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Design Challenges and Solutions for Service Animal Access under the ACAA: A Justifactory Guide for Regulators and Stakeholders

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based on PSDP's ACAA Committee discussions and collaborations through early March 2016

The Department of Justice's (DOJ's) Americans with Disabilities Act (ADA) regulations and guidance on service animal access have been refined through years of testing, wise consideration, and response to stakeholder input—they are the gold standard. So when other federal and state agencies are increasingly bringing their regs in line with DOJ's, why should the Department of Transportation (DOT) do anything different with service animals and air travel?

The answer is they should only differ when it's justified by the special nature of air travel. We'll be navigating how and to what extent that special nature comes into play to untangle the unique design challenges—and practicable solutions—for a system of service animal access under the Air Carrier Access Act (ACAA). The stakeholders in this system are most clearly service animal users, trainers, prospective service animal users, air travel industries, and industry personnel, but also include all fellow air travelers that may find their journeys joined by a service animal team.

§1: *The current state of things*

What makes air travel access distinct from general public access for service animals includes these three considerations for air travel:

- (1) some pets are allowed on board when people pay fees
- (2) the environments of airports and cabins of airplanes in flight are more challenging than average for an animal (humans, too!)—including in terms of airport activity and stress, and airplane crowding and confinement
- (3) gatekeepers (employees) are more in the position of actively verifying an animal's status

The current system has some additional features that've fallen out of these considerations. While certain pets are allowed when people pay more, charging service animal users extra fees would be discriminatory. Because of this, people have a distinct financial incentive to claim their non-service animals as service animals—and this happens both intentionally or unintentionally.

In an unsuccessful attempt to discourage this abuse of reasonable accommodations, DOT allows extra, discriminatory requirements for people with mental health disabilities. These extra barriers—including paperwork-carrying¹ and 48-hour prior disclosure², which DOT admits is discriminatory³—certainly make it harder for those with psychiatric service dogs. Even worse, they provide a clear and well-traveled path for unsavory online business accomplices, whose m.o. is to sell medical certifications in a healthcare vacuum. This is not about assigning blame; we just have to face the ugly, messy state of things to understand what's needed to improve.

If we're speaking plainly about the online businesses, these rubber-stamping paperwork factories have created an air travel access pipeline for pet owners. Owners just have to be willing to tick a few boxes from the comfort

1 <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-90>

2 <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-57>

3 "While it is always a good idea for passengers and carriers to communicate about accommodations as early as possible, the Department's ACAA regulations and nondiscrimination policies have discouraged advance notice policies as an undue limitation of the ability of passengers with disabilities to travel freely and without discrimination."
<https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-24>

of their home, lying to a faceless and unaccountable "healthcare provider" with whom they have no prior or subsequent relationship. The more frugal fakers may realize they can simply claim to have one of a number of non-psychiatric invisible disabilities, thus avoiding the cost of obtaining the paperwork.

Even some legitimate service animal users have been pushed by the current system to subsidize this kind of business. This often happens because many individuals' genuine doctors are reluctant to sign anything at all they perceive as increasing their own liability. I have personally had such doctors and consequently been prevented from benefits I was owed from an insurance system I paid into.

So not only is the current service animal access system discriminatory, but it falls gravely short even on the goals it was specifically designed to achieve. If we want to come up with a smarter solution for air travel access, we should identify the particular design challenges. But we can't proceed with unity and conviction until we map out some overall goals all stakeholders should agree on.

§2: Overall goals, including parity

It looks like the main goals that come into play for the various stakeholders are:

- Public safety through reasonable measures
- Fair and just disability access (mental health parity + no undue burden on disabled)
- Privacy of specific medical information
- Discouraging intentional and unintentional fraud
- Clarity and systematic ease of use for all parties
- Respect and liability reduction for airline and airport personnel as non-experts in disability access, animal behavior, and legal affairs

Many of these goals go hand in hand, which is promising if we want a system that fairly ties together everyone's needs. When we recognize that hierarchical thinking about disability types isn't just misdirected, but is unhelpful, we can see a fair system that discourages fraud will give every person with a disability the same privileges (and burdens) across the board.

If we're going to treat people with disabilities the same, we either have to expand the paperwork and prior notification burdens to service animal users with *non*-psychiatric disabilities, or eliminate those burdens (possibly replacing them with something that makes more sense). As DOJ and other agencies have recognized, forcing those with disabilities to carry paperwork to access goods and services others can access without paperwork is discriminatory.⁴ The same reasoning applies to giving advanced notice.⁵ If there isn't enough reason for those with non-psychiatric disabilities to give notice, there isn't enough reason to require early notice from service animal users with mental health disabilities.

