

2018

Puppies, Ponies, Pigs and Parrots: Policies, Practices, and Procedures in Pubs, Pads, Planes and Professions: Where we Live, Work, and Play, and How we Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation

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Puppies, Ponies, Pigs, and Parrots:
Policies, Practices and Procedures
in Pubs, Pads, Planes and Professions:
Where We Live, Work, and Play, and How We Get There:
Animal Accommodations in Public Places, Housing, Employment and Transportation

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This version is an expanded and adapted version of the article published as Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots: Policies, Practices and Procedures in Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment and Transportation*, 23 *ANIMAL L.13* (2018) and it is adapted with permission. This version not only provides additional case citations, but updates developments that have occurred since the presentation was given. Appreciation to Michael Olivas, who provides me with many news stories about these issues on a regular basis. The article will be updated on an occasional basis. This version was revised on July 26, 2019.

Overview

Although the United States is a pet loving country, American culture (unlike Europe where small dogs are seen in many public places) has historically not supported having these guests in most public places.¹ For many years, the exception was the traditional guide dog – the German Shepherd or the Lab. The desire to bring our four legged and two legged friends (and even no-legged snakes) to public places, however, has increased dramatically in recent years as

¹ F. Diana Barth, *Is an emotional support animal serving person's needs or their narcissism?* THINK (June 29, 2019) <https://www.nbcnews.com/think/opinion/emotional-support-animal-serving-person-s-needs-or-their-narcissism-ncna1024586>; Farah Stockman, 'Reptiles to Insects': Emotional Support Animals Or Just Pets?: States Are Cracking Down on What They See As Fraud More than an Aid for Mental Health NEW YORK TIMES A12 (June 19, 2019) <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html>; Peter Moore, *Americans Love Dogs, But Don't Want Them in Their Restaurants*, YOUgov (Feb. 3, 2016, 7:09 AM), <https://today.yougov.com/news/2016/02/03/americans-dont-want-dogs-restaurants/> [<https://perma.cc/3YU4-ADWG>] (accessed Jan. 19, 2018); *6 Different Types of Service Animals*, DISABILITY GUIDE, <https://disabilityguide.com/6-different-types-of-service-animals.html> [<https://perma.cc/3DZ9-482S>] (accessed Jan. 19, 2018). Jason Nar, *The emotional support alligator that helps a York County man deal with depression*, January 24, 2019 (<http://www.philly.com/news/alligator-esa-peacock-dogs-animals-crocodiles-support-depression-20190124.html>).

the increase in stories about turkeys on planes,² parrots in backpacks,³ and kangaroos at McDonald's⁴ demonstrate. The increasing presence of "fake" support animals is noted as well.⁵

The increasing presence of dogs and other animals in public places has been addressed by the Americans with Disabilities Act (ADA)⁶ through its regulations promulgated in 2010. The ADA, passed in 1990, prohibits places of public accommodation and public service programs from discriminating on the basis of disability.⁷ It also requires these programs to provide reasonable accommodations,⁸ which can take the form of waiving prohibitions on animals by the operators of these public places and making other accommodations to policies related to animals. Title I of the ADA⁹ applies to employment settings, which might also allow an individual to request the presence of an animal in the workplace. While not as comprehensive as the ADA, the Fair Housing Act (FHA)¹⁰ and the Air Carrier Access Act (ACAA)¹¹ incorporate the possibility that animals as reasonable accommodations might be required in housing settings and in air travel.

Although the 2010 federal regulations¹² provide some clarification about what is legally required with respect to service and emotional support (or comfort) animals, there are still a number of uncertainties about what is required in some settings. Many programs have implemented policies and practices, and some of these have been at issue when courts have applied the statutory and regulatory requirements to these policies and practices.

This article addresses how disability discrimination policy clarifies when animals might be allowed as accommodations in various settings. It provides the basic statutory and regulatory framework, additional administrative agency guidance, and judicial interpretations of these requirements in various settings. Major settings where animals might be an accommodation are

²Grace E. Cutler, "Flying turkey ruffles feathers about 'emotional support' animals on planes," <http://www.foxnews.com/travel/2016/01/14/turkey-ruffles-feathers-about-emotional-support-animals-on-flights.html>; .

³ Rebecca Skloot, *Creature comforts*, NEW YORK TIMES (December 31, 2008) <http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html>.

⁴ Debbi Baker, "McDonald's not lovin' in when woman shows up with her therapy kangaroo named Jimmy," <http://www.sandiegouniontribune.com/opinion/the-conversation/sdut-therapy-kangaroo-wisconsin-mcdonalds-2015feb04-htmlstory.html>.

⁵ Kathryn Daniel, *Fake Service Animals Are Becoming More Common*, May 8, 2017, http://weartv.com/news/local/051017_10pm_dis-service-dogs; Wes Siler, *Stop Faking Service Dogs*, https://www.outsideonline.com/2236871/stop-faking-service-dogs?utm_medium=social&utm_source=email&utm_campaign=onsiteshare.

⁶ 42 U.S.C. §§ 12101 et. seq.. See also, Frequently Asked Questions About Service Animals and the ADA, https://www.ada.gov/regs2010/service_animal_qa.html.

⁷ For an overview of disability discrimination law, see LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* Chapter 1 (Thomson West 2012 and cumulative supplements).

⁸ 42 U.S.C. §§ 12131 (Title II) and 12182(b)(2)(A)(ii). Title I of the ADA referencing employment also requires reasonable accommodation. See 42 U.S.C. § 12112(b)(5).

⁹ 42 U.S.C. §§ 12111-12117.

¹⁰ 42 U.S.C. § 3601 et. seq.

¹¹ 49 U.S.C. § 1374.

¹² 75 Fed. Reg. 56164, 56192-195 (Sept. 15, 2010). This includes commentary and analysis. <https://www.gpo.gov/fdsys/pkg/FR-2010-09-15/html/2010-21821.htm> 75 Fed. Register 56192 ?) (Sept 15, 2010). For regulatory guidance, see Department of Justice, Frequently Asked Questions about Service Animals and the ADA, July 20, 2015, https://www.ada.gov/regs2010/service_animal_qa.pdf, last visited July 30, 2018.

addressed separately, with particular focus on higher education institutions because those settings have the potential of incorporating several different types of setting and on health care programs because of the particular concerns about health and safety.

For each situation, the following is addressed: what individuals are considered to be protected as meeting the definition of “disabled”, the reasonable accommodations required with respect to animals for these individuals, what documentation of the disability and the need for the accommodation is required, and what kinds of animals are to be allowed. Finally, the article highlights principles common to all animal participation in various settings and provides a suggestion of the areas that are likely to emerge and those that would benefit from further clarification. While the focus is primarily on federal law, reference to state statutes is incorporated as appropriate.¹³

As these requirements are discussed, it is essential to clarify the distinction between service animals and emotional support animals (ESAs) and the settings in which statutory coverage allows different categories and types of animals. Some institutional policies provide additional categories of animals and are broader than federal law and this can add even greater complexity to an issue that is already challenging and confusing.

Service animals are those that are individually trained to provide a specific service for an individual with a disability.¹⁴ Emotional support animals (ESAs) are sometimes referred to as companion animals, comfort animals, therapeutic animals, or psychiatric animals.¹⁵ ESAs do not necessarily perform a specific task or service, but relieve stress or provide comfort for individuals with mental health challenges. Both ESAs and service animals are to be distinguished from pets, although one of the challenges of disability discrimination law is the increase in the number of individuals who simply want to bring their pets to various places and have begun using disability discrimination law to be allowed to do so. When these individuals push the limits, it makes it more difficult for those whose disabilities legitimately would benefit from the presence of a service animal or an ESA.

¹³ Some states waive dog license fees for service animals. Disability Rights and Public Accommodations, adasoutheast.org/.../public_accommodations_disability_rights_state-by-state. (8) Kentucky, Louisiana, Massachusetts, New Mexico, Ohio, Oregon, Virginia, West Virginia. Some states have with provisions for criminal (usually misdemeanor penalties) for fraud (\$1,000 fine and even jail, for example) (16) California, Colorado, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Texas, Utah, Washington State (only covers physical disabilities?). Some states also expand the types of animals considered for these purposes. States that cover more than dogs – (13) Illinois, Idaho, Indiana, Maine, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, Washington, West Virginia. *See also* Green v. Housing Authority of Clackamas County, 994 F. Supp. 1253 (D. Ore. 1998) (federal law overrides state law requiring use of orange leashes on service animals). Some state laws allow dogs in training to be in public places, but also allow a requirement of greater documentation. State laws that are broader would seem to take precedence in most settings, but little case law has provided guidance on these issues.

¹⁴ 28 C.F.R. §§ 35.104, 36.104; 36,202(c). Under Titles II and III of the ADA, the only animals allowed as “service” animals are dogs and miniature horses.

¹⁵ Federal law does not specify what animals might be allowed as ESAs in various settings, but animals frequently sought in housing for emotional support and for service include dogs, cats, rabbits, gerbils, potbellied pigs, birds, ferrets, sugar gliders (a popular college student companion), and even snakes.

One of the reasons that animals are unique as “reasonable accommodations” is that this accommodation can directly affect others who may have fears or phobias, asthma, or allergies. Animals take up space, and in some situations that can affect the space that others have and can expect to have. Animals also can disrupt or present a danger or health concern that would affect others. Animals leave dander, hair, and waste behind. As a general rule, no other reasonable accommodation requires other individuals in various settings, not just the programmatic setting itself, to “accommodate” another person’s disability.

I. Basic Statutory Framework

Within all frameworks, the following are generally consistent expectations.¹⁶ The animal must be under the control of the individual.¹⁷ Allowing an animal does not require the program to provide personal assistance.¹⁸ The animal must not disturb, harm, or create a risk to others.¹⁹ Additional charges in advance may not be required, although an owner could be charged for damage to the premises that actually occurred.²⁰ The requirements for documentation of the disability and the relationship of the disability to the animal accommodation,²¹ however, vary depending on the settings, as further described below. The types of animals allowed also varies depending on the setting.

A. Americans with Disabilities Act and Rehabilitation Act

1) Statutory Overview

Section 504 of the Rehabilitation Act of 1973 (Section 504)²² applies to programs that receive federal financial assistance. The Americans with Disabilities Act (ADA),²³ enacted in 1990, is much more comprehensive and has three major titles that would apply to situations involving animals as accommodations. Title I applies to employment.²⁴ Title II applies to state and local governmental programs.²⁵ Title III applies to twelve categories of privately provided accommodations made available to the public.²⁶ The ADA and the Rehabilitation Act are generally intended to be interpreted consistently, and the basic application is generally the same. For that reason, both statutes are covered in this joint section.

¹⁶ Although the citations are to regulations for Titles II and III of the ADA, it is probable that similar expectations would apply in other settings.

¹⁷ 28 C.F.R. § 35.136(d); 28 C.F.R. §36.302(c)(4). See e.g., *Johnson v. Oregon Bureau of Labor Industries*, 415 P.3d 1071 (Or. App. 2018) (grocery store owner violated state law (similar to ADA) in denying service dog based on claim that it was under control of husband not owner; issue of two dogs also raised).

¹⁸ 28 C.F.R. § 35.136(e); 28 C.F.R. §36.302(c)(5).

¹⁹ 28 C.F.R. § 35.136(b); 28 C.F.R. § 36.302(c)(2).

²⁰ 28 C.F.R. § 35.136(h); 28 C.F.R. §36.302(c) (8).

²¹ *Riley v. Board of Comm’rs of Tippecanoe County*, 56 Nat’l Disability L. Rep. ¶ 27 (N.D. Inc. 2017) (veteran with PTSD unable to show that dog was trained to work or perform tasks related to disability; denial of dog admission to court house; dog was trained to open doors and pull groceries, but these tasks were unrelated to disability).

²² 29 U.S.C. § 794.

²³ 42 U.S.C. §§ 12101 et seq.

²⁴ 42 U.S.C. §§ 12111-12117.

²⁵ 42 U.S.C. 12131-12165.

²⁶ 42 U.S.C. 12181-12213, 12181(7) (listing categories).

Both the Rehabilitation Act and ADA prohibit discrimination on the basis of disability and require reasonable accommodations. The term “reasonable accommodations” can include providing auxiliary aids and services (such as interpreters) and modifying policies, practices, and procedures. The regulations pursuant to these statutes establish that the program itself would not be required to *provide* service animals as an auxiliary aid or service.²⁷ Neither do they generally contemplate providing assistance for addressing the needs of these animals – such as taking a dog outside to be walked or providing food or water.²⁸ Instead, animals in disability discrimination law would be an issue in the context of modifying policies. Making an exception to a policy that generally prohibits animals would be such a modification.

Reasonable accommodations are those that do not lower standards nor place an undue burden on the program. In addition, animals whose conduct (such as relieving themselves, biting, or barking) interferes with others can generally be prohibited. Undue burden includes both financial and administrative burdens.

A case that provides guidance about the process for determining whether a request for reasonable accommodation should be granted is *Wynne v. Tufts University School of Medicine*.²⁹ The case involved a request by a medical school student with a learning disability to have a test given in a different format. When the request was denied, the student brought suit under Section 504. In deciding how such a request should be handled, the court established a standard by which programs must demonstrate that certain accommodations need not be provided. The court held that universities must demonstrate that the relevant officials within the university considered alternative means, their feasibility, cost, and effect on the academic program, and that it was rationally justifiable to conclude that available alternatives would either lower academic standards or require substantial program alteration. It is not certain whether a similar framework would apply to all settings, but it is probable that it would.

Individuals are only entitled to protection and accommodations if they meet the definition of disability. To be protected under these statutes, an individual must meet the definition of being disabled and be otherwise qualified to carry out the essential requirements of the program, with or without reasonable accommodation. It also requires that the individual not pose a direct threat to others.³⁰ In the context of animals as accommodations this would also mean that the animal not be a direct threat.

The definition covers those with substantial limitations to major life activities, having a record of such an impairment, or being regarded as having such an impairment.³¹ Individuals seeking to have animals allowed on the premises as an accommodation would generally fit under

²⁷ 28 C.F.R. § 35.135. The Department of Justice withdrew technical assistance (effective December 21, 2018) on guidance documents for service animals (Commonly Asked Questions about Service Animals in Places of Business (1996) and ADA Business Brief – Service Animals (published in 2002 and 2008, Title II and Title III Documents). The regulations remain in place, but some clarification through guidance documents is no longer provided.

