existing Title II provisions, but is so defined at existing 28 C.F.R. §36.208(b).

NCSD agrees with the proposal of the Department to apply the existing definition from its current location in Title III and also locating it in the definitions for Title II, (28 C.F.R. §35.104). To this end, NCSD urges the Department to do the same with any and all other definitions, including, service animals, so that definitions, to the fullest extent possible, are consistent across Titles.

Accommodations Related Sub Issues

Since its promulgation, the one sub issue of service animals alone has been the subject of many a law suit and of many a law or other journal review.^{xliv}

NCSD thusly applauds the attempts of the Department to continue to support the civil rights of service animal handlers, while, at the same time, providing clarification and addressing concerns of the broader public. For instance, the Department tenders several proposals related to misbehaving service animals, who if they are misbehaving badly enough to be so removed, are probably not service animals in the first place. NCSD desires to comment on some of those proposals.

NCSD agrees with the Department endeavoring to clarify the circumstances under which a public entity can request the removal of a service animal.

Despite the large number of households with pets in the United States, many Americans possess ungrounded fears of animals generally and service animals specifically. With the phobias of particular individuals and with the existing broad language of the regulations, it seems that too much leeway exists for public entities to exclude service animals that it

claims are not behaving. NCSO thusly agrees with the Department amending 28 C.F.R. §35.136 to include, the following criteria, as grounds on which a public entity can request a service animal be removed: 1. The animal is out of control and the animal's handler does not take effective action to control it; 2. The animal is not housebroken (a basic requirement for a service animal); 3. The animal's presence or behavior fundamentally alters the nature of the service the public entity provides, (e.g., repeated barking) or 4. The animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications in....

To prevent against humiliation of people with disabilities, on the one hand, and, on the other, to help places of public accommodation or public entities, which are often uneducated about service animals, to distinguish between legitimate service animals and animals that are frauds; NCSO believes that the Department is leaning in the correct direction with its proposal to expressly incorporate language that a public entity must not inquire into the disability of a handler, or require proof of service animal certification or licensing or of medical documentation of the disability. Rather, it may inquire as to the following: 1. If the animal is required because of a disability and 2. What work or tasks the animal has been trained to perform. As long as these questions are not propounded repeatedly or in such a way to be harassing, as one or more courts have suggested in opinions, then these limited questions appear consistent with the intent of the ADA.^{xlv}

However, NCSO would note that there are some service animals, such as, dog guides, whose harness clearly identify them as service animals.

An area that does not appear to be covered by the proposals of the Department in neither the Title II nor Title III contexts is that of purported allergies of individuals to animals generally and service animals specifically. Inquire with any handler of a legitimate service animal under the existing regulatory panoply at Pt. 36 and one will learn any of the sundry experiences of a taxicab driver refusing to transport a service animal team.^{xlvi} The claim that is often raised and bantered to the frustration of handlers in such situations is that a driver suffers with an alleged allergy.^{xlvii} Furthermore, there are some religious traditions, strange as they are to the handlers of service animals, that dogs are filthy, and, as such, should not be accommodated.^{xlviii} To address specious allergenic and religious arguments, NCSO recommends the Department amend the existing regulations to clarify these issues, especially, doing so, based on the guidance of the Assistant City Solicitor of Cincinnati, Ohio, of many years ago concerning such issues.^{xlix} In that guidance, the Assistant City Solicitor makes clear that the onus to claim of an allergy is on the party so using it as an excuse to deny access rights, and not the service animal handler.¹

NCSO now desires to turn to each of the questions posed in the NPRM with respect to service animals and respond to them in turn. The Department propounded the following questions:

Q. 9 - Should the Department clarify the phrase "providing minimal protection" in the definition, or remove it?

Q. 10 - : Should the Department eliminate certain species from the definition of service animal? If so, please provide comment on the Department's use of the phrase, "common domestic animal," and on its choice of which types of animals to exclude.

Q. 11 - : Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the common domestic animal prong of the proposed definition?

