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Director
Regulation Policy and Management (02REG)
Department of Veterans Affairs
810 Vermont Ave. NW., Room 1068
Washington, DC 20420

Re: RIN 2900-AO39-Animals on VA Property.

Director:

Psychiatric Service Dog Partners (PSDP/"We") is a group dedicated to promoting the mental health of psychiatric service dog users through education, support, and advocacy. We are quite happy to see the present VA proposed rulemaking, and welcome the opportunity to share our findings on this proposal.

We are in a uniquely fortunate position with respect to commenting on the proposed regulations. Many of our past and present support-community members are veterans, as are members of the population targeted by our extensive online resources. We continuously employ our community's and board's experience to develop several materials to assist and advocate for the general community of service dog users. Among other activities, PSDP personnel have given invited VA healthcare facility presentations, both for staff and for patients, regarding the use of service dogs and handler access rights and responsibilities.

Overall, we are very pleased with the VA proposal, and we appreciate the obvious effort put into reconciling VA regulations with the reasoning of the DOJ and with the requirements of federal laws and regulations that obligate VA.[1]

While we commend the efforts of VA, we also write to suggest and justify improvements to the proposal. Some of our suggestions are seemingly minor, but a common thread is that the suggested modifications are necessary to safeguard the rights of persons with disabilities. We believe safeguarding those rights can be accomplished in a manner consistent both with the goals of patient care, health, and safety, and with a respect for the weight of available scientific authority and precedential reasoning.

Below we review the proposed regulations that concern us in order of appearance in the proposal, which is not necessarily the order of importance.

1 In concert with VA leaning on DOJ reasoning regarding the ADA, and the VA being subject to Section 504 of the Rehab Act, it may be worth noting that "Because the requirements of Section 504 and the ADA are similar in many respects, courts generally apply the same analysis to both." This claim is in the second endnote of a DHHS Office for Civil Rights letter of findings (accessed December 23, 2014), available at: http://www.hhs.gov/ocr/civilrights/activities/examples/Disability/hanoverdsslof.html

§ 1.218(a)(11)(i), *Handler control, tethering*

> […]*A service animal must be in a guiding harness or on a leash, and under control of the individual with the disability at all times while on VA property.*[…]

This sentence in § 1.218(a)(11)(i) seems to prohibit two types of situations we think it is not desirable to prohibit.

The first type involves a distinction between the service dog handler and the person with a disability. This is usually the same person, but not always. Some service dog teams are triads, whether temporarily or permanently. This team involves not just the person with a disability and the service dog, but an additional person who may be responsible for holding the dog's leash or giving it commands.

A triad may exist when it is not easy for the person with a disability to control a dog, whether due to physical or mental limitations. This is often the case when the person with a disability is a child, but can also exist when an adult experiences limitations in their abilities to handle a dog.[2] The adult and their family members may still derive significant benefit from having the dog available to perform work or tasks the individual and their family members are unable to perform.[3]

Due to the existence of service dog triads, we recommend against requiring that the service dog is under control of the person with a disability. Instead, who must control the dog may be left unspecified, or it may be specified as the service dog handler. We prefer the latter, so that human control is clearly required.

It is also reasonable that family members and other responsible parties should not be prevented from being able to take the service dog out to relieve itself while the person with the disability remains inside. This is another reason we recommend against requiring control by the person with a disability—as opposed to the handler.[4]

The second kind of situation that may be prohibited by the proposed regulatory sentence above is one in which the person with a disability requires the service dog to momentarily become untethered from the handler in order to perform a service. An example of this involves a person dropping their cane beyond the reach of the leash, when that person requires a cane to walk. The person's dog may be trained to reliably retrieve the cane, but if the dog is required to remain tethered to the person at all times, the person has lost this independence-enabling service.

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2 Note that families with children visit the VA, not just adult veterans. All potential visitors should be considered.

3 See our “Work & Tasks” page for examples: http://www.psychdogpartners.org/resources/work-tasks

4 The DOJ relevantly reasons:

> *The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied.*

This is excerpted from the section-by-section analysis in “Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services”: http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&r=APPENDIX&n=28y1.0.1.1.36.7.32.3.11 under “*Responsibility for care and supervision of service animal.*”

In general, we support constant tethering as part of what it means to have a service dog under control. However, we recommend against an absolute requirement of constant tethering, with very specific prescriptions detailed in the suggested language below.

There is a further difficulty with the wording that is revealed by close inspection. The first part of the sentence dictates that “A service animal must be in a guiding harness or on a leash,”. Many people would assume that this means the service dog not only (1) must be wearing equipment, but that (2) this equipment must be continually attached to the handler. However, only (1) is unquestionably required by the proposed language.