²⁸ 28 C.F.R. §§ 35.136(e) and 36.302(c)(5); 28 C.F.R. § 35.136(h); 28 C.F.R. § 36.302(c)

²⁹ 932 F.2d 19, 26 (1st Cir. 1991).

³⁰ 28 C.F.R. §§ 35.104, 35.139; 36.301(b).

³¹ 42 U.S.C. 12102(1).

one of four major categories of disabilities – 1) mobility impairments (where the animal assists with retrieval, balance, pulling, etc. – e.g., dogs, miniature horses, and monkeys); 2) sensory impairments (such as guide dogs and hearing assistance dogs); 3) health impairments (animals that alert to seizures or blood insulin sugar changes); and mental health (animals that either “do” something such as nudging a person in stress or those that provide emotional support/comfort by their presence).

Whether the person has a disability is not generally a disputed issue for the first three types of disabilities, but it may be for those requiring emotional support animals. The level of mental health impairment requisite for an individual to meet the definition is not clearly settled, although some judicial decisions have addressed this issue. Both the issue of whether an individual has a disability and how the requested accommodation relates to the disability raise issues of what is permissible to require in terms of documentation.

The 2008 Amendments to the ADA provided clarification that the statutory definition of disability was intended to be read broadly.³² Judicial decisions after the amendments seems to indicate fewer cases where the disability itself is the issue and more focus on whether the person is otherwise qualified or on the reasonableness of the accommodation. With respect to animal accommodation issues, however, individuals with mental health concerns seeking emotional support or comfort animals may raise the issue of whether they meet the definition of being disabled.

2) Regulations and Regulatory Guidance

Section 504 of the Rehabilitation Act is the underlying disability discrimination statute used as the model for other major federal statutes. The Section 504 model regulations promulgated in 1978 and the judicial decisions interpreting the statute and regulations provide a framework for ADA interpretations. The model regulations are intended to be the foundation for all federal agencies to use as the framework for each agency in guiding principles for entities that receive federal funding through that agency’s programs.³³ The regulation most relevant to situations where animals might be accommodations relates to modification of practices.³⁴ There is nothing in regulations under any federal law that would require that an animal be *provided* as an accommodation. Instead regulations that suggest that modification of policies should be considered would apply. Many programs covered by federal nondiscrimination laws have policies that prohibit animals on the premises. The accommodation would be allowing a variance or an exemption to such a policy.

The ADA was enacted in 1990 and amended in 2008 and both the original statute and the amendments are substantially more detailed than the Rehabilitation Act. The ADA incorporates in specific provisions much of the judicial guidance that interpreted Section 504. Unlike the Rehabilitation Act, there are no general model regulations. Instead, separate regulations have been promulgated over years that cover a range of topics. Depending on the area involved, different federal agencies are responsible for applicable regulations. The Department of Justice has ADA oversight of Title II and Title III programs. The Department of Labor and EEOC

³² 42 U.S.C. § 12102.

³³ 47 Fed. Reg. 2132 (Jan. 13, 1978).

³⁴ This is addressed in the section on service animals and public accommodations.

oversee most employment settings that would fall under Title I of the ADA. Of most significance to animal accommodations are the 2010 regulations promulgated by the Department of Justice.³⁵ These provide a great deal of guidance on what is required and what is not, but they still leave open some unsettled questions. Some of these have been addressed through general agency guidance.³⁶

The 2010 DOJ regulations only require inclusion of dogs (and miniature horses) and permit entities to request or require only minimal documentation. The following two questions can be asked:

Is the dog a service animal required for a disability?³⁷

What work or task has the dog been trained to perform?³⁸

(and perhaps only if it is not apparent)

A covered entity cannot ask for official “documentation” that the animal is a trained service animal or require the dog to wear a special coat or blanket.³⁹ Other requirements are that the animal must be under control.⁴⁰ Entities allowing service animals are not required to perform assistance to the animal.⁴¹

While most judicial attention regarding animals is given to the DOJ regulations, employment is also covered under both Section 504 and the ADA. The federal agency responsible for implementing nondiscrimination policy in most employment settings is the Equal Employment Opportunity Commission. Equal Employment Opportunity Commission has regulations on ADA and employment, but does not specifically reference animals as an accommodation.⁴²

B. Fair Housing Act

The Fair Housing Act (FHA)⁴³ prohibits discrimination and requires reasonable accommodation in the sale or rental of most housing. Generally this does not apply to hotels and motels, except those that have long term residences.⁴⁴ The application to housing at colleges and

³⁵ 28 C.F.R. Parts 35 and 36.

³⁶ In July 2015, the Department of Justice released an 8-page guide about service animals. United States Department of Justice, Frequently Asked Questions About Service Animals and the ADA, Civil Rights Division, July 20, 2015, available at http://www.ada.gov/regs2010/service_animal_qa.pdf last visited July 24, 2018.

³⁷ It is impermissible to ask what the disability is. 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6).

³⁸ Even that inquiry may be impermissible where it is apparent what service is performed, such as a guide dog for an individual who is blind. *Id.*

³⁹ *Id.* Unfortunately, there are some unscrupulous practices by entities claiming to provide specialty training which may not be engaging in ethical practices. See Allen G. Breen, ‘Lawless’ world of service dogs, Associated Press May 4, 2019, <https://www.apnews.com/d0bb5c8e25574612869a71f3dd1a8e6a>.

⁴⁰ 28 C.F.R. § 35.136(d) and § 36.302(c)(4).

⁴¹ 28 C.F.R. § 35.316(e) and § 36.302(c)(5)

⁴² 29 C.F.R. Part 1630. See e.g., <http://www.eeoc.gov/policy/docs/accommodation.html> (general guidance on reasonable accommodations in employment settings); http://www.eeoc.gov/facts/restaurant_guide.html (guidance regarding employees in food service settings).

⁴³ 42 U.S.C. § 3601 et seq. ,

https://www.animallaw.info/sites/default/files/FHEO_notice_assistance_animals2013.pdf.

⁴⁴ Covered housing generally refers to residences. See 42 §3602(b), Private clubs and religious organization housing would be exempt. 42 U.S.C. § 3607.

universities has not been fully resolved, but it is likely that it would apply to most college housing settings. This issue is discussed more fully below.

It is not unusual for rental agreements and ownership arrangements such as condominiums, homeowner's associations, and cooperative housing settings to have restrictions or prohibitions related to animals. Some restrictions prohibit animals entirely, reference the types of animals allowed, restrict the number of animals, or limit the size of animals. The refusal to *consider* an exception to such rules would violate the reasonable accommodation mandate in most situations.

The primary federal agency responsible for oversight of the Fair Housing Act is the Department of Housing and Urban Development (HUD). In addition to providing guidance that indicates that university housing is subject to the Fair Housing Act and related guidance on documentation requests,⁴⁵ various types of housing are addressed in HUD regulations. These include general regulations applicable to most housing settings,⁴⁶ federally administered and subsidized programs,⁴⁷ and public housing.⁴⁸ These regulations are much less specific than the DOJ Title II/III ADA regulations on animal accommodations. Generally, HUD regulations apply to more than just guide dogs, and probably to all service dogs and probably to many emotional support animals (other than those that just make the person "feel good"). Short term-lodging would be subject to Title III and specific regulations requiring that the animal be trained to do something. Emotional support animals are thus not covered.

In housing settings, the types of animals would probably be less restrictive than those allowed within the ADA. Animals other than dogs or miniature horses might be accommodation animals. This might be the case for both service animals (such as a monkey that opens a refrigerator) or emotional support or comfort animals (such as a cat or a rabbit). There is little clarity about documentation for either service or emotional support animals in housing settings. The application of animal accommodation issues in specific housing settings is addressed in a later section.⁴⁹

C. Air Carrier Access Act and Other Transportation Statutes

Air travel provides unique issues because it involves a passenger accessing public spaces such as the terminal and accessory businesses (restaurants, gift shops, etc.) within an airport terminal, and the aircraft itself. The Air Carrier Access Act (ACAA)⁵⁰ primarily covers only the

⁴⁵See <http://www.justice.gov/opa/pr/2011/November/11-crt-1532.html> (on service animals and assistance animals in housing and HUD-funded programs).

⁴⁶ 24 C.F.R. § 5.303, 72 FED. REG. 58448 (October 27, 2008). The 2008 amendments remove the requirement of certification of the disability, training and the relationship of the animal to assistance with the disability. Verification of a disability is meeting the FHA or 504 definition need for animal to provide assistance (not clear whether emotional support is to be considered to be assistance), and relationship between assistance and disability. More than just making a person "feel good" is required, although alleviating depression by an emotional support animal might.

⁴⁷ These would be the same requirements as for all housing.

⁴⁸ Public housing requirements are found in 24 C.F.R. § 960.705 and is similar to the previous categories, but is found in a separate regulation.

⁴⁹ See Section II(B), *infra*.

⁵⁰ 49 U.S.C. § 41705.

aircraft itself and to some extent related boarding procedures. The ADA would be the primary statutory coverage for the physical facility access. Many airports are entities that combine private and state or local governmental involvement. For example, an airport authority (a county governmental authority) might lease space to a private vendor and would also have arrangements for boarding gate use so that individuals can get on and off of the planes (which are regulated by ACAA).

The Department of Transportation has specific regulations about animals for air travel, pursuant to the Air Carrier Access Act.⁵¹ Other public transportation settings including mass transit, light rail, paratransit, commuter rail, over-the-road buses, demand responsive systems, taxis (and now Uber and Lyft type systems) do not currently have separate federal agency regulations related to animal accommodations. Many of these settings have various guidance and policy documents from the providers of such services, but a regulatory framework other than reference to the DOJ regulations has not yet been developed.

D. Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA)⁵² and how it would affect animals as accommodations is discussed in a separate article in this symposium issue,⁵³ so it is not discussed in detail in this article. It can be noted, however, that IDEA is somewhat different from the other statutes involving individuals with disabilities. IDEA is both a benefits and rights statute. Its goal is primarily to provide special education and related services for age eligible students who fit a specifically defined set of disabilities. Generally speaking, an animal would not be considered to be a related service. It has been argued, however, that reference to the animal's presence could be something incorporated into the individualized educational program.

Students with disabilities might also be protected from discrimination and entitled to reasonable accommodation under Section 504 of the Rehabilitation Act and/or the ADA.⁵⁴ Where IDEA provides a remedy in a particular situation, it is generally to be the exclusive avenue through which services can be pursued.⁵⁵

Having animal accommodations in school settings is not a frequently requested accommodation, but a 2017 Supreme Court decision is one of those rare cases. In *Fry v. Napoleon Community School*,⁵⁶ a twelve-year-old girl with cerebral palsy sought to have her

⁵¹ 28 C.F.R. § 382.117 (issued May 2008).

⁵² 20 U.S.C. §§ 1400 et. seq.

⁵³ See Rebecca Huss, *Canines in the Classroom: Issues Relating to Service Animals After Fry v. Napoleon Community Schools* 137 S. Ct. 743, 752 (2017), 24 ANIMAL L. REV. 53 (2018).

⁵⁴ In a 2018 Office for Civil Rights letter, it was determined that it was not an ADA or 504 violation when a school volunteer incorrectly refused to allow a parent to bring a service dog to the school. The school corrected quickly, advised the volunteer, and implemented training. Pasco County (FL) Schools, 57 Nat'l Disability L. Rep. ¶ 118 (Atlanta 2018).

⁵⁵ LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 2:46 (Thomson West 2012 and cumulative supplements).

⁵⁶ 137 S. Ct. 743, 197 L. Ed.2d 46 (2017). On remand the court held that she was not required to exhaust IDEA remedies because the relief she sought was not for denial of FAPE; initial request only referenced ADA). *E.F. v. Fry*, 2019 WL 1002355 (E.D. Mich. 2019). See also *Berardelli v. Allied Services District of Rehabilitation*

dog, Wonder, with her at school to provide assistance in moving around the school. The dog is a service dog trained to provide specific services. The remanded issue is whether Ehlana Fry was required to exhaust IDEA remedies before pursuing 504/ADA claims.

If this case ultimately results in a finding that this is a 504/ADA claim, and that IDEA need not be addressed, issues of how the DOJ regulations would apply in such a setting remain.⁵⁷ Ordinarily, programs are not required to provide assistance in the care and supervision of a service animal. How would that work in a school setting, especially for very young children where safety concerns would be raised if the child needed to leave the school building without supervision to allow the dog to relieve itself?

II. Application to Pubs, Pads, Planes, Professions -- where we live, work and play, and how we get there

The following subsections provide an overview of how the array of federal statutes and regulations apply to different settings.

A. Pubs (public places and spaces)

In 2010, in recognition of the increasing attention and interest in having accommodation animals in public places, the Department of Justice promulgated regulations that specify a number of key requirements on this issue.⁵⁸ These regulations clarify what animals are considered subject to these regulations, what documentation could be required, and what situation might allow denial of the animal's presence. As noted previously, animal accommodation regulations in Title II and Title III settings only permit dogs and miniature horses and require that these animals be trained to perform a service. The regulatory context demonstrates the balance that was struck with not requiring overly burdensome documentation such as official training documents, with the legitimate concerns of others in a setting.

Regulations applying to public places and spaces recognize that unlike a setting such as housing or even to some degree employment, the animal accompanying someone in a public place may have a significant effect on other people in ways much different than almost any other

Medicine, 900 F.3d 104 (3d Cir. 2018) (ADA regulations on service animals applied to Rehabilitation Act; requested accommodation of seizure alert dog in school setting for student with epilepsy was reasonable accommodation); *Doucette v. Jacobs*, 2018 WL 457173 (D. Mass. 2018) (parents' claim that school officials' refusal to permit severely disabled child access to service dog was denial of FAPE and parents required to exhaust administrative remedies); *Cedar Falls County School Dist.* 58 Nat'l Disability L. Rep. ¶ 16 (Chicago 2017) (not a violation to refused to provide one-to-one aide as handler for service dog); *North East Indep. School Dist.* 58 Nat'l Disability L. Rep. ¶ 152 (2018) (no section 504 or Title II violation when service animal brought to school was required to be tethered to boy's waistband after dog repeatedly escaped from classroom, lunged at other service dogs, did not follow students' commands, and refused to use staircase).

⁵⁷ See e.g., *Pettus v. Conway School District*, 58 Nat'l Disability L. Rep. ¶ 114 (E.D. Ark. 2019) (school not required to allow teenager with anxiety and depression to bring service animal to school while ADA claim is pending; other means of addressing anxiety had been provided; issues about whether the dog was necessary);

⁵⁸ 75 Fed. Reg. 56, 164-56,358 (Sept. 15, 2010) (to be codified 28 C.F.R. pt.35) (providing an analysis of the section on animal accommodations).

type of accommodation. These regulations and the judicial decisions on this issue reflect those differences.