Since mental health parity was supposed to be gained last century, it looks like all disabilities should be treated the same for service animal access, now that we're over a decade into this century. This makes it our overdue duty to eliminate the paperwork-carrying and prior notification requirements. On its own, this would leave us with something much more similar to the DOJ regs and guidance, wherein gatekeepers can only ask (1) whether it's a service animal required for a disability, and (2) what work or tasks the animal's trained to do (to assist with the disability).⁶

§3: Anti-fraud design challenges

But the burdens in the current system were enacted to prevent fraud. This was perceived as a problem so significant and perverse that DOT was willing to discriminate against those with certain disabilities in a misguided attempt to address it. What else can we do to discourage fraud and try to ensure public safety—while still avoiding undue burdens on people with disabilities?

We'll get to that, but wait, there's more! Another consideration here is that we cannot expect airline and airport employees to be experts in making all the determinations about whether it's a service animal. Employees may have some training, but any system has to be easy for non-experts to implement. In the absence of obvious misbehavior, the burden should be on the handlers as to whether their animals meet the criteria for service

4 See "Inquiries about services animals." <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>

5 See footnote 3 to reference DOT claiming prior notice requirements are discriminatory.

6 See Q7. http://www.ada.gov/regs2010/service_animal_qa.pdf

animals, rather than on airline employees. "Credible verbal assurances"⁷ leaves a lot of room for interpretation.

Other important considerations here involve both intentional fraud and unintended misunderstandings. Some people will lie, cheat, and steal to get whatever they want, no matter the risk. The best we can do, then, is give the system enough teeth and clear enforcement paths so that it's simply not worth the risk to the majority of prospective "fakers". That way the punishment is large on the back end and only for violators, rather than small and for everyone up front.

But some well-meaning people simply don't understand that their animals don't qualify as service animals, whether it's because they don't have a disability or their animal isn't sufficiently trained. Consequently, we can't rely on jargon, but must use descriptive terms in plain language so there's minimal confusion about what handlers are being asked to verify. We need to minimize the chances of unintentional violations.

So in our system for discouraging fraud, we want to:

- Avoid undue burdens on people with disabilities, such as paperwork-carrying or notification requirements
- Relieve some of the burden from airline employees, not requiring them to be expert assessors
- Allow obvious, ongoing misbehavior of an animal to overrule any initial handler verifications
- Give the system teeth to make lying not worth it
- Use descriptive terms rather than jargon to avoid misunderstandings (hint: avoid "Is that a service animal?")

§4: *Anti-fraud solution*

One way to meet these anti-fraud goals is for airline ticket counters and gate/boarding desks to stock and use a form. The form would be for handlers representing their animals as service animals; they would complete and turn in the form for flight access/accommodations with the animal. Airlines would then have a record they could file (signed by the handler and the form-accepting employee), and people with disabilities would not have to carry the completed form for access. The form would state the steep penalties for knowingly telling falsehoods on it, and handlers would simply have to check the boxes next to the jargonless descriptions that apply to them and their animals.

This is not a free pass. This is a special application of the DOJ questioning system for this unique context. Handlers would not be asked to reveal any private medical information, such as whether they have a mental illness. In essence, they are just asked whether they have a service animal through the component aspects of what that means, but they're "on the record" rather than just answering verbally. They also can't shift any blame onto anyone else for their black and white answers—and airline employees don't have to rely on personal judgment about anyone's verbal answers.

Just like with the DOJ system for public access, blatantly disruptive behavior removes the accommodation, regardless of whether the animal is a well-behaved service animal in other contexts. Depending on the particular situation, the consequences can vary from being charged the pet fee for that flight (and any up to a month later) to much more serious and formal repercussions for fraudulently filling out the form.

§5: *Species restrictions*

Here it's appropriate to bring up what species are suitable as service animals in the sky. Again, the DOJ reasoning is the respected authority with plenty of transparently argued guidance, so the only reason to depart from it is when the special context gives us reason to.

The latest DOJ rules have restricted service animals to dogs, with some special exceptions for miniature horses. This DOJ restriction (from allowing most domesticated animals) arose because there were consequences DOJ didn't anticipate with the earlier phrasing, but then wanted to prevent once problems developed. There were safety concerns with some species, such as capuchin monkeys, but overall the problem was that people were taking out untrained pets of all species as service animals. The restriction mainly to dogs was designed to ratchet down the intentional and unintentional "faking" that was especially prevalent among handlers of these other species, making the whole service animal community subject to ridicule.

⁷ "These five steps can help one determine whether an animal is a service animal or a pet: 1. *Obtain credible verbal assurances[...]*" <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-109>

It looks like the same reasons DOJ had for increased species restrictions have only been magnified in the context of air travel. The collection of "colorful stories" has continued to grow.⁸ This means it's high time for DOT to restrict these other species from being considered service animals for airline access, which fences the field down to dogs and miniature horses.

Conversations with our horse-owning leaders and research into guide horses reveal that some miniature horses are able to be trained to signal a short time before they need to eliminate, which means they are able to ride in taxis, busses, and subways without incident. However, they are not able to go for long periods of time without eliminating, and you can't maintain their health while withholding/restricting water and food from them before traveling, as handlers often do for long flights with service dogs.