There are also subtle issues with the restriction to a “guiding harness”, since there are mobility harnesses, etc., that are perfectly appropriate yet not properly referred to as “guiding” harnesses. There is no apparent reason to restrict the type of tether to the limits of our current imagination and experience.

The ambiguity, unnecessary gear restriction, and the possibility of the earlier reasonable hypothetical situations being prohibited mean the sentence in question merits revision. We suggest the following language to account for the considerations above:

> *A service animal must be directly under the handler's control at all times while on VA property. The service animal must wear a harness, leash, or other tether, and such equipment must be continually held by the handler in close proximity, unless the tether or its holding interferes with the service animal's safe, effective performance of work or tasks.*[5]

§ 1.218(a)(11)(ii)(A), *Handler control*

> *(ii) A service animal will be denied access to VA property or removed from VA property if:*
>
> *(A) The animal is not under the control of the individual with a disability;*

The considerations we outlined in the section above also apply here. These considerations pertain to the sometimes-applying distinction between the person with a disability and the handler of the service dog. We suggest the following language for (A):

> *(A) The animal is not under the control of the handler;*

This allows for triads, and allows family members to take the service dog out to relieve itself.

§ 1.218(a)(11)(iii)(C), *Acute inpatient hospital settings*

> *(iii) Service animals will be restricted from accessing certain areas of VA property under the control of the Veterans Health Administration (VHA property) to ensure patient care, patient safety, or infection control standards are not*

5 The DOJ's phrasing on this topic is in 28 CFR 36.302(c)(4):

> *Animal under handler's control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).*

compromised. Such areas include but are not limited to: […]

(C) Acute inpatient hospital settings (e.g. intensive care units, stabilization units, locked mental health units);

Here we are most concerned with the blanket prohibition on the use of service animals in locked mental health units. However, many of the points we have to make are more generally applicable. We elaborate on this at the end of this section.

VA rightly leans on the thoroughly vetted reasoning used by the DOJ regarding the use of service animals in healthcare settings. We find this appropriate because a VA hospital does not seem to relevantly differ from an ADA Title III-covered hospital. The DOJ, in turn, has leaned on the Centers for Disease Control and Prevention ("CDC") as the guiding authority regarding any justification for the exclusion of service animals in particular situations in healthcare settings.[6]

PSDP's recommendations below follow the CDC's in pointing to the need for individualized assessment, rather than blanket prohibitions when it comes to hospital settings that do not necessitate the use of personal protective equipment (PPE) by humans.

It should be clear that justification for a blanket restriction on service dogs in locked mental health units cannot be found in CDC guidance, as opposed to justification for exclusion elsewhere based on infection control. Consequently, it would not be "consistent with Centers for Disease Control and Prevention guidance" to prohibit service animals from locked mental health units on the basis of those units requiring added precautions that are not related to infection control.[7]

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6 In explaining its approach, VA offers the following:

> *[…]In promulgating § 36.302, the Department of Justice (DOJ) considered a substantial number of public comments regarding service animal access during a comprehensive, multi-staged rulemaking process, culminating in the publication of a final rule at 75 FR 56236, Sept. 15, 2010. We agree with the discussion and rationale used by DOJ in their rulemaking to limit the access of service animals in healthcare settings. Particularly, we agree that, consistent with Centers for Disease Control and Prevention guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection control measures and that require persons to undertake added precautions. Id.*

7 From the CDC:

> *If health-care personnel, visitors, and patients are permitted to enter care areas (e.g., inpatient rooms, some ICUs, and public areas) without taking additional precautions to prevent transmission of infectious agents (e.g., donning gloves, gowns, or masks), a clean, healthy, well-behaved service animal should be allowed access with its handler.*[…]
>
> *Excluding a service animal from an OR or similar special care areas (e.g., burn units, some ICUs, PE units, and any other area containing equipment critical for life support) is appropriate if these areas are considered to have "restricted access" with regards to the general public. General infection-control measures that dictate such limited access include a) the area is required to meet environmental criteria to minimize the risk of disease transmission, b) strict attention to hand hygiene and absence of dermatologic conditions, and c) barrier protective measures [e.g., using gloves, wearing gowns and masks] are indicated for persons in the affected space. No infection-control measures regarding the use of barrier precautions could be reasonably imposed on the service animal. Excluding a service animal that becomes threatening because of a perceived danger to its handler during treatment also is appropriate; however, exclusion of such an animal must be based on the actual behavior of the particular animal, not on speculation about how the animal might behave.*

The places covered by "restricted access" are clearly intended only as those based on infection control, not based on worries specific to locked mental health units. This excerpt and all others attributed to the CDC in PSDP's comment come from pages 108–10 of their "Guidelines for Environmental Infection Control