Title II applies generally to state and local governmental programs, such as public higher education and courthouses.⁵⁹ Title III applies to twelve categories of privately operated programs open to the public.⁶⁰ The places most likely to be involved in animal accommodation cases include courthouses, hotels, health care settings, shopping malls,⁶¹ and restaurants. Another significant area is at institutions of higher education, which because of the unique issues involved in that setting is addressed separately below.

Courts have addressed several cases involving these settings.⁶² The specific issues of these decisions include cases involving what animals are allowed.⁶³

1) Safety and health considerations

⁵⁹ 42 U.S.C. § 12131. In *Sykes v. Cook County Circuit Court Probate Division*, 837 F.3d 736 (7th Cir. 2016) the court held that there was no jurisdiction for a federal court to decide an ADA complaint based on a probate judge's order rather than a court policy. A probate court judge had banned a dog (never decided whether it was a service or emotional support animal or a pet) brought to the courtroom.

⁶⁰ These include places of lodging, food and drink service establishments, places of entertainment, places of public gathering, stores and shopping centers, service providers, public transportation terminals and stations, places of public display, places of recreation, educational facilities, social service establishments, and places of exercise and similar recreation. 42 U.S.C. § 12181 (7); 28 C.F.R. § 36.10. For an unusual situation, see *Greene v. New England Suzuki Institution*, 57 Nat'l Disability L. Rep. ¶ 115 (D. Me. 2018). In that case, parents of a child with severe allergies to dogs requested that it not be allowed. When the dog was allowed at the final concert, parents made comments about bringing a gun to a concert which resulted in their being banned from participation in the following year. Court denied a preliminary injunction for the parents.

⁶¹ *Smith v. Morgan*, 59 Nat'l Disability L. Rep. ¶ 59 (N.D. Ala. 2019) (case of patron who is deaf with service dog at convenience store that refused service not moot; assurances by store after documentation was produced did not resolve concerns about whether the conduct was likely to recur); *Davis v. City of Philadelphia*, 58 Nat'l Disability L. Rep. ¶ 112 (E.D. Pa. 2019) (allowing police officers to be sued in official capacity under ADA Title II; police officers ordered individual with seizure disorder with service alert dog to leave restaurant, although manager permitted dog to stay); *Santiago Ortiz v. Caparra Center Associates*, 2016 WL 1092482 (D. Puerto Rico 2016) (granting standing in complaint involving refusal to allow child to bring service animal to shopping mall). In October 2018, the Department of Justice reached an agreement with The Place of Antiques (St. Regis, Montana) following up on a complaint that the store refused to allow a veteran with PTSD to have his service dog in the store. The settlement required adoption of a service dog policy, training for employees and managers, and a posting of the policy in the store on social media. See Settlement Agreement between The United States of America and The Place of Antiques, DOJ #202-44-38 (October 11, 2018) https://www.ada.gov/place_of_antiques_sa.html. Significant is the cooperation by the place of business throughout the investigation and its indication that it did not realize that service dogs for PTSD were allowed under the ADA. It highlights the importance of training for frontline employees as well as managers.

⁶² For cases involving service animals in public accommodations and public service programs generally, see LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* Chapter 1 (Thomson West 2012 and cumulative supplements) § 5:5 notes 7-16 (Thomson West 2012).

⁶³ In a decision before the 2010 regulations were promulgated, one court held that a miniature horse was not a service animal under the ADA. *See Access Now, Inc. v. Town of Jasper, Tennessee*, 268 F. Supp. 2d 973 (E.D. Tenn. 2003). Even if this case arose today, the miniature horse would still not be allowed because the court also held that the owner did not have disability and horse did not assist and perform tasks for owner's benefit to help her overcome or deal with any disability.

Issues of safety and health are addressed by the DOJ regulations and have been the focus of some by court decision.⁶⁴ These cases generally highlight the importance of giving individualized approaches to whether service dogs should be allowed in various settings. The regulations require that the animal be housebroken⁶⁵ and that it be under the handler's control.⁶⁶

An emerging issue is how to address local ordinances that prohibit specific breeds (often pit bull dogs) from being allowed in various settings. While the reasons for such restrictions relate to safety and presumptions about dangerous tendencies of certain breeds (which may be unfounded), refusal to consider an exemption from general breed prohibitions for an individual with a disability is likely to violate disability discrimination law.⁶⁷ Programs must instead consider the request for exemption on an individualized basis.

Concerns about safety often arise in health care settings. One of the very early cases highlighting this issue was *Perino v. St. Vincent's Medical Center of Staten Island*,⁶⁸ a 1986 state case from Pennsylvania. The case involved a blind man who wanted to bring his guide dog to the labor and delivery room when his wife was giving birth. The court held that it was not a violation of state law to deny the request. The court seemed to indicate that state disability law did not apply to access to a health care setting. The court seems not to consider whether he could have been allowed to have the dog in the waiting room, but instead indicated across-the-board denial in a hospital setting. It is probable that if this same set of facts occurred under the ADA today (or even most state laws), it would be determined that the setting was subject to the ADA, but that legitimate concerns about safety (in the *Perino* case there was concern about stepping around the dog in a small space) would allow the denial in the delivery room. Courts are generally very deferential to the opinion of health care providers about safety and health concerns.⁶⁹

⁶⁴ See e.g., *Crowder v. Kitagawa*, 81 F.3d 1480, 15 A.D.D. 1, 5 A.D. Cas. (BNA) 810 (9th Cir. 1996) (not modifying animal quarantine laws for individuals with visual impairments may violate ADA)

⁶⁵ 28 C.F.R. § 35.136(b)(2); 28 C.F.R. § 36.302(c)(2)(ii).

⁶⁶ 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(4).

⁶⁷ *Chavez v. Aber*, 51 Nat'l Disability L. Rep. ¶ 34 (W.D. Tex. 2015) (allowing case to move forward when tenant requested pit bull dog as emotional support animal; lease had no-pets policy; landlord sought to evict her, denied lease renewal); *Warren v. DelVista Towers Condominium, Inc.*, 59 F. Supp. 3d 1082 (S.D. Fla. 2014) (denying motion to dismiss in case involving request to modify no pets policy; fact issues existed regarding direct threat of emotional support dog and applying county ordinance banning pit bull dogs); *Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026 (N.D. Iowa 2011) (granting preliminary injunction against city's policy of prohibiting pit bull dogs as service animals as violation of ADA).

⁶⁸ *Perino v. St. Vincent's Medical Center of Staten Island*, 132 Misc. 2d 20, 502 N.Y.S.2d 921 (Sup 1986) (exclusion of a blind person's guide dog from the delivery and labor room of a hospital allowed under state law).

⁶⁹ See e.g., *O'Connor v. Scottsdale Healthcare Corp.*, 871 F. Supp. 2d 900 (D. Ariz. 2012), adhered to on reconsideration, 2012 WL 2106365 (D. Ariz. 2012), aff'd, 582 Fed. Appx. 695 (9th Cir. 2014) and aff'd, 582 Fed. Appx. 695 (9th Cir. 2014) (service animal at hospital; unusual fact settings where plaintiff was delayed from entry to hospital with service dog, but ultimately allowed entry, during time frame when regulations were being clarified); *Gill v. Abington Memorial Hospital*, 58 Nat'l Disability L. Rep. ¶133 (E.D. Pa. 2019) (granting hospital's motion for summary judgment in Title III ADA case; hospital had denied individual visiting her mother in common area of behavioral unit of hospital to be accompanied by her service dog because of concerns that patients would react adversely; visitor not denied access for dog to any other area of hospital); *Hurley v. Loma Linda University Medical Center*, 48 Nat'l Disability Law Rep. ¶160, 2014 WL 580202 (C.D. Cal. 2014) (inquiry of hospital visitor about service dog were more than limited inquiries allowed; officer requested documentation two or three times); *Roe v. Providence Health System-Oregon*, 655 F. Supp. 2d 1164 (D. Or. 2009) (legitimate assistance animals should be

Safety and health concerns can also arise in settings involving food. In *Johnson v. Gambrinus Company/Spoetzl Brewery*,⁷⁰ a Fifth Circuit decision from 1997, the facts involved denial of a guide dog on a factory tour of a brewery.⁷¹ The court considered the type and degree of risk related to animal dander falling into brewery vats and denied the factory's decision as a violation of the ADA. In cases of employment in food service settings, it will be important that employers do careful assessments about actual health risks in various settings. The same would be true in health care employment settings. As the later section on housing indicates, each setting raises varying issues about the impact on others and how that can reasonably be addressed.

While little case law has addressed the issue of animals biting or otherwise physically attacking individuals, the regulations make clear that an animal must be under control and may be excluded when it presents such a danger.⁷²

2) Disruption, interference with others, and related concerns

Unlike almost any other accommodation, allowing an animal into a public place can affect others due to disruption such as barking.⁷³ This may be a greater concern in a setting such as a concert performance or a movie. The regulatory guidance contemplates that issue by requiring that the animal be under control.⁷⁴ One case has even recognized that odors can interfere with others if they are bad enough.⁷⁵

The 2010 regulations seem to acknowledge that other individuals may be affected by animals because of allergies or fear of animals.⁷⁶ These regulations, however, are somewhat

allowed when feasible, but not when they create a direct threat; frequent hospital patient brought dog to assist severe neurological illness; putrid odor annoyed other patients and raised concerns about spread of infection); *Pool v. Riverside Health Services, Inc.*, 12 A.D.D. 143 (D. Kan. 1995) (emergency room's exclusion of guide dog not a violation of Title III).

⁷⁰ *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 22 A.D.D. 669, 7 A.D. Cas. (BNA) 837 (5th Cir. 1997) (Title III violation when brewery refused to allow guide dog on tour; dog posed no significant contamination risk).

⁷¹ *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 22 A.D.D. 669, 7 A.D. Cas. (BNA) 837 (5th Cir. 1997) (Title III violation when brewery refused to allow guide dog on tour; dog posed no significant contamination risk);

⁷² The regulatory guidance recognizes that an animal may react because of provocation, and that a reasonable amount of time to be given a reasonable opportunity to correct the animal. 75 Fed. Reg. 35,508-557

⁷³ *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 26 A.D. Cas. (BNA) 1325 (2d Cir. 2012) (pre-regulation facts; restaurant customer not excluded because of her service dog; adverse treatment related to dog's conduct); *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 15 A.D. Cas. (BNA) 1125 (9th Cir. 2004) (modification of concert hall's policies to allow patron to attend performances with service animal that may have made disruptive noises at past performances, if such behavior would have been acceptable if engaged in by humans, was necessary and reasonable accommodation); *Gipson v. Popeye's Chicken & Biscuits*, 942 F. Supp. 2d 1303 (N.D. Ga. 2013) (service dog at restaurant for individual with diabetes; police officer response to dispute was not discriminatory).

⁷⁴ In settings where such barking where similar noise levels, such as clapping, cheering, or crying children, are allowed, this should not be the basis for removal. This is found in 75 Fed. Reg. 35,508-557 the regulatory guidance.

⁷⁵ *Roe v. Providence Health System-Oregon*, 655 F. Supp. 2d 1164 (D. Or. 2009) (legitimate assistance animals should be allowed when feasible, but not when they create a direct threat; frequent hospital patient brought dog to assist severe neurological illness; putrid odor annoyed other patients and raised concerns about spread of infection).

⁷⁶ ADA Requirements Service Animals, Department of Justice, Civil Rights Division, Disability Rights Section (July 2011), https://www.ada.gov/service_animals_2010.htm (last visited July 28, 2018).

dismissive of how much consideration must be given to those issues. While it may not be likely that an allergy or a fear of animals rises to the level of that individual having a disability, more guidance might have been given to that issue. Perhaps that is because in many (but not all) settings, someone with allergies or fears could simply move away from the animal. That is not usually an option, however, in settings such as air travel, which is addressed below.

Wild animals in zoos may have significant adverse reactions to the presence of dogs. There may also be legitimate issues of vaccination. In recognition of that, many zoos have set restrictions about where service animals are allowed. The zoos would almost certainly be settings in either Title II (publicly operated zoos) and Title III (private provider of public accommodation), there has been virtually no litigation challenging these limitations. It is uncertain what would occur should there be a total ban on service animals. It is probable that the zoo would bear the initial burden of demonstrating the threat and that the limitation was necessary to avoid the threat. Guidance from the Department of Justice provides some indication of how zoo restrictions would be viewed.⁷⁷

Although it may not be an issue in many settings, the space that an animal might take up or concerns about someone tripping over an animal that is not readily visible in a crowd could interfere with access of others. This issue is specifically addressed in airplane access,⁷⁸ but not for other settings.

3) Documentation issues

The 2010 regulations recognize the challenges of documentation of the disability and the relationship of the requested accommodation to the disability.⁷⁹ In most (but not all) public settings, the presence of the animal is for a short period of time. This is different than a housing or employment setting. In recognition of that and the burden of requiring individuals to have official documentation that an animal is a service animal, the regulations set out rules that attempt to balance concerns of operators of public programs and others in those settings with the need for the individual with disability to have an accommodation.⁸⁰

In Title II and Title III settings, an animal must be a service animal and must be trained to do something.⁸¹ Unlike emotional support or comfort animals whose presence might relieve anxiety, service animals must actually perform a service. Although there has been an increase in personal conduct that demonstrates abuse of the animal accommodation rules in public settings,

⁷⁷ For regulatory guidance, see Department of Justice, Frequently Asked Questions about Service Animals and the ADA, July 20, 2015, https://www.ada.gov/regs2010/service_animal_qa.pdf, last visited July 30, 2018. See Question 26.

⁷⁸ 14 C.F.R. § 382.117 (b) (animal should not obstruct aisle or other areas involved in emergency evacuation).

⁷⁹ 28 C.F.R. 35.136(f); 28 C.F.R. §36.302(c)(6).