Consequently, we have not lassoed miniature horses as an acceptable service animal species in this context, leaving dogs as the only animals that qualify as service animals for air travel. Of course, airlines would remain free and encouraged to make their own exceptions on a case-by-case basis, allowing for those reasonable accommodations too specific to detail in regulations.

§6: Training standards

This leads us to another salient question: what is the training standard for service animals (dogs)? This splits into two types of training: public access training and disability mitigation (assistance) training.

Public access training is training the dog in various environments to the point at which the dog is reliably safe, non-disruptive, and well-behaved in novel situations. We certainly assume this includes housetraining, for its absence would be disruptive.

A common initial thought is that requiring certification would solve all the problems, but as DOJ has found, specific certifications or registrations do not demonstrate that the dog is or will be well-behaved in the environment.⁹ Additionally, requiring handlers to acquire and carry such paperwork would present undue burdens on those with disabilities.^{10,11} The best overall approach seems to consist of striving for clarity on the form (and an accompanying guidance brief) as to the level of expected training.

This does not involve getting government bureaucracy into the business of dog training. Instead, the handler is asked outright on the form to attest that the dog has undergone training in various environments so it's reasonable to expect the dog to behave at the airport and on the airplane. The handler is directly responsible for the reliability of the dog's training, and not anyone else.

Of course, some people may be willing to interpret whatever question is asked about public access training in a much looser way than is desired. There is another layer to this cake that both aligns the requirements more with DOJ's and conveys that the bar for service dog access is not so low that a barely trained pet would qualify.

This other aspect follows the standard DOJ recipe in requiring that service dogs be trained to do work or tasks to mitigate the person's disability. This means the dog has to actually recognize and respond reliably to a command, or to a change in the person or environment, in a way that helps relieve symptoms or negative effects of their disability—it cannot be that the mere untrained presence of the dog makes the person feel better. This is another blindspot that has been exploited in the current system. When people don't have to take disability-mitigation training seriously, as a practical matter it seems they also do not take public access training seriously.

§7: Emotional support animals unsupported

One consequence of this proposed disability-mitigation training requirement is that emotional support animals (ESAs) would no longer be allowed. This is in contrast with psychiatric service dogs, which do perform disability-

8 DOT downplayed this in 2008, when the problem may be been smaller: "Because they make for colorful stories, accounts of unusual service animals have received publicity wholly disproportionate to their frequency or importance. Some (e.g., tales of service snakes, which grow larger with each retelling) have become the stuff of urban legends." <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-36>

9 See Q17 http://www.ada.gov/regs2010/service_animal_qa.pdf and "Training requirement." <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>

10 See "Inquiries about services animals." <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>

11 As DOT notes, "Under U.S. law (the ADA as well as the ACAA), it is generally not permissible to insist on written credentials for an animal as a condition for treating it as a service animal." <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-36>

mitigating work or tasks for psychiatric disabilities and are public access trained. We believe it's an accident that ESAs were given ACAA access in the first place. This accident seems to have resulted from DOT co-opting a HUD term and confusingly giving it a significantly different meaning—in a way no one noticed.

Historically, ESAs were created in FHAct regulations as part of the protected general class of "assistance animals" with access rights in no-pet housing.¹² They did not need to be trained for public access because they only had housing access rights, unlike service animals that accompany their disabled users in public.¹³ There are other, mildly arcane considerations, but as long as their mere presence helps someone with a disability, they're basically covered for housing.

Later—and clearly with good intentions—DOT allowed access for what sounded an awful lot like HUD's ESAs (without using that full name), but DOT oddly assumed these animals would be public access trained.¹⁴ Some years following this, DOT started using the terms others were using: ESAs and psychiatric service dogs/animals. Confusingly, DOT continued to assume that the animals they were now calling ESAs (like HUD) were public access trained (unlike with HUD).¹⁵

DOT further added to the frustration of advocates in this arena. In spite of DOT itself at least having distinguished between psychiatric service dogs and ESAs on the basis of ESAs not being work or task trained, DOT remained reluctant to treat the categories differently from one another. This did not stop DOT from treating access for their handlers differently from that of non-psychiatric service animals' handlers. Advocates even petitioned DOT regarding this in 2009, but the education efforts and pleas went nowhere at the time.¹⁶

We believe DOT is practically the only party aware that "DOT-ESAs" are expected to be public access trained, unlike "HUD-ESAs". We do not believe this pervasive ignorance is likely to change, nor do we imagine it would be helpful to even try to start bifurcating this term in the public consciousness into two technical meanings. When this difference is brought to light among experts, it does seem strange to expect animals to be public access trained if their only experiences in no-pet places are in the advanced environments of airports and airplanes. Contrast this with the intense and lengthy public access training and everyday outings of service dogs!