While the CDC provides nothing that specifically addresses service dogs in locked mental health units, it does provide guidance that is clearly applicable to them. The prohibitions the CDC finds justified are either (1) for infection control, where personal protective equipment (PPE) is antecedently required, or (2) based on individualized assessments that determine a particular service animal in question poses a threat to health or safety.[8]

We have no problem with blanket exclusions of service animals in places where significant PPE measures are required of all non-patient persons in the area (measures well beyond those used in a simple phlebotomy). However, we take strong exception to assumptions that all service animals should be excluded in particular non-PPE areas because VA reasons through what it believes is typical of a situation. This is contrary to the approach recommended by the CDC, which VA claims it is following, and it is contrary to putting patient care over bureaucratic ease.

In addition to the VA proposal being contrary both to CDC recommendations and prioritizing patients, our reasons are twofold for taking exception to this sledgehammer approach. First, we do not concur with the VA assessment of what is typical.[9] Second, even if VA were correct about what is typical in a particular setting, this does not indicate that the reasoning that applies to the majority also applies to everyone else. For instance, it may be that most service dog users in recovery settings do not have the ability themselves or ability through friends, family, or charities to take care of their dog's needs. However, patient A's lack of support structure is an inexcusably sorry reason to deprive patient B of their support structure.[10]

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in Health-Care Facilities" (accessed December 23, 2014), available at: http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf

8 From the CDC:

> *Because health-care facilities are covered by the ADA or the Rehabilitation Act, a person with a disability may be accompanied by a service animal within the facility unless the animal's presence or behavior creates a fundamental alteration in the nature of a facility's services in a particular area or a direct threat to other persons in a particular area. A "direct threat" is defined as a significant risk to the health or safety of others that cannot be mitigated or eliminated by modifying policies, practices, or procedures. The determination that a service animal poses a direct threat in any particular health-care setting must be based on an individualized assessment of the service animal, the patient, and the health-care situation. When evaluating risk in such situations, health-care personnel should consider the nature of the risk (including duration and severity); the probability that injury will occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk (J. Wodatch, U.S. Department of Justice, 2000). The person with a disability should contribute to the risk-assessment process as part of a pre-procedure health-care provider/patient conference.*

9 VA's reasoning in the proposed rulemaking includes the following:

> *Another impossible or impractical requirement to impose upon service animals would be the requirement to remain continuously indoors in intensively monitored settings, such as acute inpatient hospital settings. In such settings, veterans would typically be recovering from an acute medical episode, and would not likely be able to effectively attend to the needs of a service animal (e.g. taking the service animal outside, or feeding or watering the service animal). Staff in these inpatient hospital settings must not be expected to set aside their patient monitoring and care duties to instead attend to the needs of a service animal. Additionally, the immediate needs of veterans in these settings would be most appropriately fulfilled by medical staff and not a service animal (for instance, getting in and out of a hospital bed).*
>
> […]*These restrictions would also be consistent with the mandate in section 109 that VA may not prohibit the use of certain service animals, because service animals would not actually be used by individuals with disabilities in a majority of these medical care areas, or in those areas in which public access generally is not granted.*

10 As in an earlier footnote, we provide relevant reasoning from the DOJ:

> *The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to*

As the licensed therapist of one of our community members put it, it doesn't make sense to take away someone's psychiatric service dog when they need it most.

Further, VA seems to make two kinds of implicit assumptions in its reasoning toward blanket exclusion policies—and these assumptions do not correspond well with the world. First, that the only kind of person who uses a service dog and may wish to be in a VA hospital is someone who is currently a patient there. Second, that it would be impossible for a service dog user who is a patient to have a friend or family member be responsible for the elimination needs, etc. of the service dog, or to themselves take care of these needs with the reasonable accommodation of minimal modifications to facility practices.

It does not make sense to universally prohibit service dogs in settings where visitors may be allowed without PPE. Those visitors may themselves have service dogs. PSDP community members, including board members, have experience using service dogs while visiting and accompanying friends and family members to hospital visits, including stays in locked mental health units.