⁸⁰

⁸¹ 28 C.F.R. § 35.104 (definition). *Pruett v. Arizona*, 606 F. Supp. 2d 1065, 21 A.D. Cas. (BNA) 1520 (D. Ariz. 2009) (seeking modification of state wildlife holding license policy that plaintiff sought to allow her to possess a chimpanzee as a service animal; modifications sought were fundamental alterations and not reasonable; chimp had not been trained to assist with diabetes and had not been a service animal).

the regulations specify what inquiries can be made.⁸² Surcharges may not be charged, but the cost to repair any damage may be charged after the fact if such charges are normally charged.⁸³

A few cases have involved facts where the issue of permissible inquiry has been raised.⁸⁴ Some of these cases highlight the importance of training for those who must respond to allowing participation of an individual accompanied by an animal.⁸⁵ This can be challenging because often those on the front lines of the provision of service in a public accommodation are low paid, high turnover employees.

While not clearly stated within the regulations, it is almost certain that programs that require that animals are current on vaccinations will be permitted to require evidence of this as documentation as long as this is required for all animals, not just those providing service or emotional support.

4) Who is responsible – issues of training, franchise settings, and supervisors

An issue that has been raised in a few cases involves questions about responsibility and potential liability for failure to allow animals as an accommodation. Responsibility can be an issue in franchise or licensing relationships, universities that regulate fraternities and sororities (which are private clubs with some exemption from civil rights requirements), programs that lease or provide permits to other programs, and employees who may not be acting appropriately.⁸⁶ There is insufficient judicial guidance at this point to clarify what is required in these various settings.

⁸² 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6). *Hurley v. Loma Linda University Medical Center*, 48 Nat'l Disability Law Rep. ¶160, 2014 WL 580202 (C.D. Cal. 2014) (inquiry of hospital visitor about service dog were more than limited inquiries allowed; officer requested documentation two or three times); *Stan v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 119, 10 A.D. Cas. (BNA) 1632 (N.D. N.Y. 2000) (where store challenged entry of person with a disability with service dog, full and equal opportunity to participate in place of public accommodation was denied); *Dohmen v. Iowa Dept. for the Blind*, 794 N.W.2d 295 (Iowa Ct. App. 2010) (no discrimination in case by blind student claiming denial of use of service animal in educational program violated ADA; essence of program was curriculum was based on nonvisual theory and no visual aids, no service dogs were allowed; alternative educational sites were offered); *Satterwhite v. City of Auburn*, 945 So. 2d 1076 (Ala. Crim. App. 2006) (no demonstration of disability requiring service animal; defendant's refusal to leave book and video store because of her dog resulted in finding of criminal trespass).

⁸³ 28 C.F.R. § 35.136(h); 28 C.F.R. § 36.302(c).

⁸⁴ *Davis v. Ma*, 848 F. Supp. 2d 1105, 75 A.L.R. Fed. 2d 665 (C.D. Cal. 2012), *aff'd*, 568 Fed. Appx. 488 (9th Cir. 2014) (customer's puppy not trained service animal; puppy not fully vaccinated and doctor note did not explain how puppy ameliorated back issues; fact issues remained about whether animal was a trained service animal); *Dilorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187 (W.D. Wash. 2007) (employees made permissible inquiries about qualifications of a dog accompanying a store patron); *Grill v. Costco Wholesale Corp.*, 312 F. Supp. 2d 1349 (W.D. Wash. 2004) (no ADA violation where private membership club's written policy regarding admittance of service animals into warehouse stores, which required that employees first look for visual identification that animal was service animal, and in absence of visual evidence, permitted employees to inquire what "task or function" animal performed without asking for specifics of individual's disability); *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. 2005) (upholding exclusion of puppy from casino where owner refused to answer questions about its training).

⁸⁵ See e.g., *Sears v. Bradley County Government*, 821 F. Supp. 2d 987 (E.D. Tenn. 2011) (service animal in courthouse; no intentional discrimination when security officer sought clarification from court officers about permissibility of bringing service animal into court; training session had been implemented after the incident);

⁸⁶ 28 C.F.R. § 36.201(b). *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034, 8 A.D. Cas. (BNA) 968 (8th Cir. 1998) (franchiser and police officers were not liable to customer for asking her to leave a place of public accommodation

As previously noted, training personnel who are likely to face questions about admittance of an animal in a particular setting is important. This can be challenging in light of the complexity of the issues (including some state and local legal requirements), the low pay and high turnover of some employees likely to be faced with animal accommodation issues.

because she had a service dog); *Cordoves v. Miami-Dade County*, 92 F. Supp. 3d 1221, 2015 WL 2258457 (S.D. Fla. 2015) (individual claiming ADA compliance expertise not qualified as expert in obligations regarding service animals in claim against shopping mall; individual had no expertise as animal trainer and did not know what was needed to train a service animal).

B. Housing

Unlike settings where individual presence is for short periods of time, housing involves a full time presence and impacts others in different ways. On the other hand it is also a setting where the presence of a support animal can be essential.⁸⁷

Although hotels and motels and campus housing are not as clearly covered by the Fair Housing Act,⁸⁸ this section will discuss all of those settings. Although hotels and motels and short term rental properties such as Airbnb⁸⁹ are probably only covered by Title III of the ADA, staying overnight in a room can raise issues such as damage to the room and impact on others in nearby rooms.⁹⁰ Some of these same issues can arise in short term rental settings, such as Airbnb, which are most likely only covered by Title III of the ADA, although this is not clearly settled. Campus housing types range widely from the traditional “dormitory” that is more likely to be a “license” than a “lease” to university operated apartments to Greek living housing (with private club exemptions). While a clubhouse in a homeowner association setting may be a private club and exempt from ADA Title III coverage, access to such a facility is likely to be subject to the Fair Housing Act.⁹¹ All of these settings involve constant presence and impact on others who live or who are staying in proximity. For that reason, all of these housing settings are addressed in this section, although the primary focus is on housing that is clearly covered by the Fair Housing Act.

Single family dwellings purchased for residential use generally raise disability discrimination issues covered by both private and public policies. Purchase of residential property in a common interest community the condo, coop, or homeowner’s association rules

⁸⁷ See LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (Thomson West 2012 and cumulative supplements) § 7:8 note 26.

⁸⁸ There is a distinction in hotel settings between long term stay settings (sometimes termed as “residential type” inns) and short term stays. Some hotel chains have both with common public areas to accommodate both short term and residential customers. 28 C.F.R. 36.104 definition for Place of lodging. Hotel chains that hold themselves out as “pet free” in order that customers can know of minimal contact with animals cannot guarantee that such a designation would eliminate animals that were service or emotional support animals.

⁸⁹ Jeremy Quittner, *Airbnb and Discrimination: Why It’s All So Confusing* (June 23, 2016), <http://fortune.com/2016/06/23/airbnb-discrimination-laws/>.

⁹⁰ For interesting industry guidance on regulations in hotel settings, see Kathleen Pohlid, *New Regulations on Service Animals in the Hotel Industry*, HOTEL EXECUTIVE, http://hotelexecutive.com/business_review/2489/new-regulations-on-service-animals-in-the-hotel-industry (last visited May 30, 2017).

⁹¹ *Sanzaro v. Ardiente Homeowners Association*, 364 F. Supp. 3d 1158 (D. Nev. 2019) (denial of access to clubhouse while accompanied by service dog actionable under FHA and was denial of reasonable accommodation and compensatory and punitive damages could be awarded; clubhouse subject to private club exception under ADA)

may be subject to restrictions regarding pets and animals.⁹² Similarly, zoning restrictions regarding animals can impact residential living in single family residence situations.⁹³

Generally the Fair Housing Act applies to traditional apartment rental settings.⁹⁴ More recently, the increasing use of short term rental of Airbnb properties has started to raise issues

⁹² *Ajit Bhogaita v. Altamonte Heights Condominium Assn., Inc.*, 2012 WL 6562766 (M.D. Fla. 2012), *aff'd*, 765 F.3d 1277 (11th Cir. 2014) (veteran with PTSD, chronic anxiety, and depression could pursue claim that modification of condo rule limiting pet size would affect his having an emotional support animal; prescribed by physician); *DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006) (permissible to request additional medical information from condominium owner seeking exemption from no-pets rule; dog was permitted to live with owner temporarily); *Carlson v. Sunshine Villas HOA Inc.*, 47 Nat'l Disability L. Rep. ¶ 84 (M.D. Fla. 2018) (denying HOA's motion to dismiss claim of discrimination when tenant provided request for accommodation to both HOA and landlord of apartment rented that was to accommodate the tenant's PTSD as suggested by her doctor); *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998) (waiver of no pets policy reasonable for deaf tenant); *Myers v. Condominiums of Edelweiss, Inc.*, 2013 WL 4597973 (N.D. Ill. 2013) (questions remain regarding whether condominium must waive no-pet policy for individual who had cat for emotional support); *Oregon Bureau of Labor and Industries ex rel. Mayorga v. Housing Authority of Douglas County*, 2014 WL 5285609 (D. Or. 2014) (condo association request for fence where owner of service dog had not made known the justification and it was not readily apparent; permissible to seek medical information to justify the request; resident had made previous requests for fencing for gardening; summary judgment for condo association; request for anxiety disorder emotional support animal was initially denied but letter granted; no basis for showing that delay was violation of FHA); *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272 (S.D. Fla. 2014) (resident's multiple sclerosis made it readily apparent that requested accommodation of service dog would alleviate difficulties; requests for additional medical records to justify request not appropriate).

⁹³ *See e.g., Anderson v. City of Blue Ash, Ohio*, 2014 WL 3102326 (S.D. Ohio 2014) (miniature horse providing only comfort and reassurance did not qualify as ADA service animal; zoning ordinances related to odors and animal waste not required to be waived); (on appeal) *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) (miniature horse qualifies as service animal; was individually trained to do work and perform task of beneficial exercise in girl's backyard; reversing the lower court's summary judgment on accommodation of city zoning policy, remanding on that issue, upholding summary judgment for city on intentional discrimination and disparate impact issues); *Manzke v. Jefferson County*, 58 Nat'l Disability L. Rep. ¶ 49 (W.D. Wis. 2018) (because resident withdrew zoning variance request claim was not ripe; owner seeking variance to accommodate animals (four miniature goats and two geese); *Cowart v. City of Eau Claire*, 571 F. Supp. 2d 1005 (W.D. Wis. 2008) (individual who claimed she needed more dogs than city allowed did not demonstrate that she was disabled under Title II of the ADA; granting summary judgment for city).

⁹⁴ *LaRosa v. River Quarry Apartments*, 59 Nat'l Disability L. Rep. ¶ 16 (D. Idaho 2019) (landlord did not violate FHA when emotional support dog was allowed in housing pending receipt of documentation even when additional documentation was requested; tenant with post-traumatic stress disorder moved out after four months, but had dog with him during entire time); *Chavez v. Aber*, 51 Nat'l Disability L. Rep. ¶ 34 (W.D. Tex. 2015) (allowing case to move forward when tenant requested pit bull dog as emotional support animal; lease had no-pets policy; landlord sought to evict her, denied lease renewal); *Kromenhoer v. Cowpet Bay West Condominium Association*, 77 F. Supp. 3d 462 (D. V.I. 2014) (FHA case does not require preferential treatment for tenants with disabilities; tenant must request accommodation and can only bring FHA claim if request is denied; claim involved emotional support animal and waiver of no pets policy; providing notice of condition but would not allow information to be shared with Board that was to consider the animal request; notice of condition is not a request for accommodation); *Warren v. DelVista Towers Condominium, Inc.*, 59 F. Supp. 3d 1082 (S.D. Fla. 2014) (denying motion to discuss in case involving request to modify no pets policy; fact issues existed regarding direct threat of emotional support dog and applying county ordinance banning pit bull dogs); *Smith v. Powdrill*, 2013 WL 5786586 (C.D. Cal. 2013) (granting summary judgment to tenant requesting companion animal to address symptoms of depression and anxiety and other disorders); *Association of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor*, 892 F. Supp. 2d 1268

that are not clearly addressed in existing policies.⁹⁵ Are these properties to be treated more like hotels and motels (subject to Title III of the ADA) or more like landlord tenant situations (subject to FHA). This can be important in terms of what types of animals must be allowed (or at least considered to be allowed) and what kinds of documentation might be permissible to request.

As noted previously, the Fair Housing Act statutory language and the regulations are far less specific than the ADA regarding animal accommodations in housing. Some judicial interpretations have provided guidance on these requirements. Several cases have addressed the question of whether an individual even has a disability that would entitle that individual to be accommodated.⁹⁶ These cases include issues of documentation not only of the disability, but its relationship to the requested accommodation.⁹⁷

Other cases address what types of animals are allowed.⁹⁸ These cases address an array of situations including specific types of animals, size of animals, specific breeds, and even the

(D. Haw. 2012) (allowing case to proceed regarding emotional support animals in apartment complex that did not allow pets); *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989) (landlord of housing project subsidized by federal government could not evict a low-income tenant with a psychiatric disability for owning a cat in violation of project rules because she was emotionally dependent on the cat and allowing her to keep it was a reasonable accommodation).

⁹⁵ Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by its Hosts*, September 9, 2009 New York Times, https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html?_r=0; Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect> (last visited May 20, 2017) (includes reference to expectation that hosts may not charge additional fees for pet fees).

⁹⁶ *Cowart v. City of Eau Claire*, 571 F. Supp. 2d 1005 (W.D. Wis. 2008) (individual who claimed she needed more dogs than city allowed did not demonstrate that she was disabled under Title II of the ADA; granting summary judgment for city):

⁹⁷ *Ajit Bhogaita v. Altamonte Heights Condominium Ass'n, Inc.*, 2012 WL 6562766 (M.D. Fla. 2012), *aff'd*, 765 F.3d 1277 (11th Cir. 2014) (veteran with PTSD, chronic anxiety, and depression could pursue claim that modification of condo rule limiting pet size would affect his having an emotional support animal; prescribed by physician); *DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006) (permissible to request additional medical information from condominium owner seeking exemption from no-pets rule; dog was permitted to live with owner temporarily); *Kromenhoer v. Cowpet Bay West Condominium Association*, 77 F. Supp. 3d 462 (D. V.I. 2014) (FHA case does not require preferential treatment for tenants with disabilities; tenant must request accommodation and can only bring FHA claim if request is denied; claim involved emotional support animal and waiver of no pets policy; providing notice of condition but would not allow it to be shared with Board that was to consider the animal request; notice of condition is not a request for accommodation); *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272 (S.D. Fla. 2014) (resident's multiple sclerosis made it readily apparent that requested accommodation of service dog would alleviate difficulties; requests for additional medical records to justify request not appropriate); *Nason v. Stone Hill Realty Association*, (Mass. 1996) (no clear nexus between MS and need for cat); *In re Kenna Homes Co-op. Corp.*, 210 W. Va. 380, 557 S.E.2d 787 (2001) (cooperative housing project did not violate FHA; regulation prohibited animals except service animals that were properly trained, certified for the particular disability of the resident, and resident has certification of disability from specializing doctor; residents were seeking to keep dogs as a reasonable accommodation); *Meadowland Apartments v. Schumacher*, 2012 S.D. 30, 813 N.W.2d 618 (S.D. 2012) (tenant in federally subsidized apartment did not provide the information sufficient to request for dog accommodation).