Eliminating ESA access in flights would resolve the longstanding confusion, leaving untrained ESA access to housing only. Then it would be only users of *trained* service dogs that have mandated access to spaces that appropriately require public access *training*. Just like mixing up established jargon, a contrary system just doesn't work out in practice!

§8: Reasonable and valuable accommodation extensions: deliveries and SDITs

While untrained ESAs don't merit public access rights, there are two exceptional other categories where it is reasonable to grant access rights. In each case, the dog is public access trained to the point at which it's expected to behave in airports and aircraft, and access would be an *indirect*—albeit reasonable—

12 "The Fair Housing Act and HUD's Section 504 regulations govern the use of animals needed as a reasonable accommodation in housing. HUD's regulations and policies pertaining to reasonable accommodation were constructed specifically to address housing and, furthermore, were enacted prior to the development and implementation of the ADA regulations. Thus, the requirements for assistance/service animals must be evaluated in the appropriate context of housing, and are independent of the ADA regulations that were formulated to meet the needs of persons with disabilities in a different context and were adopted subsequent to HUD's regulations." <https://www.federalregister.gov/articles/2008/10/27/E8-25474/pet-ownership-for-the-elderly-and-persons-with-disabilities>

13 "There is a valid distinction between the functions animals provide to persons with disabilities in the public arena, i.e., performing tasks enabling individuals to use public services and public accommodations, as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities. Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress. Conversely, persons with disabilities who use emotional support animals may not need to take them into public spaces covered by the ADA." (ibid.)

14 In 1996, DOT mandated access (with restrictions) for animals that (1) provided emotional support to a person with a disability, (2) were not necessarily trained to do work or tasks, and (3) *were trained for public access*. DOT did not call them "emotional support animals" (ESAs) at the time. See p. 56421 of this federal register entry: <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-10> By 2003, DOT had begun calling these animals ESAs.

15 "Of course, like any service animal that a passenger wishes to bring into the cabin, an emotional support animal must be trained to behave properly in a public setting." <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-36>

16 Our predecessor, Psychiatric Service Dog Society, filed a petition in 2009 in an attempt to end the discriminatory regulations. Rather than relying on the articulations of the experts, DOT dithered by seizing on the less articulate personal comments of some individual advocates. <https://www.federalregister.gov/articles/2009/09/18/E9-21351/nondiscrimination-on-the-basis-of-disability-in-air-travel>

accommodation for a person with a disability.

Since service dog training programs are often hundreds or even thousands of miles from the recipients, it is occasionally optimal for a trainer to fly with a trained dog for both delivery to and local training with the recipient. Accommodating such a dog trainer/trained dog pair for one trip is a reasonable and valuable extension of the accommodations given directly to those with disabilities.

The other exceptional category involves *advanced* service dogs in training. Service dog public access training must increase incrementally if the dog is to graduate as a service dog. A dog may not yet be ready to graduate either due to the need for more public access training that does not bear on the dog behaving during air travel, or due simply to the fact that the service dog in training is still being trained to perform work or tasks.

If either of these is the case and the dog is expected to behave in the air travel environments, this is another reasonable and valuable extension of the usual accommodations. This allows advanced dogs to train specifically to airport and airplane conditions, rather than just training in similar environments, graduating, and then being thrown into such an environment and possibly (and avoidably) becoming an unexpected washout after great investment and expectations.

§9: Airport access (vs. airplane access)

One final design challenge pertains to what's needed for *airport* access,¹⁷ as opposed to *flight* access.

Airlines would be strongly encouraged to note "service dog" on the person's tickets to signify when the access form has been successfully completed and filed, and to prevent agents from iteratively requiring form completion on multiple legs of the same flight. As we covered above, handlers cannot be expected to carry paperwork for access, and some may even use an automated check-in, bypassing the first opportunity to complete the form. So if we can't rely on *paperwork* for access and accommodations outside of the airplane, how should access work in these places?

This is where DOJ-style questions are appropriate. However, with the nuances we've justified above, those exact questions don't include the variety of teams that would have airport access. Instead, when it is not clear to an employee whether the person and dog constitute a service dog team (or some acceptable extension), the employee may ask two questions:

- (1) Is this dog trained to behave in airports?
- (2) Is this dog trained or training to assist with an individual's disability?

These are a short mashup of the questions on the form, constructed specifically for airport access. They get to the heart of the matter, and just like with the form, clear and ongoing misbehavior are grounds for revoking accommodations in a way proportional to the situation.

§10: Terms of success

While not especially short, this article is still a mere distillation of many hours of intense discussion within PSDP's ACAA committee and through collaboration with other stakeholder groups. Here we've covered a breadth of the main design challenges for service animal access in air travel, and outlined a system we hope meets these unique challenges and the universal stakeholder goals in the best way practicable. We don't believe everyone will be happy with each aspect of our proposal, but we'll count success in terms of the degree to which others see our system as the best-justified way to construct the puzzle using all the roughly contoured pieces on the table.

