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Why Context Matters: Defining Service Animals Under Federal Law

Rebecca J. Huss*

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I. INTRODUCTION

Twenty million families in the United States include at least one individual who has a disability.¹ The percentage of the population in the United States reporting some level of disability has increased to almost nineteen percent.² The number of persons using service animals to assist with disabilities appears to be growing. Unfortunately, due to lack of clarity in this area of the law, persons with disabilities continue to have difficulties as they attempt to live their daily lives accompanied by their service animals.

1. U.S. Department of Justice, Transcript of the Public Hearing on Proposals to Amend Regulations Under Titles II and III of the ADA, http://www.ada.gov/NPRM2008/public_hearing_ranscript.htm (last visited Feb. 15, 2010) (testimony of Grace Chung Becker, Acting Assistant Att’y Gen. for Civil Rights at the Dep’t of Justice).

2. Matthew W. Brault, *Americans with Disabilities: 2005*, CURRENT POPULATION REPORTS (U.S. Census Bureau), Dec. 2008, at 4, available at <http://www.census.gov/prod/2008pubs/p70-117.pdf> (stating that 18.7% of the population of the United States reported some level of disability). The number and percentage of persons with severe disabilities has also increased. *Id.*

The Americans with Disabilities Act (ADA) is a comprehensive civil rights law that prohibits discrimination on the basis of disability.³ Among other issues, the ADA provides that individuals with disabilities must be granted access to places of public accommodation.⁴ In June of 2008, the Department of Justice (DOJ) proposed new regulations implementing the ADA.⁵ Included in the proposed regulations was language impacting whether an animal being used to assist a person with a disability must be allowed in public accommodations.⁶

This rulemaking process illustrated the significant issues surrounding the use of service animals in our communities. Central in many disputes in this area is the problem of disparate definitions of service animals under various laws.

The Article begins with a brief history of service animals.⁷ The various ways that humans benefit from service animals is discussed, along with a consideration of some of the ethical issues surrounding the use of service animals.⁸ It continues with an analysis of the proposed changes to the ADA rules and selected case law that illustrates the need for clarification in this area of the law.⁹ As there has been considerable activity relating to service animals under the Fair Housing Amendments Act (FHA), the next part will consider the issue under that law.¹⁰ The Article then evaluates the way service animals are handled under the Air Carrier Access Act (ACAA) because of recent regulatory activity interpreting that law.¹¹ There is then a short section discussing how various state laws may expand the definition of service animal.¹² The Article concludes by arguing that there are rational

3. 42 U.S.C. §§ 12101–12213 (2000).

4. *Id.*

5. Press Release, U.S. Dep't of Justice, The Department of Justice Proposes New Rules to Implement the Americans with Disabilities Act (ADA) (June 4, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/June/08-crt-498.html> [hereinafter DOJ Proposes New Rules]. The DOJ is the agency responsible for implementing regulations interpreting Title III of the ADA. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508, 34,508–09 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 36) [hereinafter NPRM Title III]. To the extent that transportation providers are subject to Title II and Title III of the Act such providers are regulated by the Department of Transportation. *Id.* at 34,509.

6. *See* DOJ Proposes New Rules, *supra* note 5.

7. *See infra* notes 14–24 and accompanying text.

8. *See infra* notes 25–72 and accompanying text.

9. *See infra* notes 73–212 and accompanying text.

10. *See infra* notes 213–276 and accompanying text.

11. *See infra* notes 277–313 and accompanying text.

12. *See infra* notes 314–343 and accompanying text.

reasons to have an expansive definition of service animal under the ADA and, in the alternative, if there is a restrictive definition under the ADA, the broader protections under the FHA and ACAA should remain in place.¹³

II. HISTORY AND CURRENT USES OF SERVICE ANIMALS

A. *The History of Service Animals*

There is a long history of the domestication of animals by humans, and subsequent use of those animals for a variety of purposes.¹⁴ It is estimated that there are almost 154 million dogs and cats kept as companion animals in the United States.¹⁵ There appears to be general consensus that the number of animals used as service, support or therapy animals is growing, but the number is still quite limited. It is difficult to estimate the number of assistance dogs working in the United States. There have been estimates ranging from 10,000 to 30,000 dogs currently being used by persons with disabilities in the United States.¹⁶

There are records that dogs were kept at healing temples in Ancient Greece.¹⁷ Certainly service animals have been part of our society since at least the thirteenth century.¹⁸ There are records describing systematic

13. See *infra* notes 344–361 and accompanying text.

14. See generally ROGER A. CARAS, A PERFECT HARMONY, THE INTERTWINING LIVES OF ANIMALS AND HUMANS (1996) (discussing various ways that animals have been used by humans throughout history); Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 188–92 (2003) (discussing the domestication of animals and the changing perception of certain companion animals in our society).