In addition, it is possible for a service dog user who is a patient to have a friend or family

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> *walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied.*

This is excerpted from the section-by-section analysis in "Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services": http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&r=APPENDIX&n=28y1.0.1.1.36.7.32.3.11 under "*Responsibility for care and supervision of service animal.*"

The CDC also weighs in on this issue:

> *Another issue regarding service animals is whether to permit persons with disabilities to be accompanied by their service animals during all phases of their stay in the health-care facility. Health-care personnel should discuss all aspects of anticipatory care with the patient who uses a service animal. Health-care personnel may not exclude a service animal because health-care staff may be able to perform the same services that the service animal does (e.g., retrieving dropped items and guiding an otherwise ambulatory person to the restroom). Similarly, health-care personnel can not exclude service animals because the health-care staff perceive a lack of need for the service animal during the person's stay in the health-care facility. A person with a disability is entitled to independent access (i.e., to be accompanied by a service animal unless the animal poses a direct threat or a fundamental alteration in the nature of services); "need" for the animal is not a valid factor in either analysis. For some forms of care (e.g., ambulation as physical therapy following total hip replacement or knee replacement), the service animal should not be used in place of a credentialed health-care worker who directly provides therapy. However, service animals need not be restricted from being in the presence of its handler during this time; in addition, rehabilitation and discharge planning should incorporate the patient's future use of the animal. The health-care personnel and the patient with a disability should discuss both the possible need for the service animal to be separated from its handler for a period of time during non-emergency care and an alternate plan of care for the service animal in the event the patient is unable or unwilling to provide that care. This plan might include family members taking the animal out of the facility several times a day for exercise and elimination, the animal staying with relatives, or boarding off-site. Care of the service animal, however, remains the obligation of the person with the disability, not the health-care staff.*

Note VA's following reasoning in the proposed rulemaking is entirely contrary to the CDC above:

> *Additionally, the immediate needs of veterans in these settings would be most appropriately fulfilled by medical staff and not a service animal (for instance, getting in and out of a hospital bed).*

member be responsible for the elimination needs, etc. of the service dog.

We also have experience wherein a service dog user was in a locked mental health unit, and a family member brought the patient's service dog every morning and took care of her service dog's outside needs regularly throughout the day. The family member took the patient's service dog home at night. Hospital personnel allowed all three parties outside for half an hour at a time when they assessed that there was would be no resulting risk of danger to the patient. This significantly aided her recovery while in the hospital.

The duration of her inpatient stay was reduced and her subsequent recovery was stronger because hospital personnel were willing to honor her rights and her family's abilities in an individualized assessment.

Finally, it is possible for a service dog user who is a patient to take care of the elimination needs, etc. of the service dog, with the reasonable accommodation of minimal facilitation from staff.

One of our community members worked with her local hospital to produce a tailored plan in case she needed to use their locked mental health unit. She did so because she, like many other service dog users, would not voluntarily use the hospital's facilities without her service dog, yet she found herself in a position wherein voluntary treatment there with the aid of her service dog would be best for her.

In this type of situation, arrangements include the availability of a staff member to let her and her service dog outside at regular, short intervals during the day for her dog's needs, as well the availability of a staff member from outside the unit to be called if she needed to attend to any of her dog's needs during the night.[11]

This patient does not present a significant flight or suicide risk when she is with her dog, but does otherwise. Her difficulty ambulating long distances and regular use of a wheelchair were additional factors that could be considered, as well as her willingness to sign a release of liability for times she was not physically inside the locked unit.

In the end, putting patient care first necessitates that the minimal accommodations she requested in order to receive care clearly outweigh the risk to her health that would directly result from turning her away. (A blanket prohibition on service dogs is functionally equivalent to turning her away.)

All of this is not to say that there are no situations in which a particular service dog should be turned away. However, those situations are already covered by the proposed regulation § 1.218(a)(11)(ii).

We strongly urge the VA to resist the illusorily *easy* solution of blanket restrictions. We recommend instead following the *right* solution, suggested by the CDC and reinforced by those with experience and expertise, which involves individualized assessment for any

11 In this case and above, we take this as an extension of the reasoning put forth on page 177 of the article the CDC repeatedly deferred to for guidance in constructing its guidelines:

> *It would be a reasonable modification of policies and practices to identify an area accessible to the handler where the service animal could toilet and to permit the service animal to be exercised by another person, if the handler was unable.*

From Duncan SL, APIC Guideline Committee. APIC State-of-the-art report: the implications of service animals in healthcare settings. Am J Infect Control 2000; 28:170–80. This article, accessed December 23, 2014, is available at: http://www.petpartners.org/document.doc?id=404

access restrictions in places not requiring the use of personal protective equipment (PPE).[12]

In place of the current § 1.218(a)(11)(iii), we recommend the following action be taken (or any permutation that fully respects the above considerations).

(A), (B), and (C) describe places that are only relevantly excluded insofar as they are locations requiring the use of PPE by all non-patients.[13] Since (G) already specifies "Any areas where personal protective equipment must be worn", we recommend that (A)–(C) be eliminated in deference to the content of (G), with the phrase "by all non-patients" appended for clarity. (D) and (F) describe locations where PPE may not technically be required, but it still makes sense to exclude service animals for sterility maintenance. (E) pertains to others with allergies or phobias, and we consider these cases in the next section.