To see the system practically fleshed out, please consult our three-page proposal; the latest updates will be reflected in the version on our website. The proposal currently consists of a one-page form and a two-page guidance brief.

Psychiatric Service Dogs Partners' purpose is to promote the mental health of people using service dogs for psychiatric disabilities by educating, advocating, providing expertise, facilitating peer support, and promoting responsible service dog training and handling.

¹⁷ The question of which laws govern accessibility in airports has a complicated answer. See p. 56417–8 of the federal register entry linked below for a start. For our purposes, we will assume the simple view that ACAA regulations can govern all airport accessibility for service animal handlers. <https://www.federalregister.gov/articles/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#h-10>

ADDENDUM

—3/18/16—

After consulting with several national disability advocacy groups, we learned of some key (non-supportive) positions individuals could take in response to the proposed form. This is not to say that each position has an actual supporter!

This addendum is an attempt to prevent or fix potential misunderstandings, and to respond to those positions that may otherwise have unhappy results. Here's an index as a heads-up:

- §A1: Ounce of prevention
- §A2: Addressing fraud denial
- §A3: Eliminating ESA access is not discriminatory
- §A4: Where "losing" is winning for service dog users
- §A5: No technical loss for the disability community
- §A6: This is not a zero-sum game

§A1: *Ounce of prevention*

First we'll look at a worrisome way of thinking we encountered. This way of thinking isn't so bad for normal public access situations, but is not so great for the captive audience of airplane passengers.

Some seem to think that the current system of enforcement is fine (excluding the non-discriminatory bits). In this way of thinking, it would be okay just to have the DOJ-style questions and allow ESAs.¹⁸ It would thus be okay not to actively discourage handlers of inadequately trained animals and "fakers" from boarding a plane, because there are remedies if an animal bites someone or causes some other severe disturbance.

In an everyday store on the ground, there's at least the possibility of having the dog leave if things are starting to go badly. Doggie parachutes are not an analogous option for misbehavior on aircraft, though!

This is part of why we believe that in the special context of flying, an ounce of prevention is worth a pound of cure. You may agree with this reasoning or not, but you don't have to be part of the service dog community to think of it. In contrast, an experienced service dog handler might have some frightening "insider information", enabling the sober realizations that follow.

When a service animal is attacked or its training is otherwise ruined by another animal, it may have to retire early. This happened to the second service dog of one of our board members. Her investment in years of training and thousands of dollars was ruined when he was attacked multiple times by an untrained pet.

Allowing this egregious irresponsibility can rob people with disabilities of their independence and integration in society. It can take years and financial strain to get another service dog unexpectedly. This is not something we want to risk to allow an increasing number of people to fly openly with their pet/ESA, when they apparently don't need the pet in the rest of their public life.

We are certainly not opposed to individuals choosing to mitigate their disabilities—that is not independently in question. The fact remains, though, that this must be done in a reasonable manner.

A gas-powered wheelchair may help a mobility-impaired person get around, but that doesn't automatically make it a reasonable accommodation indoors. In a similar vein, "Segway"-style devices may be excellent mobility aids for some—but if it isn't needed for a disability, a business has no ethical or legal obligation to accommodate. We also think it's likely there are safe, reasonable medical remedies available to the flying-phobic other than their untrained pets.

If our form can institute and clarify the requirements and penalties¹⁹, it may significantly lower the chances of traumatic incidents that would cause a service dog to retire early. Yes, the form is a small burden. So is ever

¹⁸ When we talk about ESA access or service dog access, this is shorthand. It is the person with the disability that has access with the animal (or doesn't). The animal does not have access on its own, or with someone else (generally).

¹⁹ In case it isn't clear, we are not committed to specific penalties, nor are we suggesting that the slightest misbehavior of a legitimate service dog is grounds for a penalty. We are largely concerned that the penalties are scary enough to discourage most people from flying, and that the repercussions are clearly advertised so that they will in fact do that discouraging. Some worry the penalties will be incorrectly applied to a service dog that's just having a bad day. Employees tend to be excessively permissive when it comes to service dogs, so we do not share this worry. The sort of behavior that merits action is the sort of behavior that a well-trained service dog would be expected *never* to engage in—even on a bad day.

having to answer the DOJ-style questions. But filling out the form is merely a focused version of answering those questions for the flying context, and it's in black and white to suit this context. So it's a burden, but not an *undue* burden.

As we've said, an ounce of prevention is worth a pound of cure. Maybe it's because of this that 95.5% of our community mostly or completely supports our proposal. Whatever the reason, it looks like there is overwhelming support within a subset of the disability community to whom the proposal directly applies. If the form appears to non-service-dog-users like a burden we wouldn't want, I hope a closer look—and certainly the voices of those affected—would relieve them of that impression.

§A2: Addressing fraud denial

Our access form was designed primarily as a replacement for the current, discriminatory system DOT put in place to prevent fraud. In the absence of this form, our proposal would be very similar to just having a DOJ style of questioning.