15. AM. VETERINARY MED. ASS'N, U.S. PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK 1 (2007). The breakdown between these species is 72 million dogs and 81.7 million cats. *Id.* This does not include the estimates of the feral cat population of up to 100 million cats. NO KILL SOLUTIONS, DO FERAL CATS HAVE A RIGHT TO LIVE? 4 (2005), available at <http://www.nokilladvocacycenter.org/pdf/Feral%20Cats.pdf>. Another estimate found similar results with 77.8 million dogs and 93.6 million cats. AM. PET PROD. MFR. ASS'N, 2009–2010 APPMA NATIONAL PET OWNERS SURVEY 8 (2009) [hereinafter APPA].

16. Assistance Dogs United, <http://www.assistancedogunitedcampaign.org/donor.html> (last visited Feb. 15, 2010) (estimating there are 10,000 dogs working in the United States); Nora Wenthold & Teresa A. Savage, *Ethical Issues with Service Animals*, 14 TOPICS IN STROKE REHABILITATION 68, 68 (2007) (estimating there are 17,000 assistance dogs working in the United States); International Association of Assistance Dog Partners, Veterinary Teaching Hospital Fee Structure for Disabled Clients Partnered with Guide, Hearing and Service Dogs, <http://www.iaadp.org/vthfee.html> (last visited Feb. 15, 2010) (estimating that there are 30,000 disabled individuals working with guide, hearing, and service dogs).

17. Wenthold & Savage, *supra* note 16, at 68.

18. ALISON HORNSBY, HELPING HOUNDS, THE STORY OF ASSISTANCE DOGS 5 (2000). A Chinese scroll dating from the thirteenth century shows a blind man being led by a dog. *Id.* Similar scenes have been depicted in art from the sixteenth century. *Id.*

attempts to train dogs to assist persons with visual impairments in the late 1700s.¹⁹

Formal techniques used to train service animals are recorded after World War I.²⁰ Large-scale training of service animals to lead the blind occurred after World War I in Germany.²¹ Service animals were used in the United States in the late 1920s.²² The use of service animals began with dogs utilized to assist persons with visual disabilities.²³ The first use of a service animal to assist a person with hearing limitations occurred in the United States in 1976.²⁴

B. Current Uses of Service Animals

1. Animals Used for Animal-Assisted Activities and Animal-Assisted Therapy

It is important to distinguish between service animals and animals used for Animal-Assisted Activities (AAA) and Animal-Assisted Therapy (AAT).²⁵ AAA is more informal, takes place in a variety of environments, and is not targeted to any specific medical condition or person.²⁶ One example of AAA would be a “read to a pet program” in a library or school.²⁷

19. Wenthold & Savage, *supra* note 16, at 68 (describing records found at one hospital for the blind and other records of training dogs to assist persons with visual impairments).

20. HORNSBY, *supra* note 18, at 5.

21. *Id.* at 5–6.

22. *Id.* at 6 (discussing the reports that Dorothy Eustis visited the training center in Europe and was the person who trained the first guide dog for use by an American).

23. *Id.* at 5.

24. *Id.* at 40.

25. See Delta Society, Understanding the Differences Between AAA and AAT, <http://www.deltasociety.org/Page.aspx?pid=321> (last visited Feb. 15, 2010).

26. *Id.*; see also CYNTHIA K. CHANDLER, ANIMAL ASSISTED THERAPY IN COUNSELING 5 (2005) (distinguishing AAA and AAT and stating that “AAA is a less formal human-animal interaction”).