At the end of the next section, we consolidate our recommendations regarding § 1.218(a)(11)(iii) to reflect the sum of these modifications.

§ 1.218(a)(11)(iii)(E), *Allergies and phobias*

> *(iii) Service animals will be restricted from accessing certain areas of VA property under the control of the Veterans Health Administration (VHA property) to ensure patient care, patient safety, or infection control standards are not compromised. Such areas include but are not limited to:* […]
>
> *(E) Patient rooms or patient treatment areas where it is indicated that a patient has animal allergies, or has fear or phobia(s) of animals;*

The spirit of this restriction is appropriate—that those with disabling allergies or phobias also

12 In addition to CDC and service dog expert recommendations, case law on service dog access in locked mental health units has also born out this recommendation. See Abigayil Tamara v. El Camino Hospital et al. In this case, the judge found that several factors "suggest that the presence of a service animal might affect the ward, but not that it will fundamentally alter its nature." (8) In particular, Judge Whyte found (on page 13):

> *Tamara's request that the hospital admit service dogs unless it conducts an individualized assessment finding substantive evidence that her dog is a direct threat to the health and safety of the operation that cannot be mitigated by reasonably altering policy is merely requesting compliance with the ADA.*

The findings emphatically underscore the need for individualized assessments, noting that blanket prohibitions of service animals are clearly discriminatory. This 2013 case (accessed December 23, 2014) is available at: https://cases.justia.com/federal/district-courts/california/candce/5:2012cv01032/251928/51/0.pdf?ts=1376339564

13 The locations proposed by VA for blanket exclusions are as follows:

> *(A) Operating rooms and surgical suites;*
>
> *(B) Areas where invasive procedures are being performed;*
>
> *(C) Acute inpatient hospital settings (e.g. intensive care units, stabilization units, locked mental health units);*
>
> *(D) Decontamination, sterile processing, and sterile storage areas;*
>
> *(E) Patient rooms or patient treatment areas where it is indicated that a patient has animal allergies, or has fear or phobia(s) of animals;*
>
> *(F) Food preparation areas; and*
>
> *(G) Any areas where personal protective equipment must be worn.*

ought to have their disabilities accommodated. We have some suggestions for the execution.

First, the other patient's allergies or phobia(s) must constitute a disability under the circumstances in order to formally merit accommodation.

In facing access challenges, service dog handlers will regularly hear gatekeepers insincerely claim to have an allergy as a last resort, after a drawn-out discussion has resulted in the gatekeeper realizing the handler has access rights. We have no problem with equal accommodation in cases where an allergy would result (for example) in a significant impairment to breathing, even if the animal were across the room. We are merely opposed to loose language providing a ready excuse for those who simply don't want to be around a dog.[14]

This applies equally to phobias. No service dog handler wants to put anyone in a state of involuntary physiological or psychological agitation. We also do not want access rights abrogated by those whose fear of dogs is minor.

We often compare service dogs to medical equipment such as wheelchairs. If someone has an irrational fear of someone else's wheelchair that triggers panic attacks, the wheelchair user and phobic person should be happy to mutually avoid one another, while both accessing the goods or services in question. If someone just doesn't like the other person's wheelchair and expresses irritation, this should in no way be allowed to prevent the wheelchair user from moving through life uninterrupted.

This first issue, that the allergy or phobia must rise to the level of disability to merit accommodation, has a practical counterpart already alluded to. Any time there are two disabilities that are at odds, both parties must be accommodated.

It is not entirely clear from § 1.218(a)(11)(iii)(E) that this is the case. The blanket prohibition against service animal users in particular areas in deference to another's disability is in fact not providing equal access, but second-class access to the service dog user.

Imagine a large (100' x 100') physical therapy room with an East exit and a West exit, in which a service dog handler has an appointment from 9:00–10:00, using only equipment on the East side of the room. Now imagine a dog-phobic person has an appointment from 9:15–10:15, planning to use only equipment on the West side of the room.

In this scenario, under the proposed regulation VA staff would be justified in requiring the removal of the service dog at 9:15. This is not right.