We found several disability advocacy groups highly suspicious that fraud exists to a degree justifying a counter-measure. So these groups tended to want a DOJ-style questioning, with no special 48-hour notice, doctor's letter, or our form. The reasoning below in this section is intended to address this permissive approach, as we believe it does not respect the practical reality of the situation.²⁰

Either there is significant fraud that merits a deterrent, or there isn't.

If there is (or would be) significant fraud that calls for a deterrent, we need something to replace the current deterrent system. Our access form is a prime candidate.

If there isn't, then a DOJ questioning system might be alright. However, this assumes that having just a DOJ questioning system itself would not lead to significant fraud. This assumption deserves inspection, but I'll leave that to the reader.

Now for the practical reality, for those who deny there's significant fraud. If anyone wants to try to convince DOT and industry groups that there wouldn't be fraud with a DOJ questioning system, I wish you thick skin and safe travels! Not only am I not sure how you would substantiate this view,²¹ but from the Reg Neg objectives²² and their historical trajectory, they seem absolutely determined to do *something* to address the actual or perceived fraud.

That's why we (PSDP) must persist in making available the best *something* to meet the design challenges, respecting everyone's interests as much as we can.

We don't believe we have "a solution in search of a problem". We have ourselves seen and heard of harmful fraud, which is more likely to be harmful and so noticed when our community members are present with their canine partners (seeing another dog brings a pet's/ESA's lack of training to the surface). We strive to be proactive here because in a vacuum, we know not what devilish system might replace the current one.

§A3: Eliminating ESA access is not discriminatory

It was difficult for me to discern exactly whether any individuals believed that eliminating ESA access would be discriminatory, but there were indications in our discussions that this is another avenue for misunderstanding.

I must assume no one objects to thinking that public access training is a reasonable requirement for public access in no-pet places. This is training that makes good behavior reliable and obscenely bad behavior out of the question. DOT has explicitly assumed this requirement (see §7 above), and without this assumption, it is quite difficult to reach common ground. Since ESAs aren't public access trained as a practical matter, we struggle to understand the desire to preserve ESA access.

Some individuals may be under the impression that eliminating ESA access would discriminate against one type of disability. We did not anticipate this impression, because—being fundamentally wrong in our view—this notion

²⁰ I assume here that since the current deterrent system—48-hour notice and a doctor's letter—violates mental health parity, we have to get rid of it.

²¹ Don't expect there to be survey data wherein you get a realistic feel for how much fraud there is!

²² "Specifically, the Department is exploring a Reg Neg to...Establish safeguards to reduce the likelihood that passengers wishing to travel with their pets will be able to falsely claim that their pets are service animals"
<http://www.regulations.gov/#documentDetail;D=DOT-OST-2015-0246-0001>

is foreign to us. I'll explain why it's not true.

Imagine there were a type of service dog for every type of disability. Eliminating ESA access would not eliminate access for any such type of service dog. So there is no disability against which ESA access elimination would discriminate.

People with psychiatric service dogs in training often obtain housing access for their dog as an ESA. Our community tends to think of it as:

ESA + public access training + disability mitigation training = psychiatric service dog

If you switch this formula around, an ESA is a psychiatric service dog without training.²³ Some members of the psychiatric service dog community have actually viewed ESA access as psychiatric-service-dog-in-training access for owner-trainers. This means that the lack of access for other types of service dogs in training would appear to discriminate against those whose disabilities cannot be mitigated by ESAs. This turns the situation on its head, but we'd wander too far to pursue this further here.

So under our proposal, people (with or without disabilities) would not have unfettered public access with their untrained animals. However, if someone's disability is so severe that they need the services of a service dog, if they engage in public access training and disability mitigation training like those with service dogs, they can have one.

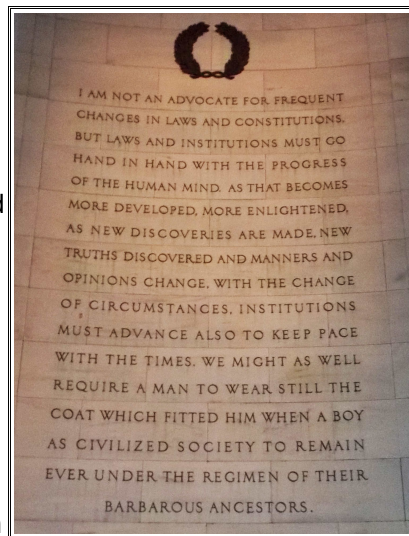
This means that type of disability has nothing to do with eliminating ESA access. It's primarily about public safety, and secondarily about fraud prevention. DOJ has clarified that ESAs don't have public access rights elsewhere, and as I detail in §7 above, it's largely an historical accident that people think their untrained housing-access ESAs are also flying-access ESAs.