⁹⁸ *Anderson v. City of Blue Ash, Ohio*, 2014 WL 3102326 (S.D. Ohio 2014) (miniature horse providing only comfort and reassurance did not qualify as ADA service animal; zoning ordinances related to odors and animal waste not required to be waived); (on appeal) *Anderson v. City of Blue Ash*, 798 F.3d 338, 51 Nat'l Disability L.

number of animals. Courts have also reviewed issues about the behavior and other impact of the animal itself.⁹⁹ These cases include issues of what can be required in terms of vaccinations, assistance for the animal, and fees that can be required in various settings.¹⁰⁰ Finally, some cases address who is responsible for animal accommodation issues when landlords, homeowners' associations, and other decision makers are involved.¹⁰¹

Rep. ¶ 121 (6th Cir. 2015) (miniature horse qualifies as services animal; was individually trained to do work and perform task of beneficial exercise in girl's backyard; reversing the lower court's summary judgment on accommodation of city zoning policy, remanding on that issue, upholding summary judgment for city on intentional discrimination and disparate impact issues); *Ajit Bhogaita v. Altamonte Heights Condominium Assn., Inc.*, 2012 WL 6562766 (M.D. Fla. 2012), aff'd, 765 F.3d 1277 (11th Cir. 2014) (veteran with PTSD, chronic anxiety, and depression could pursue claim that modification of condo rule limiting pet size would affect his having an emotional support animal; prescribed by physician); *Warren v. DelVista Towers Condominium, Inc.*, 59 F. Supp. 3d 1082 (S.D. Fla. 2014) (denying motion to dismiss in case involving request to modify no pets policy; fact issues existed regarding direct threat of emotional support dog and applying county ordinance banning pit bull dogs); *Cowart v. City of Eau Claire*, 571 F. Supp. 2d 1005 (W.D. Wis. 2008) (individual who claimed she needed more dogs than city allowed did not demonstrate that she was disabled under Title II of the ADA; granting summary judgment for city); *Prindable v. Association of Apartment Owners of 2987 Klakaua*, 204 F. Supp. 2d 1245 (D. Hawaii (2003) (dog was not individually trained service animal so accommodation was not required); *Janush v. Charities Housing Development Corp.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000) (tenant's alleged need for two birds and two cats to act as service animals supported claim that landlord's eviction of tenant for violation of no pets rule violated FHA); *Oras v. Housing Authority of the City of Bayonne*, 373 N.J. Super. 302, 861 A.2d 194 (2004); *Wilkison v. City of Arapahoe*, 926 N.W.2d 441 (Neb. 2019) (reversing lower court's injunction against city that had prohibited a pit bull dog; although accommodation to breed specificity might be required under FHA, this individual did not demonstrate that the waiver was necessary in this particular instance); *Timberlane Mobile Home Park v. Washington State Human Rights Com'n*, 122 Wash. App. 896, 95 P.3d 1288 (Div. 2 2004) (mobile home resident with severe migraine headaches failed to show that her dog met state's definition of service animal).

⁹⁹ *Anderson v. City of Blue Ash, Ohio*, 2014 WL 3102326 (S.D. Ohio 2014) (miniature horse providing only comfort and reassurance did not qualify as ADA service animal; zoning ordinances related to odors and animal waste not required to be waived); (on appeal) *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) (miniature horse qualifies as service animal; was individually trained to do work and perform task of beneficial exercise in girl's backyard; reversing the lower court's summary judgment on accommodation of city zoning policy, remanding on that issue, upholding summary judgment for city on intentional discrimination and disparate impact issues); *Warren v. DelVista Towers Condominium, Inc.*, 59 F. Supp. 3d 1082 (S.D. Fla. 2014) (denying motion to dismiss in case involving request to modify no pets policy; fact issues existed regarding direct threat of emotional support dog and applying county ordinance banning pit bull dogs).

¹⁰⁰ *Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc.*, 778 F. Supp. 2d 1028, 66 A.L.R. Fed. 2d 687 (D.N.D. 2011) (charging an animal fee without a clear explanation about when fees applied created triable issues about whether denial of fee waiver was pretext); *Intermountain Fair Housing Council v. CVE Falls Park, L.L.C.*, 2011 WL 2945824 (D. Idaho 2011) (imposing security deposit for service animal impermissible under FHA).

¹⁰¹ *Geraci v. Union Square Condo, Ass'n*, 57 Nat'l Disability L. Rep. ¶ 83 (7th Cir. 2018) (condo association not violating retaliation provisions of FHA by sharing resident's lawsuit requesting elevator key for nonstop elevator ride to accommodate her PTSD to avoid riding elevator with dogs; her PTSD was public knowledge because of lawsuit and sharing information about litigation with residents was reasonable); *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798 (E.D. Cal. 2016) (granting partial summary judgment in claim involving denial of request to keep a cat as an emotional support animal; owner was vicariously liable for managers' violations of FHA); *Geraci v. Union Square Condo. Ass'n*, 54 Nat'l Disability L. Rep. ¶ 115 (N.D. Ill. 2017) (allowing claim to proceed involving request of condo association to accommodate resident with PTSD and fear of dogs; request for key for nonstop elevator to avoid her riding elevator with dogs); *Hintz v. Chase*, 55 Nat'l Disability L. Rep. 150 (N.D. Cal. 2017) (denying real estate agency motion to dismiss FHA claim; assisting owner in discriminatory act

C. Travel

The individual who attends a conference at a hotel or who meets a friend at a shopping mall may have relatively clear guidance on what federal law requires with respect to service and support animals. It can be less clear, however, what is required with respect to the means of travel the individual uses to get there. With the exception of air travel, other means of transportation -- trains, subways, bus systems, and taxi and similar services are generally subject primarily to the ADA and/or Section 504 (where the program receives federal financial assistance). While major entities within many of these industries have adopted policies and practices related to animal accommodations, the regulatory specificity for these settings is not as clear.

1) Air travel

The only type of transportation that currently has federal regulatory guidance about animal accommodations specific to that industry is air travel. Most of that regulation applies only to the aircraft itself and to a lesser extent boarding and disembarking. What is allowed within the airport itself is covered by the ADA and/or Section 504, depending on how the airport is funded and who (private or state/local government authority) operates it.¹⁰²

The Air Carrier Access Act (ACAA) of 1968¹⁰³ was the first comprehensive federal law to directly prohibit discrimination on the basis of disability on airlines.¹⁰⁴ Since its enactment, the Department of Transportation has issued regulations applying to a range of issues.¹⁰⁵ There are specific regulations beyond the general nondiscrimination provisions that clarify requirements for air travel.¹⁰⁶ These regulations clarify that only service animals are required

might result in liability; case involved prospective tenant requesting service dog in rental property; owner declined due to allergies; agent knowingly assisted in denial).

¹⁰² *Kao v. British Airways*, 56 Nat'l Disability L. Rep. ¶ 113 (S.D.N.Y. 2018 (dismissing Title III claim by airline passenger seeking to fly with her two dogs; counter supervisor refused based on inadequate documentation; check-in counter not subject to Title III; held that airline operations not subject to ADA).

¹⁰³ 49 U.S.C. § 41705. This is an amendment to the Federal Aviation Act.

¹⁰⁴ LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* §§ 8:1-8:3 (Thomson West 2012 and cumulative supplements).

¹⁰⁵ *See* 14 C.F.R. § 382 (including regulations relating to accessibility on the aircraft, auxiliary aids, and services in air terminals regarding gate announcements and other information); *see also* *Pet Ownership for the Elderly and Persons With Disabilities*, 73 Fed. Reg. 63834, 63834–838 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5) (amending HUD's regulations governing the requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities); *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. 56164, 56192 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35) (relating to nondiscrimination on the basis of disability in state and local government services).

¹⁰⁶ *Guidance Concerning Service Animals in Air Transportation*, 68 Fed. Reg. 24875, 24875 (May 9, 2003) (codified at 14 C.F.R. pt. 382) (clarifying and applying the ACAA in determining (1) whether an animal is a service animal and its user a qualified individual with a disability, (2) how to accommodate a qualified person with a disability with a service animal in the aircraft cabin, and (3) when a service animal legally can be refused carriage in the cabin); *see also* 14 C.F.R. § 382.117(e)–(f) (permitting airlines to refuse to accept service animals (1) without

(not emotional support animals or service animals in training) to be allowed under the ACAA.¹⁰⁷ This does not mean that airlines might not have broader policies regarding animals on planes. All major airlines have their own policies, and these policies often include information on the specific documentation that would be required. A great deal of media attention has been given to

current documentation of need, and (2) if they are certain unusual animals); 14 C.F.R. § 382.55(a) (allowing service animals on planes); Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals*, ADA NAT'L NETWORK, <https://adata.org/publication/service-animals-booklet> [<https://perma.cc/249G-87SB>] (accessed Jan. 19, 2018) (clarifying the documentation owners of service animals should have when engaging in air travel).

¹⁰⁷ 14 C.F.R. §§ 382.117(a), (d) (requiring a service animal to accompany a passenger with a disability, and providing for what documentation can be required, including: service animal identification cards, other written documentation, presence of harnesses or markings on harnesses, tags, or credible verbal assurances from the person using the animal). There has been substantial criticism of the loose standards being applied to obtain identification cards. *See, e.g.*, Katrena Hamberger, *Too Many Take Advantage of Term 'Service Dog'*, TIMES REC. NEWS (Nov. 5, 2017, 12:45 AM), <http://www.timesrecordnews.com/story/life/2017/11/05/too-many-take-advantage-term-service-dog/825235001/> [<https://perma.cc/FLX4-DN9Q>] (accessed Jan. 19, 2018) (“There [is] also a plethora of websites that will be happy to sell anyone a vest and ID card declaring your dog a service animal. However, there’s usually no requirement to prove the true abilities of the service animal. Just send in your money and you will receive what you want.”).

issues of animals on airlines.¹⁰⁸ As a result, the airlines themselves have begun to change their policies,¹⁰⁹ and federal regulations are being considered to respond to these concerns.¹¹⁰

Unlike other public accommodations, airlines are able require more documentation,¹¹¹ but the regulations do not limit permissible service animals to specific types of animals.¹¹²

¹⁰⁸Dave Quinn, *Woman Sues American Airlines for Allegedly Locking Dog in Plane's Restroom*, August 15, 2019, <https://www.yahoo.com/entertainment/woman-sues-american-airlines-allegedly-162601905.html>; <https://www.cnn.com/travel/article/american-airlines-attendant-bitten-emotional-support-animal-trnd/index.html>; Rebecca Shapiro, *Passenger Sues Delta and Pet Owner After Emotional Support Dog Attacks Him*, Huffington Post, May 29, 2019, <https://www.yahoo.com/huffpost/passenger-sues-delta-and-pet-owner-after-emotional-support-dog-attacks-him-020254687.html>; Courtney Copenhagen, Phil Rogers, and Katy Smyser, *Fly the Furry Skies--Are More Animals Than Ever Packing America's Planes*, <http://www.nbcchicago.com/investigations/Fly-the-Furry-Skies-Are-More-Animals-Than-Ever-Packing-Americas-Planes-414935023.html> (February 28, 2017); Lucy Bayly, *Goats? No. Miniature ponies? Maybe: American Airlines debuts new emotional support animal policies*, NBC News (May 15, 2018) <https://www.nbcnews.com/business/travel/goats-no-miniature-ponies-maybe-american-airlines-debuts-new-emotional-n874316>; Daniella Silva and Anthony Cusummo, *Hamster flushed down toilet after college student's pet denied flight on Spirit Airlines*, NBC News (Feb. 8, 2018) <https://www.nbcnews.com/storyline/airplane-mode/hamster-flushed-down-toilet-after-college-student-s-pet-denied-n846116>; Karin Brulliard, *Fur and Fury at 40,000 feet as more people bring animals on planes*, Washington Post (Jan. 22, 2018) https://www.washingtonpost.com/news/animalia/wp/2018/01/22/fur-and-fury-at-40000-feet-as-more-people-bring-animals-on-planes/?tid=ss_mail&utm_term=.cf073db6e050; *Pit bull bites Massachusetts woman in Jet Blue check-in line*, WCVB television (Nov. 13, 2017) <http://www.wcvb.com/article/pit-bull-bites-massachusetts-woman-in-jetblue-check-in-line/13534938>; Tiffany Hsu, *Delta Airlines Tightens Rules for Service and Support Animals*, NYT (Jan. 19, 2018) (highlighting concerns about abuse and impact on other passengers and using this to avoid fees for pets) <https://www.nytimes.com/2018/01/19/business/delta-airlines-service-animals.html>; *Delta Cracks Down on Emotional Support Animals* (Jan. 19, 2018) <http://onemileatatime.boardingarea.com/2018/01/19/delta-emotional-support-animals/>.

¹⁰⁹ Southwest Airlines policy, *Traveling with Animals* <https://www.southwest.com/html/customer-service/traveling-with-animals/index-pol.html> (last visited July 4, 2018) (pet fare is \$95); Delta Airlines policy <https://pro.delta.com/content/agency/us/en/news/news-archive/2018/february-2018/delta-service-and-support-animal-policy-effective-march-1--enhan.html> (last visited July 4, 2018) (requiring proof of health and immunization records for trained service animals and emotional support animals; for emotional support animals, requiring an emotional support animal request form, which must be signed by a doctor; requiring proof of animal training form for emotional support animals) Delta Airlines Service and Support Animal Policy Effective March 1, Enhancements Added, *Southeast A.D.A. Center*, Mar. 1, 2018, available at <https://pro.delta.com/content/agency/us/en/news/news-archive/2018/february-2018/delta-service-and-support-animal-policy-effective-march-1--enhan.html>; Delta Airlines Services and Support Animals Policy, *Southeast ADA Center* <http://www.adasoutheast.org/news/articles.php?id=8668#content> (last visited July 4, 2018); United Airlines policy (effective June 18, 2018) can be found at *Travel for Animals*, <https://www.united.com/ual/en/us/fly/travel/animals.html> (last visited July 4, 2018).