27. See, e.g., Mary Renck Jalongo, “What Are All These Dogs Doing at School?”: Using Therapy Dogs to Promote Children’s Reading Practice, 81 CHILDHOOD EDUC. 152, 153–56 (2005) (discussing the issues that should be considered prior to the implementation of a reading program and the reading improvement that has been shown by such programs); Debra Nussbaum, *Literacy: at These Readings, Listeners Growl for More*, N.Y. TIMES, Aug. 13, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9B01E4DB1F3FF930A2575BC0A9609C8B63> (describing programs of children reading to dogs and stating that formal programs began at least as far back as 1999); Anita B. Stone, *Story Time: By Lending an Ear, “Reading” Dogs Help Children Learn*, BARK, Sept.–Oct. 2007, at 60 (discussing programs in schools and libraries, stating that one program has 1,300 teams and describing several other programs).

In contrast, AAT is utilized by a health care or human resources provider and is an integrated part of a treatment process for specific individuals.²⁸ AAT is used in a wide range of therapies.²⁹ It is reimbursed by health insurance companies and is growing in popularity, as indicated by a recent expansion of college level training programs offering coursework in the area.³⁰ An example of AAT is equine-assisted physical therapy.³¹

Unless an animal actually lives in the environment used for therapy, such as a nursing home, the animals used for AAA and AAT are usually the companion animals of their handlers. The persons with animals used for AAA and AAT are not required to be accommodated in public accommodations or otherwise under federal law. Some animals act both as service animals and perform AAA or AAT.³²

2. General Impact on Human Health

Pet owners report that they believe pets relieve stress and are good for their health and the health of other human family members.³³ This belief is supported by an increasing number of studies that have considered the impact of companion animals on human health.³⁴ Research shows that physical contact with companion animals has a calming effect on people.³⁵ In both the general population and for persons with disabilities, “animals

28. Delta Society, Animal-Assisted Therapy, <http://www.deltasociety.org/Page.aspx?pid=320> (last visited Feb. 15, 2010); see also CHANDLER, *supra* note 26, at 5 (distinguishing between AAA and AAT).

29. See generally HANDBOOK ON ANIMAL-ASSISTED THERAPY: THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE (Aubrey H. Fine ed., 2d ed. 2006) [hereinafter HANDBOOK ON ANIMAL-ASSISTED THERAPY] (providing several examples of the use of AAT).

30. CHANDLER, *supra* note 26, at 12.

31. *Id.* at 10. Equine assisted physical therapy is often called hippotherapy and appears to be the leader of animal-related therapeutic modalities in the United States. *Id.*

32. Debi Davis, Service and Therapy Work: Can One Dog Do Both?, <http://www.deltasociety.org/Document.Doc?id=225> (last visited Feb. 15, 2010) (discussing service animals that perform in dual roles).

33. APPA, *supra* note 15, at 42 (reporting that fifty-five percent of dog owners and fifty-nine percent of cat owners say that a benefit of ownership is relaxation and stress relief, and that fifty-six percent of dog owners and forty percent of cat owners report that they believe that the animals are “good for my health or my family’s health”).

34. See generally COMPANION ANIMALS IN HUMAN HEALTH (Cindy C. Wilson & Dennis C. Turner eds., 1998) [hereinafter COMPANION ANIMALS] (discussing a variety of studies done on the impact of companion animals on human health); Delta Society, Library: Health Benefits of Animals for Adults, <http://www.deltasociety.org/Page.aspx?pid=332> (last visited Feb. 15, 2010) (listing articles that report on studies of the benefits of animals on the health of adults).

35. Aaron Honori Katcher, *How Companion Animals Make Us Feel*, in PERCEPTIONS OF ANIMALS IN AMERICAN CULTURE 113, 120 (R.J. Hoage ed., 1989) (discussing how visual and physical contact with animals induces calm).

seem to improve social interactions and promote social happiness and harmony. . . .”³⁶

3. The Benefits to Humans Who Use Service Animals

The variety of ways that humans utilize service animals is illustrated by the laws discussed herein.³⁷ Although guide and hearing dogs are perhaps the most recognizable of service animals, it is not uncommon to have service animals assisting persons with mobility issues.³⁸ The use of service animals to assist persons with psychiatric disabilities, such as depression, panic disorder and post-traumatic stress disorder, has also become common.³⁹