In real life, service dog handlers accommodate those with conflicting disabilities and vice versa, usually by the party that arrives later using a location that is farther away from the initial

14 S.L. Duncan's findings regarding allergies and accommodations under the ADA apply equally here (p. 176, APIC State-of-the-art report: the implications of service animals in healthcare settings. Am J Infect Control 2000; 28:170–80. This article, accessed December 23, 2014, is available at: http://www.petpartners.org/document.doc?id=404):

> *Avoiding or limiting contact with the service animal's saliva, dander, and urine will help mitigate allergic reactions. According to the American Academy of Allergy, Asthma & Immunology, dog or cat allergies occur in approximately 15% of the population. If the allergy is severe enough to cause impairments that substantially limit one or more major life activities (ie, causes a disability as defined in the ADA), both the person with the allergy and the person with the service animal are protected by the ADA, and the facility is obligated to ensure their access to its goods and services. If the effects of the allergy do not meet the definition of disability, the ADA does not protect the person with the allergy and the facility does not have an ADA obligation toward the person who has the allergy.*

party. There are innumerable variations possible in the details of such situations, and they are best left to individualized reasonable interpretations of the values set forth by regulations and policies.

Clearly, if the service dog user is in a hospital room first, they should not be required to switch rooms in the middle of their stay if there is another room or part of a room a phobic person could healthily use. The main ideas here are that disabling conditions merit reasonable accommodation, and service dog users (or those with disabling allergies or phobias) should not be at the bottom of an entrenched hierarchy.

Since § 1.218(a)(11)(iii)(E) is within a list of locations in which a service dog would be outright prohibited, we find it optimal to strike (E) from that list and relocate an appropriate incarnation elsewhere. This would help avoid the unfortunate sentiment that service dog users must always defer to others.

In considering the body of the proposed regulations, we believe a suitable location would be within the introductory portion of § 1.218(a)(11)(iii). It would be as simple as the following, and we include the sum of our recommendations in the previous section to make it more convenient to see how these fit together:

> *(iii) Service animals will be restricted from accessing certain areas of VA property under the control of the Veterans Health Administration (VHA property) to ensure patient care, patient safety, or infection control standards are not compromised. Where a service animal user encounters someone with a conflicting disabling condition, such as a disabling allergy or disabling phobia, both parties must be reasonably accommodated. The areas of restricted access include but are not limited to:*
>
> *(A) Any areas where personal protective equipment must be worn by all non-patients;*
>
> *(B) Decontamination, sterile processing, and sterile storage areas; and*
>
> *(C) Food preparation areas.*

This proposal would honor the considerations presented, including that the details of what constitutes reasonable accommodation depend on several unpredictable on-the-ground factors. The proposal above is also conceptually simpler and value-driven in ways we believe everyone can respect.

§ 1.218(a)(11)(vii), *Service dog health documentation*

> *(vii) An individual with a disability will be required to comply with the following requirements, if such individual will be accompanied by the service animal while receiving treatment in a VHA residential program:*
>
> *(A) The individual with a disability must provide VA with documentation that confirms the service animal has had a current rabies vaccine (one year or three year interval, depending on local requirements);*
>
> *(B) The individual with a disability must provide VA with documentation that verifies the service animal has had a comprehensive physical exam performed by a licensed veterinarian within the last 12 months that confirms immunizations*

with the core canine vaccines distemper, parvovirus, and adenovirus-2, and that confirms screening for and treatment of internal and external parasites as well as control of such parasites; and

(C) The individual with a disability must confirm in writing that at least seven days have elapsed since the dog recovered from any instances of vomiting, diarrhea, urinary or fecal incontinence, sneezing or coughing, open wounds, skin infections or mucous membrane infections, orthopedic or other conditions that may interfere with ambulation within the VA facility, and estrus in intact female service dogs.

VA justifies the above requirements in the proposed rule as follows:

This documentation would allow VA to confirm that a service animal was healthy for purposes of continuous, extended exposure to veterans, VA staff, and other VA stakeholders in residential rehabilitation and treatment areas on VHA property…

The DOJ follows the CDC's recommendations in their regulatory guidance on hospitals. The CDC advises that there is no evidence of a prima facie threat of zoonotic disease transmission from the presence of a service dog in areas of a healthcare facility where personal protective equipment is not required.[15] This means that documentation burdens, such as described in (A) and (B) above, in order "to confirm that a service animal was healthy", are simply not supported by scientific evidence as part of a nondiscriminatory protocol.[16]

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15 *No evidence suggests that animals pose a more significant risk of transmitting infection than people; therefore, service animals should not be excluded from such areas, unless an individual patient's situation or a particular animal poses greater risk that cannot be mitigated through reasonable measures.[…]*

Although animals potentially carry zoonotic pathogens transmissible to man, the risk is minimal with a healthy, clean, vaccinated, well-behaved, and well-trained service animal, the most common of which are dogs and cats. No reports have been published regarding infectious disease that affects humans originating in service dogs.

This comes from pages 108 and 109 of the CDC's "Guidelines for Environmental Infection Control in Health-Care Facilities", available at http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf (accessed December 23, 2014).