For other website stories about this issue, see

<https://www.yahoo.com/gma/woman-removed-plane-boarding-emotional-support-squirrel-105012179--abc-news-topstories.html>; <https://www.freep.com/story/sports/columnists/mitch-albom/2018/10/14/emotional-support-squirrel-plane/1630132002/>; <https://www.nbcnews.com/business/consumer/cute-not-allowed-you-can-no-longer-take-your-emotional-n946631>; <https://www.yahoo.com/lifestyle/college-student-says-southwest-airlines-banned-pet-fish-plane-just-wasnt-cat-dog-wasnt-important-191009651.html>; <https://www.ajc.com/business/delta-ban-pit-bull-service-and-support-animals-faces-challenges/jGLL0GQMZYiUMyscZxQeQK/>.

¹¹⁰ The Department of Transportation issued proposed regulations on this on May 23, 2018 (comments requested by July 9, 2018). At the time of this update (1/20/19) the regulations have not yet been finalized. See *Traveling by Air With Service Animals*, <https://www.federalregister.gov/documents/2018/05/23/2018-10815/traveling-by-air-with-service-animals>.

¹¹¹ 14 C.F.R. § 382.55(a)-(b).

¹¹² 14 C.F.R. 382.117(f).

Airlines seem also to be required to allow a broader category of animals beyond dogs and miniature horses, but they are permitted to exclude unusual animals such as snakes, reptiles, spiders, ferrets, and rodents. Foreign travel might be more restrictive, however. The airlines are also permitted to determine appropriate requirements for how much space an animal can occupy to ensure safety in exiting and other safety concerns.¹¹³

As noted previously, federal regulations on animals as accommodations give limited acknowledgement of fears and allergies that others might have.¹¹⁴ The general regulatory approach to this concern seems to be one of interactive resolution, i.e., just try to work it out.¹¹⁵ Perhaps greater recognition of the unique setting of an aircraft as being a small space, with confined areas, recycling air, and some long trips could encourage greater attention to this.¹¹⁶

As a practice, airlines have been more flexible than some other public accommodation programs, but media coverage has demonstrated that this welcoming attitude has opened the floodgates, and airlines may rethink their willingness to allow turkeys, ducks, pigs, and other animals on board without greater documentation and concern for others.¹¹⁷ It may also be that

¹¹³ See, e.g., *In-Cabin Pets*, UNITED AIRLINES, https://www.united.com/web/en-US/content/travel/animals/in_cabin.aspx [https://perma.cc/A9CM-DBV9] (accessed Jan. 19, 2018) (restricting the size of kennels that can be brought on the plane); *Service Animals*, AM. AIRLINES, <https://www.aa.com/i18n/travel-info/special-assistance/service-animals.jsp> [https://perma.cc/2AE9-QDZY] (accessed Jan. 19, 2018) (allowing service animals to be carried on at no charge if they meet specific size requirements); *Service Animals*, UNITED AIRLINES, https://www.united.com/web/en-US/content/travel/specialneeds/disabilities/assistance_animals.aspx [https://perma.cc/NU2D-CJW8] (accessed Jan. 19, 2018) (restricting the size of emotional support and psychiatric assist animals that can be brought on the plane); *Traveling with Pets*, AM. AIRLINES, <https://www.aa.com/i18n/travel-info/special-assistance/pets.jsp> [https://perma.cc/NDU2-SC23] (accessed Jan. 19, 2018) (restricting the size of kennels for cats and dogs); Jordan Valinsky, *Southwest Airlines Only Cats and Dogs, Allowed as Emotional Support Animals* (allowing only one animal, required to be on leash or in carrier, documentation required), <https://money.cnn.com/2018/08/14/news/companies/southwest-airlines-pet-policy/index.html> (accessed on August 17, 2018).

Because airline policies are in a significant state of flux, it is advisable to check current policies.

¹¹⁴ An interesting, but unresolved issue, is where such a condition might itself rise to the level of being a disability. Then the question is whose disability should be given priority.

¹¹⁵ Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35694, 35716 (July 26, 1991) (to be codified at 28 CFR pt. 35); Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164, 56177 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35); Amendment of Americans With Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53204, 53223 (Aug. 11, 2016) (to be codified at 28 C.F.R. pts. 35, 36).

¹¹⁶ The Department of Transportation issued proposed regulations on this on May 23, 2018 (comments requested by July 9, 2018). See *Traveling by Air With Service Animals*.

<https://www.federalregister.gov/documents/2018/05/23/2018-10815/traveling-by-air-with-service-animals>. For an article on possible legislation, see Amanda Carrozza, *Emotional Support Animals: New Rules Proposed Laws* (March 6, 2018) (Veterinarian Monthly Digest) <https://www.vmdtoday.com/news/emotional-support-animals-new-rules-proposed-laws>.

¹¹⁷ Jane L. Levere, *When a Service Animal Has to Go, Airports' Options May be Wanting*, NYT (July 24, 2017) <https://www.nytimes.com/2017/07/24/business/service-animals-airports.html?emc=eta1>, Jennifer Dixon, *Too Many Passengers Fly with Phony Support Pets, Critics Say*, DETROIT PRESS (Dec. 27, 2016) <http://www.freep.com/story/news/local/michigan/2016/12/27/too-many-air-passengers-fly-phony-support-pets-critics-say/93969310/>; <http://www.news.com.au/travel/travel-ideas/weird-and-wacky/emotional-support-duck-wins-over-the-internet/news-story/96fb6003136c51ec814bc4c882ae4622>; <http://www.nbcsandiego.com/news/local/Emotional-Support-Animals-a-Growing-Problem-on-Airplanes-Flight-Attendants-320993451.html>. Hugo Martin, "Airlines seek to limit types of therapy animals allowed on planes, LOS ANGELES TIMES (September 24, 2016) <http://www.latimes.com/business/la-fi-travel-briefcase-animals->

this increase is a response to the high fees required by some airlines for animals not categorized as accommodation animals.¹¹⁸ Another concern is that traveling in the cargo hold has proven to be quite adverse to animal health, including death, because of temperature and air pressure problems.¹¹⁹

One of the concerns of animals in air travel settings is the need for them to relieve themselves. Unfortunately, not all airports have pet relief stations within the gate areas, requiring travelers to exit, and return through security check points. This is an issue that does not rise to the level of disability discrimination accommodation, but it does highlight an area ripe for consideration. Because most airports are financed in part by federal funding, it may be that additional federal appropriations improve the availability of such relief stations.¹²⁰

2) Other transportation

Publicly available transportation is operated in different locales by a wide range of public/private relationships. Some are privately operated programs with considerable governmental regulation and oversight. Such transportation systems include subways, fixed-route buses, paratransit, rail (long distance and light rail), shuttles and limousine services, and taxicabs (and more recently Uber™ and Lyft™ type services). Generally speaking, all of these programs fall under the Title II/III ADA regulations of 2010 that have similar requirements for both state and local governmental programs and private providers of programs available to the public.

As is the case with airlines, beyond the regulations themselves, it is the policy and practice of the corporate provider that is the source of limits on animals. An individual would need to challenge a particular policy or practice as violating the ADA. Like airlines, increasing demand to bring animals has resulted in media attention to these issues. In particular attention to the newer on demand services like Uber and Lyft (and whether they are even subject to Title III) has been raised.¹²¹ There is very little judicial interpretation of these issues.¹²²

[20160924-snap-story.html](https://www.nationalgeographic.com/2018/01/woman-brings-peacock-plane-emotional-support-animal-explained-spd/); Sarah Gibbens, *Can Peacocks Be Emotional Support Animals: It's Complicated*, January 31, 2018 <https://news.nationalgeographic.com/2018/01/woman-brings-peacock-plane-emotional-support-animal-explained-spd/>.

¹¹⁸ Benjamin Siu, *Emotional Support Animal Policy Updated for 2 Major Airlines*, ABCNEWS (Mar. 1, 2018), <http://abcnews.go.com/US/emotional-support-animal-policy-updated-major-airlines/story?id=53439217> [<https://perma.cc/7HQR-R29B>] (accessed Mar. 10, 2018) (describing United's policy update for allowing service animals on board flights after an increase in animal-related incidents in 2017).

¹¹⁹ See, e.g., David Thyberg, *Is It Dangerous for Your Pet to Travel in the Travel Compartment on an Airplane?*, USA TODAY, <http://traveltips.usatoday.com/dangerous-pet-travel-luggage-compartment-airplane-9941.html> [<https://perma.cc/4HKX-MLC6>] (accessed Jan. 19, 2018) (describing the negative health effects on pets traveling in the cargo hold).

¹²⁰ A Guide to In-Terminal Pet Relief Stations, November 8, 2016, https://www.huffingtonpost.com/entry/a-guide-to-in-terminal-airport-pet-relief-stations_us_5820be3be4b0334571e09fb7.

¹²¹ Tracey Lien, *Uber drivers must accept service animals under lawsuit settlement* (LA TIMES (July 15, 2016) <http://www.latimes.com/business/technology/la-fi-tn-uber-service-animals-20160715-snap-story.htmlv>.

¹²² See e.g., *Man Sues After Dog Attack on City Bus*, https://www.abqjournal.com/1252074/man-sues-after-dog-attack-on-city-bus.html?utm_source=email-a-story&utm_medium=email&utm_campaign=email-a-story; *Lockett v. Catalina Channel Exp., Inc.*, 496 F.3d 1061 (9th Cir. 2007) (refusal to allow blind passenger to bring guide dog into ferry lounge which had been designated as free of animal dander at the request of another passenger; one time occurrence not an ADA violation); *Levine v. National Railroad Passenger Corporation*, 80 F. Supp. 3d 29 (D.D.C.

D. Work

There are very few cases involving animals as an accommodation in employment.¹²³ The interest in bringing animals into the workplace, however, is significant.¹²⁴ As a general framework, the ADA regulations for Title I are applicable regarding reasonable accommodations.¹²⁵ A detailed review of those requirements is beyond the scope of this article.¹²⁶

In the context of animal accommodations, employment disability discrimination policy contemplates the obligation to engage in an interactive process to address accommodation issues.¹²⁷ Issues of consideration of coworkers might also arise, in the context of coworker fears, phobias, and allergies. Employment settings will impact coworkers to a much greater degree because of proximity of others (other employees and customers) and longer periods of presence

2015) (passenger using service dog not entitled to sit in “mobility aid” seating area of train or demanding that luggage be cleared in that area); *O'Brien v. Werner Bus Lines, Inc.*, 14 A.D.D. 634, 5 A.D. Cas. (BNA) 444 (E.D. Pa. 1996) (denial of entry onto bus with guide dogs did not show risk of future harm).

¹²³ *Schultz v. Alticor/Amway Corp.*, 177 F. Supp. 2d 674 (W.D. Mich. 2001), judgment aff'd, 43 Fed. Appx. 797 (6th Cir. 2002) (employer not required to allow hearing-impaired employee to bring service dog to work when employee had minimal contact with others and dog did not assist in performing “essential functions” of his job); *Maubach v. City of Fairfax*, 57 Nat'l Disability L. Rep. ¶ 55 (E.D. Va. 2018) (granting summary judgment to city recognizing difference between Title I and Title II animal accommodations, but assuming that emotional support animals should be considered to be reasonable accommodations, deciding that the significant allergic reactions of 911 dispatcher's coworkers and lack of evidence to alleviate the issue, presence of dog to calm employee for panic attack posed undue hardship on city and its emergency operations center; interactive process broke down due to employee) *Clark v. School Dist. Five of Lexington & Richland Counties*, 55 Nat'l Disability L. Rep. ¶ 6 (D.S.C. 2017) (triable issues remain regarding whether reasonable accommodation would require permitting teacher to bring dog who placed deep pressure on chest of teacher to avert panic attacks); *Edwards v. U.S. E.P.A.*, 456 F. Supp. 2d 72 (D.D.C. 2006) (program analyst failed to show partial paralysis and intestinal conditions could be effectively resolved by being allowed to bring untrained, 10-month-old puppy to work); *Bonnette v. Shinseki*, 907 F. Supp. 2d 54 (D.D.C. 2012) (single incident of insensitivity regarding employee's service dog does not mean that numerous steps agency took to accommodate dog were inadequate); *Nelson v. Ryan*, 860 F. Supp. 76 (W.D. N.Y. 1994) (employer reasonably accommodated blind employee by allowing him to take sick leave, personal leave, and vacation time for training a new guide dog; paid leave not required); *McDonald v. Department of Environmental Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749 (2009) (evidence sufficient to establish that former employee needed accommodation of non-skid floor coverings so her service dog could maintain traction). See also *EEOC v. CRST International Inc.* (N.D. Iowa 11/03/17 (pending case about application of DOJ regulations to workplace; trucker sought to have a dog as a reasonable accommodation on trucking trips; driver was veteran with PTSD and dog had been trained to wake him when he had nightmares which enabled him to get restful sleep). A November 2018 trial date was set, but no result could be determined at the time of this update (January 20, 2018).

¹²⁴ The Rising Trend of Pets at Work, by Krystal D'Costa, <https://blogs.scientificamerican.com/anthropology-in-practice/the-rising-trend-of-pets-at-work/>, May 11, 2017.

¹²⁵ Job Accommodation Network Guidance on Service Animals in the Workplace <https://askjan.org/media/servanim.html> is a service of the Department of Labor. This website from an organization created through the Department of Education it provides information to employers and others about accommodations in employment settings and has been in existence since the 1980s. The EEOC Interpretive Guidance to the regulations mentions guide dogs, and notes that such dogs should be allowed but need not be provided. 29 C.F.R. Pt. 1630 App.

¹²⁶ LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (Thomson West 2012 and cumulative supplements) § 4:20, note 59 and related text.

¹²⁷ 29 C.F.R. § 1630.2(o)(3). See also *Maubach v. City of Fairfax*, 57 Nat'l Disability L. Rep. ¶ 55 (E.D. Va. 2018) (granting summary judgment to city interactive process broke down due to employee)

than an individual bringing an assistance animal to a public setting for an occasional short term period of time. Employees who are accommodated by allowing service or emotional support animals are likely to be allowed animals other than dogs and miniature horses, but they would be required to be responsible for the needs of the animal. For example, an accommodation of having a coworker walk the dog would not be required because it would be viewed as a personal service. Other Title II/Title III regulations related to control of animal would probably be incorporated by reference, but the regulations relating to documentation would probably not be, at least for animals other than dogs or miniature horses and for emotional support animals. Basically, an employer could probably require more documentation of the disability and the relationship of the animal support to the disability than can be required under Title II or Title III of the ADA, but this issue has not been definitively resolved by regulations or judicial guidance.