In addition to mitigating or assisting with a specific issue, persons with disabilities may find that having a service animal has more generalized benefits. There is substantial research on the benefits, including psychosocial, of service animals assisting persons with disabilities.⁴⁰ Some of the psychosocial functions of service animals include “(1) companionship; (2) something to keep one busy; (3) something to care for; (4) something to touch and fondle; (5) a focus of attention; (6) exercise; [and] (7) safety.”⁴¹

4. Risks to Humans of Using Animals

The same risks that arise from any interaction between humans and animals will arise when animals are used for therapy or to act as service animals. One possible risk is the transmission of parasitic and other zoonotic diseases.⁴²

36. Sarah J. Brodie et al., *An Exploration of the Potential Risks Associated with Using Pet Therapy in Healthcare Settings*, 11 J. CLINICAL NURSING 444, 445 (2002).

37. See *supra* notes 15–35 and accompanying text.

38. See generally HANDBOOK ON ANIMAL-ASSISTED THERAPY, *supra* note 29.

39. *Id.*

40. Wenthold & Savage, *supra* note 16, at 69; Diane M. Collins et al., *Psychosocial Well-Being and Community Participation of Service Dog Partners*, 1 DISABILITY & REHAB.: ASSISTIVE TECH. 41, 46 (2006) (discussing the psychological improvements of persons using service animals).

41. S.A. Zapf & R.B. Rough, *The Development of an Instrument to Match Individuals with Disabilities and Service Animals*, 24 DISABILITY & REHAB. 47, 47 (2002) (citing to work done by Katcher and Freidmann). Not every animal interaction is positive. One study showed that a possible adverse effect of some therapies using animals is that the individual may become “so involved with the pet that other human beings are neglected.” James Robert Brasic, *Pets and Health*, 83 PSYCHOL. REP. 1011, 1019 (1998).

42. Brodie et al., *supra* note 36, at 445–54 (discussing the spread of zoonotic disease); see also Brasic, *supra* note 41, at 1019.

Some animals may produce allergic and respiratory disorders in their human handlers or other members of the household.⁴³ Careful selection of the animal used⁴⁴ and proper grooming can reduce these risks.⁴⁵ An animal may bite or scratch the handler or others.⁴⁶ The exact figure for the number of bites that occur is difficult to determine as not all cases are reported, and there appears to be no study of incidents that relates specifically to service animals or animal-assisted therapy programs.⁴⁷ Careful selection of animals and education of those interacting with the animal can minimize the risk of animal bites.⁴⁸

It appears, based on the increasing use of animals for therapy and service, people have determined that on the balance the benefits of using animals to assist humans outweigh the risks—at least from the human’s perspective.⁴⁹ The next issue is to consider the interests of the animals.

C. *Ethical Issues Relating to the Use of Service Animals*

Academic discussions about the ethical issues relating to humans interaction with animals does not frequently focus on domestic animals assisting humans with disabilities.⁵⁰ Underlying the theoretical work in this area is often the current status of animals as property under the law; it is only when the interest of humans is an issue that animals will be protected.⁵¹

43. Brodie et al., *supra* note 36, at 454. Of the people seen by allergists in North America, six percent have an allergic reaction to animal dander. *Id.*

44. For example, because allergies to cat dander is at the top of the hierarchy of allergy-producing animals, cats may not be the best suited for work in all environments. *Id.* at 454.

45. *Id.*

46. Basic, *supra* note 41, at 1019.

47. Brodie et al., *supra* note 36, at 454 (discussing dog bite statistics in the United Kingdom). The most recently published statistic in the United States is that there are 4.7 million dog bite incidents annually. Insurance Information Institute, Dog Bite Liability, <http://www.iii.org/media/hottopics/insurance/dogbite/> (last visited Feb. 15, 2010).

48. Brodie et al., *supra* note 36, at 454.

49. The result of a survey of the literature in this area to assess potential and actual risk concluded that the hazards are minimal. *Id.*

50. *But see* Tzachi Zamir, *The Moral Basis of Animal-Assisted Therapy*, 14 *SOC’Y & ANIMALS* 179 (2006); *see infra* notes 66–71 and accompanying text.