16 On the documentation issue, the HHS Office for Civil Rights has found that a "requirement for documented certification constitutes a service animal policy that violates 45 C.F.R. § 84.4(a) and 28 C.F.R. §35.130(a)." (http://www.hhs.gov/ocr/civilrights/activities/examples/Disability/hanoverdsslof.html, accessed December 23, 2014). The latter regulation pertains to public entities, whereas 45 CFR 84.4(a) is the HHS implementation of the Rehab Act, pertaining to federally funded programs or activities. 45 CFR 84.4(a):

General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

This indicates that, in ruling on complaints, at the very least federal agencies can view requiring service dog certification documentation for access as constituting discrimination on the basis of disability under the Rehab Act. We argue that in the absence of an individual assessment finding objective evidence to doubt the good health of a particular service dog, requiring a health certificate for access to a hospital program also constitutes discrimination on the basis of disability.

This is notwithstanding the VA claim that:

Any additional documentation that would be requested under proposed § 1.218(a)(11)(vii) would only be related to the health and wellness of the animal, and would not be related to an animal's level of training or other certification that the animal was a service animal. [cont.]

Instead, the burden of proof is appropriately placed on the residential program. The situation is different if there are objective reasons in an individual case—such as visible fleas, or a clearly painful limp—to suspect that a particular service dog may be a significant detriment to the health of other patients or employees, or that a particular service dog may not be able to ambulate in VA facilities. In such a case, the default presumption of nominal risk is overridden, and there is an objective reason to exclude the service dog.

Since putting the burden of proof on the service dog user to prove their service dog is healthy is not supported by the weight of scientific findings, per the CDC, and there is an effective recourse in the case of objective evidence of a risk posed by or to the service dog, under § 1.218(a)(11)(ii), the documentation burdens in (A) and (B) above are inappropriate. Enacting these provisions would be contrary the values of equal access and burden reduction for those with disabilities, and consequently would constitute discrimination embedded in regulation.

We therefore recommend against the inclusion of §§ 1.218(a)(11)(vii)(A) and (B) in the final rule.

What to do with proposed § 1.218(a)(11)(vii)(C) is a bit trickier. This provision would require a statement attesting to the service dog's health, presumably on a VA-provided form, to be signed by the handler.

On one hand, as detailed above based on CDC findings, the presumption should be that a service dog is healthy. In principle, we object to blanket requirements that reject this presumption without cause.

On the other hand, if we trade principles for practicality, we do not find this particular rejection of that presumption to be particularly insidious. It is possible that some service dog users would be offended at having to sign a statement indicating they are not working a dog that should not be worked. For our part we are willing to compromise here, if VA determines a compromise is necessary for reasons we cannot locate among the scientific evidence.

We cannot recommend acceptance of § 1.218(a)(11)(vii)(C) in the final rule, but we are not recommending against it.[17]

§ 1.218(a)(11)(viii), *Service animal definition*

> *(viii) A service animal means any dog that is individually trained to do work and perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks*

Requesting a service dog's AKC registration papers or puppy pictures would also not be related to the dog's level of training or certification status, but there is not a sufficiently good reason to request such paperwork. Because of this insufficiency, such a request would constitute an undue burden on the person with a disability, just as it would to force the individual to provide a health certificate for their service dog to accompany them to a residential facility without individualized due cause.

17 We must, however, recommend against “sneezing” being included among the attestations in (C). Some healthy dogs, especially those that are brachiocephalic, may routinely sneeze multiple times a day without any indication this is due to illness, and it does not take them seven days to “recover”.

> *for the purposes of this definition. Service dogs in training are not considered service animals. This definition applies regardless of whether VA is providing benefits to support a service dog under § 17.148 of this chapter.*

We note there is a key typographical error in the first sentence of the above paragraph. Historical precedent, good sense, and VA's phraseology elsewhere indicate that the phrase should be “do work or perform tasks”, rather than “do work and perform tasks”.[18]

Addressing comments submitted so far

Some commenters are under the impression that any service dog trained by an ADI-accredited program (an “ADI dog”) is beyond reproach. They cite personal anecdotes in which purported service dogs, ones they believe not to be ADI dogs, have behaved aggressively or otherwise inappropriately.

Members of our support group, which includes both program-trained service dog users and owner-trainers, have likewise experienced attacks or other ill behavior from purported service dogs sporting ADI-program insignia. *It is the behavior, not belongings* of a service animal that dictate whether it is safe for public access. Badges and patches from select corporations are no substitute for personal responsibility and upkeep of training.

We appreciate VA not focusing on where the dogs come from, but on actual service dog behavior to determine whether access is appropriate.