§A4: Where "losing" is winning for service dog users

Many general disability advocacy groups—those not specifically tuned to the needs and desires of service dog users—are under the distinct impression that any "loss" of part of the disability-related system is worse for the side of disability rights. This mindset doesn't mesh with the mild complexity of the situation.

If we dare to speak on behalf of responsible service dog users, the access "rights" involving animals of various species that are not public access trained are access "wrongs". This tends to be the case with emotional support animals, which cannot be expected to have been extensively trained in no-pets places when they don't even have access rights outside of housing and flying. When these animals poorly behave and their use grows, it negatively affects the reputation and level of safety for respectable service dog teams. The permissiveness of the current system is disrespectful to those who value the safety and unhindered access of well-trained teams.

So this is a case where *cutting out* part of the current ACAA system tied to disability rights would *improve* the situation. To see this, we must take care not to fasten ourselves to the past. We must not insist on general principle that a former (apparent) gain for disability rights must not be lost—even when we learn it was not a gain after all.²⁴ This approach would railroad our thinking. We'd miss the fact that ESA access on planes wasn't a gain overall in the first place for the disability



23 Technically—interpreting the exact HUD wording—an ESA could be for a non-psychiatric disability. For example, the emotional support of an ESA could lower the blood pressure of someone with a disabling heart condition, or could keep non-disabling depression at bay for a disabled cancer patient. "An assistance animal is...an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability."

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

24 This sentiment is explained through a quotation chiseled into the Jefferson Memorial in Washington, DC (pictured above):

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.

community, and in particular for service animal users.

We can sum it up for the general disability rights advocates like this. If the reaper comes for ESA ACAA access, don't fear the reaper. And if you're worried about negotiating in a traditional, zero-sum game manner (see §A6 below) for the disability rights "side", feel free to treat losing this access as a loss the other side can then be pushed to offset elsewhere. Perhaps this is a means by which you can join us in arguing for mandated access for trained service dog delivery and advanced service dog in training development. If you can't join us on these points, at least don't rise up to oppose us when we service dog groups self-advocate and fight against access wrongs!

§A5: No technical loss for the disability community

We've seen that eliminating ESA access isn't discriminatory (§A3) and is better for service animal users (§A4), and that our proposal would valuably increase access for other categories (§8). But you might think it's still an overall loss for the disability community, in virtue of thinking that there are ESA teams that now have access that would not have access under our proposal. We're not even sure that's the case!

What our proposal technically does is eliminate access for the elusive "DOT-ESA", which is somehow public access trained (see §7 above). Untrained "HUD-ESAs" never technically had access in the first place. Any attempt to expand mandated access to HUD-ESAs would qualify as trying to increase access, rather than defending existing rights—regardless of whether individuals are currently acting as if their HUD-ESAs already have access rights.

It seems *highly unlikely* that DOT-ESAs exist. That is, that there are animals whose mere presence is the only disability-mitigating factor, but who have been extensively public access trained in various environments. It would be strange to think they would be public access trained, because DOJ doesn't grant them access rights in any no-pets places. If DOT-ESAs do not exist, then there is no actual ESA team that technically has access now that would not have access under our proposal.

If the mythical DOT-ESA *does* exist, then we believe the training efforts and knowledge that went into the animal's extensive public access training could be easily channeled into teaching the animal a simple, disability-mitigating work or task item. That is the salient threshold between a DOT-ESA and a (DOJ) service animal, and it is not a particularly onerous step, as the public access training is the hard part.

Our proposal also contains a restriction of the species given access: dogs only. There are independent justifications in §5, but we also find justification in light of the issues we're discussing here, as follows. Miniature horses are exceptional and covered in §5.

Non-canine ESAs are highly unlikely to be public access trained, both because of the limitations of many species, and because DOJ does not grant them public access. An animal that is not allowed public access in normal circumstances cannot be expected to be reliably trained to behave in public environments that are more challenging than normal.

All of this means that eliminating DOT-ESA access is not likely to eliminate access for any team that previously had access. Of course, the practical reality is that HUD-ESAs are wrongly being granted access under the current system, due to misunderstandings. We believe there should be no room for this kind of misunderstanding in the future.

§A6: This is not a zero-sum game

A "zero-sum game" is a situation in which there's a discrete amount of something, and the more someone else in the game gets, the less you get (and vice versa). Real life situations are rarely like a zero-sum game overall. Even when it seems like they are, we can see other approaches if we are able to think creatively.

It helps to realize that one party's benefit is not necessarily the detriment of another. This is why limiting your thinking in terms of zero-sum games can be destructive: if you only think in terms of "us vs. them", you can miss opportunities to create systems that bring interests together to benefit everyone.

Our proposal is justified by both disability-based stakeholder considerations and industry-based ones, and that is on purpose. As it turns out though, even if you ignore all industry-based considerations, the others are independently enough to justify our proposal with practical reasoning. We did not need to compromise or otherwise give concessions to accommodate industry needs, because like most situations, this is not a zero-sum game!