Regarding question nine that is set forth above, NCSD agrees with the public comments submitted to this instant docket by its colleagues at IAADP and Guide Dog Users, Inc., who compose leaders in the established service animal civil rights movement.^{li} These two advocacy non-profits possess extensive grassroots based expertise and knowledge in what is sensible in terms of evolving notions of the human and animal bond, and as to how animals can be employed to provide task based assistance to people with disabilities.^{lii} The Department should adopt their views because of the cogent analysis furnished in their comments.^{liii}

A disagreement on the construction of the phrase, "minimal protection work," seems to exist. NCSD disagrees with the comments filed by DREDF in this area.^{liv}

The word, protection, possesses a broad definition, meaning, "the act of protecting or the state of being protected; preservation from injury or harm."^{lv} A rule of construction of remedial statutes, and by extension, regulations promulgated to implement their provisions, is that they should be read broadly.^{lvi} Conversely, it seems also logical that no statute or implementing regulation should be interpreted to cause more confusion, and, thereby, derogate rights that such statutes and regulations seek to shore-up in the first place. A trend in service animal law and policy, as has been enacted by the several states, is to provide relief, in the way of criminal penalties and other sanctions, for the handlers of established service animals, who suffer unwarranted and impermissible interference and attacks of pets.^{lvii} In light of increasing state sanctions for the documented problem of attacks and interference, it is imperative that the Department not muddy the waters as it were by including broad words in the definition. As opposed to the word protection, the most applicable meaning for the word alert is, "On the alert, on guard against danger; in readiness; vigilant..." The argument is that the phrase minimal protection work should be retained, because allegedly certain kinds of service animals protect their disabled handlers during a medical crisis, such as, reminding them to administer medication.^{lviii}

Protection seems to indicate aggressive or proactive action, where as alert reflects the state of helping or being ready to help. Language should not be retained in the definition that even reflects that a legitimate service animal can demonstrate aggressive behavior. A whole mark of service animals and of their rights of access is that they can behave appropriately in public, inclusive of not barking, growling or in any other way acting out. It is imperative that this language not be sufficiently broad as to allow the potential for aggressive behavior of pets or service animals of poor handlers, thereby providing them cover to claim that such behavior is a mitigating task. The broad word of protection and its potential affect on the safety of established service animal handlers does not appear

mitigated by qualifiers, such as, minimal. Therefore, NCSD urges the Department to adopt the views advocated by GDUI in their public comment to this instant docket.^{lix}

Regarding question ten that is set forth above, NCSD agrees with excluding certain kinds of animals that any reasonable person, inclusive of those with disabilities, should contemplate as historically falling within the rubric of non-domestic, livestock or wild animals. NCSD consequently agrees with the Department's proposal to revise the definition at Pt. 36 to exclude: 1. nonhuman primates born in captivity, 2. reptiles, 3. rabbits, 4. farm animals, inclusive of horses, ponies, pigs and goats, and, 5. other critters, such as, ferrets, amphibians and rodents. These exclusions appear consistent with the update to the regulations for the Air Carriers Access Act of 1986.^{lx} However, NCSD recognizes that other animals beyond dogs may be capable of being employed for assistance work on behalf of people with disabilities.

Animals like miniature horses, if they are to deserve the legal classification of service animals, need to perform task based assistance for people with disabilities and also possess the kind of specialized training, placement and behavioral standards to enable them to be appropriately about in public. Therefore, NCSD disagrees with a blanket exclusion of other kinds of animals, such as, miniature horses from assistance work as long as such animals can provide task based assistance.

For animals beyond the traditional service animals of dog guides and signal dogs specifically set forth in the existing version of Pt. 36, NCSD believes that the recent update to the regulations for the Air Carriers Access Act of 1986, as relates to service animals, will furnish the Department with useful guidance on how to address animals that are untypical and that individuals claim should be included as part of the definition.^{lxi} This update seems to endeavor to strike a balance, on the one hand, of providing the broadest feasible access to such animals that are untypical as service animals, and, on the other hand, giving carriers the ability to render determinations about such access.^{lxii}

Regarding question eleven that is set forth above, NCSD agrees with its colleagues at IAADP and GDUI that the issue is not so much size and weight, but rather, whether an animal provides task based assistance to qualify it as a service animal.^{lxiii} Even with the circumstance of dog guides, some exceptionally tall humans may be matched with a dog guide weighing beyond the typical 50 to 75 pound range that animal medical professionals recommend for a Retriever. NCSD is not assured that imposing restrictions on height and weight would inure to the access rights of people with disabilities, on the one hand, and, on the other, help places of public accommodation guard against nefarious individuals, who would bring any animal into a public venue and claim it is a service animal. NCSD thusly disagrees with imposing height and weight limitations on domestic animals.^{lxiv}