The case of *Clark v. School District Five of Lexington and Richland Counties*,¹²⁸ highlights an issue that has been raised in other settings, but which has not yet been clearly resolved by the courts. The case involved a teacher with PTSD and panic disorder whose trained chihuahua assisted in averting panic attacks by applying deep pressure to her chest. While her medical documentation supported the benefit of the accommodation, the employer proposed a weighted vest and relief from supervisory responsibilities over large groups. Her psychiatrist's response was that the weighted vest would not be effective and strongly recommended the service dog instead. The issue to be resolved is whether reasonable accommodations are limited to enabling performance of essential functions or whether a broader obligation required enabling enjoyment of the equal benefits and privileges of the employment. A similar issue is being addressed in the case of the student seeking a dog as a service animal, as addressed by the Supreme Court in the *Fry v. Napoleon Community School*.¹²⁹

One of the few case decisions to provide expansive discussion of many of the issues that could arise in an employment settings is *Maubach v. City of Fairfax*.¹³⁰ In granting a summary judgment for the city, the judge provides a discussion of many of the issues that can arise in an employment setting and applied them to this situation. The issues raised in this case included the difference between emotional support animals and service animals, the relationship of Title II/III regulations to employment settings which involves Title I, the issue of undue hardship in the context of the impact of an animal caused by severe allergic reactions of coworkers, and the obligations to engage in an interactive process. The decision also highlights the individualized determinations required in these cases. The case involved a city's 911 dispatching service with three employees working in an enclosed area. One employee with PTSD was allowed to bring an emotional support dog to work on a trial basis, but the supervisor and another dispatcher had

¹²⁸ *Clark v. School Dist. Five of Lexington & Richland Counties*, 247 F. Supp. 3d 734, 55 Nat'l Disability L. Rep. ¶ 6 (D.S.C. 2017) (triable issues remain regarding whether reasonable accommodation would require permitting teacher to bring dog who placed deep pressure on chest of teacher to avert panic attacks).

¹²⁹ *Fry v. Napoleon Community School*, 580 U.S. --, 197 L. Ed.2d 46 (2017), available at: <http://caselaw.findlaw.com/us-6th-circuit/1704024.html>.

¹³⁰ *Maubach v. City of Fairfax*, 57 Nat'l Disability L. Rep. ¶ 55 (E.D. Va. 2018) (granting summary judgment to city recognizing difference between Title I and Title II animal accommodations, but assuming that emotional support animals should be considered to be reasonable accommodations, deciding that the significant allergic reactions of 911 dispatcher's coworkers and lack of evidence to alleviate the issue, presence of dog to calm employee for panic attack posed undue hardship on city and its emergency operations center; interactive process broke down due to employee).

severe allergic reactions. Leaving aside whether the dog was a service or emotional support animal (and assuming for this case that either would be a possible accommodation in an employment setting),¹³¹ the court noted the significance of the allergic reaction, the lack of evidence that there were ways to alleviate or minimize the reaction of other employees and that the dog's presence posed an undue hardship. Moving the operation to a different space would have been prohibitively expensive in this particular situation. The employee rejected the offer to take a different shift or to get a dog that was hypoallergenic as accommodations. The request for vaccination records and training documentation¹³² was granted by the employee. Although one of few decisions on employment and animal accommodations, the court's discussion provides a good example of how to decide such cases.

E. Special Situations

1) Higher education

College campuses are unique places of accommodation because they often involve use of space in a more intense way than the short term visitor to a shopping mall or restaurant or even a hotel.¹³³ Campus use can include housing and regular presence in classrooms and libraries. Campus settings also involves not only students, but also staff and faculty and visitors to campus for a range of events, including sports and performance events. Study abroad programs raise even more complex situations. Student membership in fraternities and sororities is also complicated by the private club exemption in a setting that might be heavily regulated or facilitated by the university. Students are often placed in off campus internships and externships that require examination of who is responsible for policies on accommodations. Finally,

¹³¹ The court indicated that if employment settings required allowing only service animals, this dog did not meet that test because it was not trained to perform a specific function related to the work of the employee.

¹³² It is probable that documentation requests in an employment setting would be acceptable, although it would not be in a Title II or Title III setting. Having vaccination documentation for animals is most likely permissible in any setting.

¹³³ For overview of disability discrimination law to higher education, see LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (Thomson West 2012 and cumulative supplements) chapter 3, particularly 3:18; 3:19. Guidance for college settings can be found at NACUA Notes March 16, 2012, Volume 10, No. 6. <http://counsel.cua.edu/fedlaw/nacuanoteserviceanimalsupdate.cfm>. See also C.W. Von Bergen, *Emotional Support Animals, Service Animals, and Pets on Campus*, *ADMINISTRATIVE ISSUES JOURNAL* (Spring 2015), Volume 5, No. 1: 15-34. DOI: 10.5929/2015.5.1.3. <http://files.eric.ed.gov/fulltext/EJ1062480.pdf> (provides an excellent overview and guidance about various animal settings on campus); Katherine R. Powers, *Dogs in Dorm: How The United States v. University of Nebraska at Kearney Illustrates a Coverage Gap Created by the Intersection of the Fair Housing Act and Disability Law*, 47 *CREIGHTON L. REV.* 363 (2014) (addresses the challenges of determining the applicability of the Fair Housing Act to campus housing and suggesting the need for better guidance on the overlap) <https://www.animallaw.info/article/dogs-dorms-how-united-states-v-university-nebraska-kearney-illustrates-coverage-gap-created>; Mark Bauman, Denise L. Davidson, Michael C. Sachs & Tegan Kotarski, *Service, Comfort or Emotional Support? The Evolution of Disability Law and Campus Housing*, 40 *J. COLL. & U.L.* 150 (2013); Rebecca J. Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 *MO. L. REV.* 417 (2012). See also <http://www.nytimes.com/2015/10/05/us/four-legged-roommates-help-with-the-stresses-of-campus-life.html?emc=eta1&r=0>; <http://www.philly.com/news/emotional-support-animals-dogs-cats-college-campuses-temple-esa-service-20190121.html> and https://www.insidehighered.com/news/2019/05/21/colleges-see-rise-popularity-emotional-support-animals?utm_source=Inside+Higher+Ed&utm_campaign=a48b08ed93-DNU_2019_COPY_01&utm_medium=email&utm_term=0_1fcbc04421-a48b08ed93-197527209&mc_cid=a48b08ed93&mc_eid=ff36dd3836

individuals seeking animal accommodations might be patients in university operated health care settings which raise another layer of complexity.

Most institutions of higher education are subject to Section 504 of the Rehabilitation Act because they receive federal financial assistance through grants and/or student financial assistance. All of them are subject to either Title II of the ADA (private institutions) or Title III of the ADA (state or locally operated institutions). Student housing might be subject to the Fair Housing Act, and employment would be subject to Title I of the ADA, Title II of the ADA, and/or Section 504. The regulations under Section 504 provide a very general reference to student housing by requiring that such housing should be provided to students with disabilities on the same terms as to those who do not have disabilities¹³⁴ and also requiring that entities subject to Section 504 ensure that facilitation of housing provided by others is also available in a way that is not discriminatory.¹³⁵

For most aspects of higher education (attending class, going to the library, participating in social activities, and attending sports events) either Title II or Title III (or a combination)¹³⁶ applies. But institutions of higher education also involve housing and employment and these raise additional complexities. Higher education is the setting in which there has been the greatest institutional policy and judicial attention to issues of animals as accommodations.¹³⁷ Several key

¹³⁴ 34 C.F.R. § 104.45(a).

¹³⁵ 34 C.F.R. § 104.45(b).

¹³⁶ A private pizza chain operating in a state university student center or sports arena is an example of dual application. Not much attention has been given to these situations. Although the substantive requirements regarding animals are essentially the same for both public and private entities, the remedies available might be different and the responsibility of the institution granting a lease or license to a vendor and the resultant liability has not been given much judicial attention.

¹³⁷ See Rebecca Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417 (2012); Field, *These Student Requests Are A Different Animal*, CHRONICLE OF HIGHER EDUCATION, 2006 WLNR 18107846 (Oct. 13, 2006). See also *Alejandro v. Palm Beach State College*, 2011 WL 7400018 (S.D. Fla. 2011) (granting temporary injunction to allow student to bring psychiatric service dog to campus and class; dog trained to alert her to impending panic attack); *Velzen v. Grand Valley State University*, 902 F. Supp. 2d 1038 (W.D. Mich. 2012) (student allowed to proceed in Fair Housing Act, Section 504, and state law claims; university prohibited student from being allowed to have her guinea pig, a comfort animal, to control stress for cardiac arrhythmia; university had policy not allowing accommodations for emotional support assistance animals); Letter to: Northwest Missouri State University, 37 Nat'l Disability Law Rep. ¶ 78 (OCR 2007) (establishment of conditions, limitations, and procedural prerequisites to use of service animals, including requirements about vaccinations, reasonable and neutral, not a violation of 504/ADA).

cases have resulted in settlements.¹³⁸ While these settlements do not provide judicial precedence, they can provide guidance to institutions.¹³⁹

The 2010 regulations under the ADA provide some guidance about some types of campus housing, but the guidance is not entirely clarifying. These regulations differentiate between types of housing at places of education.¹⁴⁰ This differentiation, however, is found within the sections relating to architectural accessible design.¹⁴¹ It is not clear that the differentiation also applies to accommodations such as allowing animals.¹⁴²

¹³⁸ There are two high profile settlements that have addressed this issue. In a case brought by the Justice Department against Kent State University, (<http://www.justice.gov/crt/file/777336/download>) filed in 2014, the applicability of the Fair Housing Act to campus housing was at issue. Because the case was settled, judicial precedent does not exist. The Department of Justice had alleged that Kent State's policies did not permit students with psychological disabilities to have emotional support animals in university housing. The settlement is found at Case: 5:14-cv-01992-JRA Doc #: 53 Filed: 01/04/16 <http://www.justice.gov/opa/file/809811/download>. In the settlement, Kent State agreed to pay \$100,000 to two former students, to pay \$30,000 to a fair housing organization that advocated on behalf of the students, to pay \$15,000 to the United States, and to adopt a housing policy allowing emotional support animals.

The other major settlement involved the University of Nebraska at Kearney. Although the applicability of the Fair Housing Act was addressed in a judicial opinion, (see e.g., *United States v. University of Nebraska at Kearney*, 2013 WL 2146049 (D. Neb. 2013)) the case was settled before a judicial determination of liability was reached. The case involved the university asking for details of a student's treatment, medications, and doctor visit schedules. The Department of Justice position was that university requirements for detailed information went beyond what was needed to review the accommodation request in a housing setting. The settlement provided for payment of \$140,000 to two students denied assistance animals in university apartments and a change in policies to allow emotional assistance animals in university housing for students with psychological disabilities where animals provide necessary therapeutic benefits. <http://www.justice.gov/opa/pr/justice-department-and-university-nebraska-kearney-settle-lawsuit-over-rights-students>. The case does not resolve, but does raise the issue of differing documentation requirements that might be allowed under the ADA and FHA. For a recent story about service dogs on campus in a classroom setting, see <https://www.clarionledger.com/story/news/2018/09/13/ole-miss-banning-ptsd-service-dog-classroom-prompts-outcry/1255406002/>. At the time of this update, there has not been an update on the issue, which was in the process of being addressed by the university.

¹³⁹ The "precedential" value of a settlement becomes less clear when there is a significant change in federal enforcement policy, such as has occurred in the Trump administration.

¹⁴⁰ 28 C.F.R. 35.151(f) provides "Housing at a place of education that is subject to this section shall comply with the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. For purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards." Additional provisions in this section differentiate between short term stay housing (which does seem to be subject to either Title II or Title III) and apartments or townhouse facilities provided by or on behalf of places of education leased on a year-round basis only to graduate students or faculty, and which do not have public use or common use areas for educational programming are not considered to be transient lodging. Under Title III regulations, 28 C.F.R. § 36.104 definitions provide that a public accommodation includes places of lodging which would be primarily lodging for short term (such as hotels, short term guest rooms or sleeping rooms. "Housing at a *place of education* means housing operated by or on behalf of an...undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments or other places of residence."

¹⁴¹ See 28 C.F.R. § 35.151(f) (differentiating between "housing units containing accessible sleeping rooms," "[m]ulti-bedroom housing units," and "[a]partments or townhouse[s] within the "New construction and alterations" section); 28 C.F.R. § 36.406(e) (2017) (making the same distinctions in the "Standards for new construction and alterations" section).

¹⁴² For Title II regulations, see 28 C.F.R. § 35.151(f) (references housing at places of education, but this is found in the section on new construction and alterations, not in a general nondiscrimination portion of the regulations). This

While the Department of Housing and Urban Development¹⁴³ has taken the position that university housing is covered by the Fair Housing Act, this issue has never been definitively decided by the courts.¹⁴⁴ The HUD guidance is not a federal regulation that has gone through notice and comment, so it is not absolutely settled that all university housing is covered. For example, while university operated apartments are almost certainly covered by FHA, it is possible that a court might find that the more old-fashioned “dorm” rooms are not (and are instead to be treated as license arrangements, not leases). It can make a difference because of the different rules under ADA (limited to dogs and miniature horses and requiring the animal to be trained to perform a service but limiting documentation) and FHA (allowing more animals but allowing more documentation). While this distinction has been raised in litigation, the courts have not favored that distinction and have seemed to recognize that all university housing is covered under FHA. It is suggested that universities might spend their litigation efforts on other aspects of animals in housing rather than entering into a dispute about whether the FHA applies.

Even more complicating is the issue of fraternities and sororities and their housing and how that might be an issue for a student wanting to have an animal (often an emotional support animal) in the Greek housing setting.¹⁴⁵ A detailed discussion of this issue is beyond the scope of this article, but some of the issues relevant to determining whether and how the private club exemption of Title III of the ADA¹⁴⁶ or the Fair Housing Act might apply to these programs may depend on whether the university owns and operates the housing or whether it is entirely separate from any involvement of the university. Living in fraternity and sorority housing is often more like transient housing (such as hotels and motels) than leasing settings, so it is not clearly settled whether the ADA, Section 504, or the FHA applies in a particular situation. This can also impact

is similar to the regulations under Title III, 28 C.F.R. § 36.406(e) where the reference to housing at places of education is found in the portion of the regulations referring to architectural barriers. See also 75 Fed. Reg. 56192 (Sept. 15, 2010) for discussion of the reasoning on housing in educational programs, which seems to focus solely on architectural barrier issues.