ADDENDUM 2

—5/1/16—

Our proposal expands access for advanced service dogs in training and for the delivery of service dogs. However, we have encountered some resistance when it comes to our proposition that ESA flight access should be eliminated.

We've argued for our position and addressed some specific concerns in the guide to our proposal and its first addendum, but there remains a particularly heartfelt objection. A couple of people who use psychiatric service dogs, not ESAs, have enthusiastically voiced that flying is especially challenging for some people, and that it is unjust to deprive these people of their ESAs if those animals provide comfort to them.

Our hearts have always been sympathetic to this sentiment. Let's honor it by giving the argument its most distilled form. This way we can address the strongest possible version of this objection to ESA access elimination.

§A2.1: *Considerations beyond disability mitigation*

We'll focus on the kind of situation in which people have a disabling psychiatric condition—one that significantly limits one or more major life functions, not just one where someone experiences mild discomfort. Add to this that the mere presence of a pet mitigates the disabling psychiatric condition, enabling them to fly without chance of a significant medical incident.

At first glance, it might seem like anything that helps people engage in the world despite their disabilities would be a good thing, and following this, that ESA access should be mandated for flights because flying is a particularly challenging and stressful situation for some people. However, there are considerations that exist outside of whether an individual's disability is mitigated. For instance, we would not allow someone to fly with a gun just because it made them feel safe and kept flashbacks at bay!

§A2.2: *Training for health and safety*

We have pushed for two types of training requirements to address the health and safety of the public and the dog. This training includes extensive public access training in various environments that ESAs don't have access to, and disability mitigation training as a threshold indicator for the seriousness of the public access training. Details are in §6, where we've noted that "When people don't have to take disability-mitigation training seriously, as a practical matter it seems they also do not take public access training seriously."

We aren't creating this on our own from nothing: the Department of Justice expects this training in service animals. We are simply following their lead and agreeing with the authority's reasoning.

§A2.3: *Parity of reasoning: untoward consequences*

So what would be the consequences if we follow the contrary reasoning of those who object to our proposal's ESA flight access elimination?

Let's imagine we believed that the need for the dog to be trained for public access—to respect the dog's and public's health and safety—were outweighed whenever the situation were particularly challenging or stressful. To be consistent, this pattern of reasoning would obligate us to want ESA access in many other situations.

For instance, some people have panic attacks or dissociate when in large crowds or around loud sounds or music. For these people, these situations are particularly challenging or stressful, so by parity of reasoning, they should be allowed to take their untrained ESAs with them into such no-pet places.

From our perspective, these situations that are more likely to be difficult for people are more likely to be difficult for dogs. These are situations with an *even greater* need for public access training! If the person is more stressed, they are also less likely to be able to control an untrained dog, which makes the training even more necessary.

§A2.4: *Ensuring safety and respect without luck*

It is unfair *to the dog* for it to be thrown into a stressful situation without extensive prep work. Service dogs

undergo 1–3 years of public access training to incrementally build up to handling unexpected and otherwise very stressful situations. This ensures the dog has psychological shock absorbers and can stably do its job while remaining healthy and safe. Many dog owners are not even familiar with the signs of stress in a dog, and must be educated about this to accurately read their dogs' reactions.

Similarly, it is disrespectful *to the public* to take a dog into stressful situations without the extensive, purposive-driven training needed to create these psychological shock absorbers. Dogs are more likely to misbehave—or even present an aggression-based danger—when stressed.

“ Dogs without “shock absorbers” may be lucky... but reasonable accommodation isn't about being lucky.

Dogs without "shock absorbers" may be lucky and not encounter any "bumpy roads" that would cause a problem, but reasonable accommodation isn't about being lucky. Reasonable accommodation is about disability mitigation with an assurance of public safety and respect, even if you're not so lucky.

This is why the Department of Justice doesn't mandate access for untrained ESAs in no-pets places. Just as it isn't reasonable to mandate access for someone with an untrained dog at an indoor rock concert just because the situation would otherwise aggravate the

person's disability, it doesn't make sense to require ESA access for flying.

§A2.5: *On public access training and HUD-ESAs vs. DOT-ESAs*

As noted in §§7 and A5, the Department of Transportation expects what we call "DOT-ESAs" to be public access trained, even though "HUD-ESAs" predate them²⁵ and are not expected to be public access trained. We earlier elaborated why it is not reasonable to expect DOT-ESAs to be public access trained. In addition to the terminological discrepancy between agencies, this includes especially that they don't have access to any no-pets places in which to undergo the extensive training needed for reliable public access behavior. See the previous sections for more details.



²⁵ Case law regarding ESAs in housing under Section 504 of the Rehabilitation Act dates back at least to 1981, with *Majors v. Housing Authority of the County of DeKalb Georgia* (652 F.2d 454, under the 5th Circuit US Court of Appeals). <https://www.animallaw.info/case/majors-v-housing-authority-county-dekalb-georgia>