Like its colleagues, NCSD also believes that the focus of qualification for special legal status of service animal should be on whether a particular animal provides task based assistance.^{lxv} As will be discussed in a book chapter that is part of an overall ABA book on the law of animals, and that is in the review and editing process, the *is non qua nom* of

the legal definition for service animals is that an animal seeking to fall within the definition as such mitigates the disability of its handler. NCSA agrees with its colleagues that including broad language of, do work, will needlessly cause greater confusion, rather than clarify the definition.^{lxvi} As such, this is an area where specifics are helpful to the extent reasonable. NCSA thusly agrees with the proposal of the Department to illustrate the kinds of tasks performed by service animals, with those to, include: 1. assisting an individual during a seizure; 2. retrieving medicine or the telephone; 3. providing physical support to assist with balance and stability to individuals with mobility disabilities, and, 4. assisting individuals, including those with cognitive disabilities with navigation.

NCSA also agrees with the proposal of the Department with specific reference to the Title II context to include language in applicable provisions that service animals be: 1. individually trained to mitigate a disability; 2. housebroken (a basic requirement); 3. under the control of its handler, and as a logical extension, 4. have a harness, leash or other tether. NCSA views this language as consistent with the intent of the CADO proposed revised definition for 28 C.F.R. §36.104, that a service animal be an animal that is specialized and directly mitigates the affects of a disability, as opposed to a pet, through task based assistance. Therefore, NCSA urges the exclusion of the words; do work, from the approach proposed by the Department and the adoption of the definition as proposed by CADO and as further elaborated on above.

Captioning and Narration – Going Out to the Movies, Dear.

Next to the first national past time of baseball, it is fair to state that, in some fashion, viewing a film figures as a next ranking favorite leisure activity of Americans with and without disabilities. With the revolution in technology, more and more Americans with sensory disabilities can enjoy films and/or even television shows in an as equal capacity as their able-bodied counterparts. Leadership in the sphere of access to the vision impaired to films and television shows is attributable to the American Council of the Blind.^{lxvii}

Audio description refers to an additional narration track for vision impaired patrons of visual media, including, television and films, as well as the performing arts, including, dance and opera.^{lxviii} Beyond entertainment value, audio description provides access to information in other areas, such as, emergency warnings.

The leadership of the American Council of the Blind resulted in prodding the Federal Communications Commission to impose a mandate of audio description on broadcasters, if only for a limited number of hours of such audio description per week.^{lxix}

In 2002, the Federal Communications Commission (FCC) required the major networks and cable channels in the top 25 television markets to present at least four hours of described programming weekly.^{lxx} The FCC further required that audio described programs be made available where TV stations not in the top 25 markets had the equipment to do so.^{lxxi} The National Association of Broadcasters, the Motion Picture Association of America and the National Cable and Telecommunications Association

successfully challenged that order in court, contending that the FCC exceeded its authority.^{lxxii} Unfortunate is it that an organization, such as, the National Federation of the Blind would erect additional road blocks to those imposed by the aforesaid by possessing inane policy stances on this issue.^{lxxiii} Therefore, the answer in this area is for increased access requirements, not less. NCSD will now answer the questions of the Department on this issue.

Q. 24 and 25 - Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format, including, narrative description for the vision impaired, at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of a digital format?

Some vision impaired people will rely on the audio description, whereas others will utilize it only as a guide. Not being heterogenic, to thoughts of the contrary, the needs and wishes of visually impaired people are as varied as that of any sighted audience. Whether one vision impaired person enjoys the audio description and the other departs viewing a television show or film indicating that audio description did not assist me much at all. This divergent range of experiences as relates to audio description and other forms of captioning is not relevant to the present inquiry. All too many broadcasters and movie theatres do not enable those with sensory disabilities to enjoy the same level of experience as their able-bodied counterparts. In some instances of which NCSD is aware, when audio description does exist, it is only for a limited number of films or is available in one specific room of a movie theatre that has multiple rooms with myriad films being concurrently performed. When private sectors do not proactively undertake steps to exist with their fellow public as good citizens, then it is imperative that when there is the chance to do so, local, state and federal governments impose requirements of positive action on them. As such, NCSD recommends that the Department impose a requirement of increased access in this area. Considering the amount of revenue earned by the broadcasting and film industries annually, it is appropriate to impose this requirement as a blanket obligation of public accommodations, as opposed to a sporadic one. These industries would be pressed and disingenuous to enchant shibboleths of undue burden.