¹⁴³ Reasonable Accommodations Under the Fair Housing Act, https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/ReasonableAccommodations15 (last visited May 24, 2017).

¹⁴⁴ See *Kearney*, 940 F. Supp. 2d at 975–77 (alleging that the university violated the FHA, and thus implying that the university is covered by the FHA). This case was later settled. Press Release II, Press Release, Office of Public Affairs, Department of Justice, Justice Department and University of Nebraska at Kearney Settle Lawsuit Over Rights of Students with Psychological Disabilities to Have Assistance Animals in Student Housing (Sept. 3, 2015), <https://www.justice.gov/opa/pr/justice-department-and-university-nebraska-kearney-settle-lawsuit-over-rights-students> [<https://perma.cc/W9F2-5Q5V>] (accessed Jan. 19, 2018) [hereinafter Press Release II]. The case involved the university asking for details of a student’s treatment, medications, and doctor visit schedules. The DOJ position was that university requirements for detailed information went beyond what was needed to review the accommodation request in a housing setting. *Id.* The settlement provided for payment of \$140,000 to two students denied assistance animals in university apartments and a change in policies to allow emotional assistance animals in university housing for students with psychological disabilities where animals provide necessary therapeutic benefits. The case did not resolve, but it does raise the issue of differing documentation requirements that might be allowed under the ADA and FHA. See also *Franchi v. New Hampton School*, 656 F. Supp. 252 (D.N.H. 2009) (finding that the FHA applied to student housing, but decided before the 2010 clarifying regulations).

¹⁴⁵ Claudine McCarthy, <http://www.disabilitycomplianceforhighereducation.com/m-article-detail/limit-liability-related-to-students-with-disabilities-in-fraternity-sorority-houses.aspx>, DISABILITY COMPLIANCE FOR HIGHER EDUCATION, Jossey-Bass (February 18, 2015). See also *Entine v. Lissner*, 56 Nat’l Disability L. Rep. ¶ 73 (S.D. Ohio 2017) (granting preliminary injunction against university seeking to remove service dog from sorority).

¹⁴⁶ 42 U.S.C. § 12187.

architectural barrier issues and membership discrimination, but for purposes of this article the issue is a student requesting an animal accommodation in a living situation. It can matter whether the FHA applies because often these requests may be for emotional support animals. Documentation of the relationship of an ESA to a disability allows greater inquiry under FHA. This can raise concerns of privacy in settings where other members of the Greek organization's board are involved in reviewing requests for exceptions.

Greek housing and traditional dormitory settings often involve right to access living space beyond what might be expected in a landlord tenant situation. For example, custodial and cleaning staff or other members of the fraternal organization might have a regular privilege to enter sleeping space of a student. This raises potential issues about safety. The ADA requires that the animal be under control of the individual, which makes sense in a public setting. The FHA would involve similar expectations, but control within one's sleeping room is different than control in a public space such as a restaurant or shopping mall. Does the emotional support animal have to be caged when the student leaves the room? Related to these issues is the amenities that go with campus housing. Often there are spaces for social interaction, food service, and other "public" areas such as a laundry room or lobby area that students would expect to be able to use in the building in which they live. Can an ESA accompany them to those spaces or only be allowed in the "private" sleeping space? These questions are not clearly resolved, and would benefit from official guidance. How would that work for campus settings where students living in one building can apply food service access to one or more other buildings?

Because of the increase in requests for animals on campus, several organizations have provided guidance.¹⁴⁷ While this guidance is often very helpful, it does not provide the definitive answers to some of these issues that official federal regulations could. Caution should be paid to federal agency "guidance," opinion letters, and answers to frequently asked questions. While reliance on these can often be significant in demonstrating good faith conduct, these forms of providing information are not official, and under the Trump administration, it is not clear how much reliance can be placed on such information, including even recently enacted regulations.¹⁴⁸

¹⁴⁷ The Association of Higher Education and Disabilities (AHEAD) is a valuable source of guidance (the organization specifically notes that it does not give legal advice), and a 2013 article by Scott Lissner provides an excellent overview of the issues. The document was published before some of the cases were resolved and settled in higher education situations. https://www.google.com/?gws_rd=ssl#q=ahead+animals+on+campus+policies. The National Association of College & University Attorneys (NACUA) is also an important resource for guidance on issues such as this. Elizabeth Brody Guck & Josh Dermott, *Accommodating Service and Assistance Animals on Campus Making Heads of Tails of the ADA, FHA, and Section 504* NACUA NOTES, Vol. 9, No 8, April 14, 2011 (although written before the recent settlements, it provides some useful perspectives on proactive planning. <http://www.nacua.org/nacualert/docs/ServiceAnimals/ServiceAnimals.pdf>). An update to the piece was written by Josh Dermott on March 16, 2012 (NACUA NOTES, Vol. 10, no. 6). See also Judge David L. Bazelon Center for Mental Health Law (organization founded in 1972 with mission to advocate for individuals with mental disabilities) Fair Housing Information Sheet #6, Right to Emotional Support Animals in "No Pet" Housing <http://www.bazelon.org/LinkClick.aspx?fileticket=mHq8GV0F14c%3D&tabid>.

¹⁴⁸ Marc E. Williams and Anna C. Majestro, *Regulation through Deregulation Trump's First Year in Office* 13 IN-HOUSE DEF. Q. 36 (Winter 2018) (providing an overview of the impact of an aggressive policy of undoing Obama-era regulations); Daniel Lyons, *The Administrative Law of Deregulation: The Long Road for the Trump Administration to Undo Obama-Era Regulations*, 61 BOSTON B.J. 18 (Summer 2017)

There is nothing within the regulations that addresses whether an institution of higher education can require or can encourage students to “register” in any way when there is an animal on campus where the presence involves classrooms, libraries, and laboratories. While it may be permissible to require registration in some housing settings, that is not completely resolved. It is almost certain, however, that registration in other settings cannot be *required* but campus policies might establish policies that encourage registration or at least advance notification to avoid complications in the classroom and other settings once a semester has begun. The purpose of having animals registered in housing would be to know in emergency situations, such as a fire, if an animal is in a housing unit. The purpose for other on campus settings, especially in classrooms and labs, would be engage in an interactive process in advance where others might have phobias or allergies. This is an issue that would benefit from being more clearly addressed. It is probable, however, that programs can require vaccinations of animals to the extent it is consistent with local legal requirements.

2) Health care settings

The general requirements under Section 504 and the ADA regarding animal accommodations would apply to most health care settings in most situations. The reasonable accommodation in these settings, however, would probably only apply to allowing dogs and miniature horses. Health care settings include doctors’ offices and clinics and hospitals. Because of concerns about health risks that might be raised with the presence of an animal, the application of these requirements to health care settings can raise unique issues. In addition, one can imagine that individuals who are hospitalized would want to have an emotional support animal be with them. It is questionable whether the hospital would be required to allow such an animal that does not provide a service but only emotional support. Title II and Title III regulations under the ADA would indicate that this would not be required. In addition, even if an emotional support (or service) animal were allowed in a hospital setting, there would be additional questions about who would provide care for the animal in a setting where an individual cannot easily handle it because of being confined to a bed.

There is not much case law in this setting.¹⁴⁹ The few cases in health care settings highlight the importance of individualized assessments that consider the type of risk and other factors.

¹⁴⁹ See generally LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* Chapter 1 (Thomson West 2012 and cumulative supplements) §10:3. See also *O'Connor v. Scottsdale Healthcare Corp.*, 871 F. Supp. 2d 900 (D. Ariz. 2012), adhered to on reconsideration, 2012 WL 2106365 (D. Ariz. 2012), *aff'd*, 582 Fed. Appx. 695 (9th Cir. 2014) and *aff'd*, 582 Fed. Appx. 695 (9th Cir. 2014) (service animal at hospital; delay in allowing entrance not constructive denial of access); *Tamara v. El Camino Hospital*, 964 F. Supp. 2d 1077 (N.D. Cal. 2013) (hospital failed to demonstrate that presence of service dogs in psychiatric ward was fundamental alteration of program); *Roe v. Providence Health System-Oregon*, 655 F. Supp. 2d 1164 (D. Or. 2009) (legitimate assistance animals should be allowed when feasible, but not when they create a direct threat; frequent hospital patient brought dog to assist severe neurological illness; putrid odor annoyed other patients and raised concerns about spread of infection); *Pool v. Riverside Health Services, Inc.*, 12 A.D.D. 143 (D. Kan. 1995) (emergency room's exclusion of guide dog not a violation of Title III); *Albert v. Solimon*, 94 N.Y.2d 771, 699 N.Y.S.2d 1, 721 N.E.2d 17 (1999) (examination room of physician's office not a public facility and not required to accommodate service animal); *Perino v. St. Vincent's Medical Center of Staten Island*, 132 Misc. 2d 20, 502 N.Y.S.2d 921 (Sup 1986) (exclusion of a blind person's guide dog from delivery and labor room of hospital allowed under state law).

III. Common Principles

The 2010 ADA regulations and recent case law have provided substantially more clarity on when an animal can be required or considered as a reasonable accommodation in a range of settings. There are, however, some areas that would benefit from greater attention by policymakers. There are also some general principles that those who make policy and those who implement policy should consider in planning.

Institutions should take a positive and proactive approach to this issue. Waiting until an issue arises in an unexpected setting often leads to inappropriate responses and can generate bad publicity in extreme situations. Even though a policy might not anticipate every possible request, having a process and a framework for decision making is key. An aspect of setting a framework is determining what are fundamental and essential aspects of the program and how an animal in a setting might affect that. For example, being able to travel on a plane without the risk of tripping over a large animal and being able to exit safely would seem to be essential to airline travel.

Institutions should develop procedures that allow for an interactive approach to resolving concerns. Such process, however, must be appropriate to the setting. This is a philosophy that is supported by courts in virtually all disability discrimination situations involving requests for accommodations.

When possible having a holistic approach and a central place for addressing these issues can be helpful. Each setting will determine what makes sense. For example, a shopping center that has visitors might want to have a centralized coordination about animals not only in common areas of the mall, but also within different stores. Related to this is the importance of having training, even basic information provided to all those who might encounter someone seeking to bring an animal to a work site, a public place, or other setting.

Unique settings such as higher education and health care settings should be particularly aware that individuals with different needs and interests in the setting might raise different concerns. As noted previously, a student who lives on campus and attends classes and visits the library presents different planning concerns than the occasional alumni visit to an on campus event such as a social occasion. An attendee at a football game presents still different issues.

Having procedures that incorporate an interactive approach to resolving disagreements about whether an animal can be brought into a particular setting is important. In addition to training those who will be responsible for permitting animals, it is also important to have appropriate communications to individuals who might be seeking to bring animals. These policies should be known through websites and other easily accessed means of communication.¹⁵⁰

IV. Summary and Looking Forward

¹⁵⁰ See e.g., NBC News Story, Joe Fryer, *This 12-Year-Old is Creating an App for Disabled People*, <http://www.nbcnews.com/feature/inspiring-america/12-year-old-creating-app-disabled-people-n766326>.

Animal accommodation is not a new issue, but the increase in the number and types of animals being brought to various settings has highlighted the need for those providing access to know and understand the legal requirements. While some of these requirements are relatively straightforward, others are not.

How likely is it that policy in this area will change? It is more likely that institutions will change their policies than that the federal government will change laws or regulations.¹⁵¹ Airlines have already reconsidered some of their animal accommodation policies in light of the increase in the number of animals and the types of animals being brought onto aircraft. Colleges and universities have developed policies, but they would benefit from greater specific clarity about university housing. A revisit by the Department of Justice regarding the regulatory reference to what consideration should be given to individuals who have phobias and allergies is needed and is in progress.

As greater numbers of animals as accommodations become an issue, it will be increasingly important that training and communication and holistic approaches are taken. Those entities failing to take a proactive approach risk more than litigation. In an era of cell phone monitoring of anything that happens in a public place and social media sharing this documentation, it is essential that programs not wait for the dog to bark or bite before planning.

The detailed regulations issued by the Department of Justice in 2010 for entities subject to Title II and Title III in 2010 did not really contemplate some of the unique settings in which individuals might seek animal accommodations. The shopping mall or restaurant, in which a dog might be present for one or two hours, often in larger space, is very different than a college campus (where students may have housing, employment, library, and classroom settings over much longer periods of time and in more limited space). Similarly, health care settings, while often subject to the Title II and Title III regulations, have unique health and safety concerns that merit more attention. The presence of an animal in a small space for a long period of time with critical safety concerns such as on an airline flight brings unique concerns.

It is suggested that in some settings, the Department of Justice consider whether regulations could allow for entities to *request* registration or advance notice about a service animal when the animal would be in a small space for a recurring and lengthy period of time (such as a classroom or laboratory on campus). For example, in a college setting, a large number

¹⁵¹ The Trump administration, however, may indirectly affect these issues through Executive Orders, changing agency guidance, proposing or repealing regulations, or using the Congressional Review Act to repeal regulations enacted within the last 60 days of a previous administration. Enforcement is one of the most likely areas to see change. While the Department of Justice under the Obama administration was aggressive about a number of ADA issues, the Trump DOJ is probably much less likely to prioritize ADA enforcement or place any resources into it. It is significant, however, that the Trump administration has moved on promulgating regulations of animals on airlines in light of the many recent disputes and high profile stories.

It is also possible that Congress may make changes, such as changing the ability of individuals to bring law suits under Title III. See Laura Rothstein, *Preserving Access for People with Disabilities*, NEW ENGLAND JOURNAL OF MEDICINE, 378:22(page 2065) (May 31, 2018).

See Richard Hunt, *What a Trump Presidency Means for the ADA*, Accessibility Litigation Trends, <http://accessdefense.com/?p=3291>.

of individuals (students and faculty) might be adversely affected by phobias and allergies by lengthy proximity to dogs. While an interactive process could be applied after a student brings a dog to class, and the faculty member or nearby student has concerns, there may be better ways to develop voluntary registration or notice to avoid these problems. There are valid criticisms of such a practice, but a discussion of how to address this issue in light of the increasing number of dogs being brought to campus. Regulatory agency consideration of this issue would provide a means of avoiding litigation to address issues such as this.

In the meantime, providers of programs subject to various regulatory requirements will need to be aware of current legal requirements and ensure training of staff members who will be required to implement them. The presence of animals in the range of places is certain to be an issue that will continue to need attention.