Intersecting with this notion, one commenter may have missed the distinction between the present rulemaking proposal and Section 109 of P.L. 112-154. He petitioned that the term “appropriate accrediting body” from Section 109 be defined by VA, in hopes that this would deter individuals from purchasing fake “credentials” online.

We have addressed this tangential issue of the online purchase of service dog gear in our article, “There Are No Fake Vests”.[19] We also addressed the appropriate interpretation of Section 109 of P.L. 112-154 in 2012.[20]

We concur with the VA reasoning in the current proposal that:

> *More fundamentally, section 109 does not prohibit VA from granting access to a broader group of service animals than those trained by accredited entities generally (see Section 109 (mandating that VA may not prohibit the use of certain “covered service dogs,” but does not mandate that VA must only permit the use of such dogs)). Therefore, we interpret section 109 to only guarantee access to VA property for those service dogs that can dependably behave in accordance with typical public access standards for public settings.*

Not only is VA correct that Section 109 does “not mandate that VA must only permit the use of such [covered service] dogs”, but to interpret Section 109 as mandating such a restriction would be clearly contrary to what Congress had in mind when passing the law. This is explicit in the 113th Congress House Committee on Veterans' Affairs' Oversight Agenda, Health Care section item 5, on page 4:

18 For more information on the distinction between service dog work and tasks, and the independent importance of each, see our “Work & Tasks” page and the articles therein: http://www.psychdogpartners.org/resources/work-tasks

19 http://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/fake-vests

20 http://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/veterans-affairs-p-l-112-154-statement

> *Guide and Service Dogs–The Committee will closely monitor the implementation of section 109 of Public Law 112-154, which prohibits VA from denying the use of service dogs in, or on, any VA facility or property or any facility or property that receives VA funding. Contrary to the intent of Congress, concerns have been raised that this provision could prevent veterans with owner-trained or otherwise "unaccredited" service dogs from accessing VA property.*[21]

Again, and as VA recognizes here, it is how the service dog behaves that matters, not who trained it to behave that way. This is an above-board, common-sense approach that prohibits the disenfranchisement of conscientious owner-trainers of service dogs, who almost all train with the assistance of a professional dog trainer.

These responsible owner-trainers often cannot afford the years-long wait and tens of thousands of dollars many of these rare programs want, and the supply is immeasurably outstripped by the demand. In addition and perhaps surprisingly, through experience and applied expertise we have come to believe that for many with psychiatric disabilities, such as disabling PTSD, owner-training a suitable service dog prospect is distinctly superior to obtaining a dog from a program.[22]

We also respect John Ensminger's expertise, and concur with him regarding the "work and tasks" (versus "work or tasks") language. As noted above in our comment on the service animal definition, this conjunction seems to be an accident. Regardless, it should be a disjunction, since "work or tasks" is not only the phrase with historical precedent, but makes a lot more sense.

If even a solitary task or a singleton piece of work—such as guiding a blind handler or interrupting the suicidal thoughts of an individual with PTSD—were life-saving or life-enriching by mitigating someone's disability, that assistance behavior should be more than sufficient to qualify the dog under this aspect of the definition. Disability mitigation is not a numbers game.

We also agree with Mr. Ensminger that examples of work and tasks would be helpful in guiding local policymakers and gatekeepers. Those provided by the DOJ seem sufficient (see Mr. Ensminger's comment), but we can offer many other examples of psychiatric service dog work and tasks in our "Work and Tasks List".[23]

An optimistic future

Psychiatric Service Dog Partners is optimistic about the VA approach concerning service animals. We were joyful when we read that VA intends to carry forward the values driving the ADA, since the institutionalization of those values was so hard-won and fitting to our society.

We hope our critique of particular executions of this VA approach is accepted as essential advice from experts in the field. We have seen heartwarming success in how things can work when forward-looking values are implemented well, and some of us have been around long enough to have seen the suffering caused by a lack of those properly codified values.

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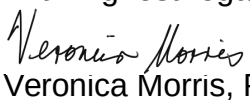
21 https://veterans.house.gov/sites/republicans.veterans.house.gov/files/documents/FINAL%20113th%20Congress%20Oversight%20Agenda%2001152013.pdf

22 http://www.psychdogpartners.org/resources/frequently-asked-questions/faq-training-basics Also, anecdotally, some of our community members (as well as many potential service dog users featured in news stories) have had distinctly negatives experiences with dogs received from programs. This is only to say that programs are no guarantee of positive outcomes.

23 http://www.psychdogpartners.org/resources/work-tasks/work-task-list

We have sincere gratitude for the difficult project VA is undertaking. If we can partner with you to be of further assistance with this or any future project, please do contact us!

With highest regard,



Veronica Morris, PhD
President, Board of Directors
on behalf of the PSDP Board of Directors