The National Association of the Deaf noted that captioning a film costs about \$2,000.^{lxxiv} As NCSD read the NPRM, the Department expressed that, with regard to narration for the vision impaired, this may be even less in cost.

Recovery of Damages

As far as NCSD can determine, the Department did not address the recovery of damages. To address the harsh holdings in *Garrett* and *Gorman*, the Department should add language specifically stating that plaintiffs can recover monetary damages against places of public accommodations and public entities, inclusive of all important punitive damages.^{lxxv}

Title II Complaints

NCSD joins DREDF in opposing the proposal of the Department to eliminate the requirement that the Department investigate each complaint.^{lxxvi} It is crucial that all complaints, including, those in the context of Title II, be separately investigated. NCSD agrees with DREDF that there are far fewer ADA Title II complaints than ADA Title III complaints. The Department should not reduce civil rights enforcement for people with disabilities because of any actual or perceived workloads that it cannot presently address. The answer is for the Department to address its internal resource allocation issues as an organization and not restrict the chance for people with disabilities to receive redress from misfeasors. In addition, the Department's obligation to investigate all Title II complaints remains crucial because Title II entities are providing vital programs and services. People with disabilities have few other avenues of redress if state and local governments fail to provide equal opportunity. The federal government must stand as the guarantor of civil rights when the violator is state or local government. The power differential between people with disabilities and the state or local governments that are obligated to serve them is much too great for any alternate routes to justice to be open or effective.

Furthermore, the Department should be expanding its capacity to investigate every Title III complaint, not deteriorating its enforcement of Title II to match what is already an unacceptable situation in Title III in the efficient and untimely investigation of complaints, if at all. Lastly, it must be noted that the very complaints that DOJ will ignore, the "on the edges," less-significant, daily and ordinary types of discrimination; that is, those that are common and don't rise to the top, are exactly the ones that need an administrative remedy, because these are not the types of issues that people will bring a lawsuit over or for which attorneys may find an incentive in incurring costs to fight. If the Department fails to investigate all complaints, inclusive of those in the context of title II, this will be a very serious step backwards.

Please do not hesitate to telephone me at (410) 241-6745 if you have questions regarding this public comment.

Sincerely,

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ⁱⁱ *Id.*

ⁱⁱⁱ 541 U.S. 509 (2004) (Stevens J.)

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- ^v *Tennessee v. Lane*, 541 U.S. 509, 525, 531-534 (2004),
- ^{vi} The Declaration of Independence, <http://patriotpost.us/histdocs/declaration.htm> (Visited Aug. 6, 2008)
- ^{vii} *King Henry VI Part 2* by William Shakespeare: Act 4. Scene II, <http://www.online-literature.com/shakespeare/henryVI2/14/> (Visited Aug. 7, 2008)
- ^{viii} Irwin Kramer, *Kramer Vs. "Living and Dying By the Law,"* *The Daily Record* (Dec. 8, 2003), http://www.kramerslaw.com/lawyer_critics.htm (Visited Aug. 7, 2008)
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- ^{xi} Center for Legal and Court Technology, <http://www.courtroom21.net/c21/index.html> (Visited Aug. 6, 2008)
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- ^{xv} Disparities between people with and without disabilities, DH, NCBDDD, <http://www.cdc.gov/ncbddd/dh/disparitiesinhealth.htm> (Visited Aug. 11, 2008)
- ^{xvi} *Id.*
- ^{xvii} ACCOMMODATING ADULT PATIENTS WITH DISABILITIES | Chart | Find Articles at BNET, http://findarticles.com/p/articles/mi_qa3932/is_2200403/ai_n9385765 (Visited Aug. 11, 2008)
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^{xxxix} Id.

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