51. *See, e.g.*, Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in *ANIMAL LAW AND THE COURTS: A READER* 7 (Taimie L. Bryant et al. eds., 2008) (discussing the fact that animal interests are only protected when it is economically beneficial for humans). As an example, one Italian study focused on the suitability of specific animals to serve humans by proposing a model that identifies shelter dogs’ suitability to serve as service animals. Pia Lucidi et al., *Ethotest: A New Model to Identify (Shelter) Dogs’ Skills as Service Animals or Adoptable Pets*, 95 *APPLIED ANIMAL BEHAV. SCI.* 103 (2005). This study is laudable in that its goal appears to be to provide a method to encourage the use of dogs (of any breed) otherwise confined to shelters to be removed from those facilities and trained for therapy work. Ultimately though, the study referenced back to humans’ interest in the dogs’ continued utility as service animals. *Id.* at 103 (stating that the “paucity of dogs dedicated to animal-

Similar issues arise with animals used in AAA, those used in AAT, and service animals.⁵²

Some commentators have raised concerns over the methods used to train service animals.⁵³ Certain training procedures and use of kennels to confine animals during training have been shown to be stressful for some dogs.⁵⁴ Another ethical issue is the managing of expectations involving the workload of service animals.⁵⁵ There needs to be a balance between work, rest and play.⁵⁶

It has also been shown that there can be a risk of injury to dogs if the dogs are being used as physical support or to pull wheelchairs.⁵⁷ There are specific welfare concerns if a dog is being used to assist someone with disabilities where the human is unable to maintain control over his or her physical actions. One example would be the use of service dogs to assist children with autism spectrum disorder.⁵⁸

The role of veterinarians has been highlighted in some research. One study focusing on the benefit of service dogs to humans discussed the use of ongoing veterinary inspections for service animals.⁵⁹ Examinations of the

assisted therapy . . . for disabled people creates long waiting lists worldwide and compromises the health of the few certified animals by demanding too much work from them at times, thus jeopardizing their future as service dogs”).

52. A more detailed discussion of issues relating to the use of nonhuman primates as service animals is found *infra* notes 130–174 and accompanying text.

53. Dennis C. Turner, *Ethical Issues in Companion Animal Ownership, Use and Research, in FURTHER ISSUES IN RESEARCH IN COMPANION ANIMAL STUDIES* 28 (Jill Nicholson & Anthony Podberscek eds., 1996); James A. Serpell et al., *Welfare Considerations in Therapy and Assistance Animals, in HANDBOOK ON ANIMAL-ASSISTED THERAPY, supra* note 29, at 453, 466 (discussing the use of aversive conditioning to instruct assistance dogs).

54. Robert Hubrecht & Dennis C. Turner, *Companion Animal Welfare in Private and Institutional Settings, in COMPANION ANIMALS, supra* note 34, at 267, 273; Serpell et al., *supra* note 53, at 462–63 (discussing the changes in physical environments that occur to many assistance animals).

55. See Wenthold & Savage, *supra* note 16, at 70. For dogs working in institutional environments there can be psychological stress due to multiple handlers that may act inconsistently. See *id.* at 71.

56. See *id.* at 70–71.

57. Hubrecht & Turner, *supra* note 54, at 273–74 (discussing the need for good harness design to avoid injuries to dogs).

58. Kristen E. Burrows et al., *Factors Affecting Behavior and Welfare of Service Dogs for Children with Autism Spectrum Disorder*, 11 *J. APPLIED ANIMAL WELFARE SCI.* 42, 50–51 (2008) (discussing aggressive behavior by the child that is often directed towards the dogs and the stress dogs have when they have been “in jacket” for long periods of time without a break).

59. D.R. Lane et al., *Dogs for the Disabled: Benefits to Recipients and Welfare of the Dog*, 59 *APPLIED ANIMAL BEHAV. SCI.* 49, 50 (1998) (discussing the role an organization that places an animal in service has for ongoing care of an animal). If an organization that places a service animal is not satisfied with the care of the animal, or the actions of the handlers, depending on the

dogs would include determining whether the animal is exhibiting signs of stress.⁶⁰ This study discussed the connection between a handler's satisfaction with the animal and the welfare of the animal and concluded that most recipients showed "a vigilance for their dog's health and well-being beyond a mere concern to keep the dog fit for work."⁶¹

The American Veterinary Medical Association (AVMA) has "wellness guidelines" for animals involved in AAT programs.⁶² The AVMA policy states that one of the guiding principles is that the animal used in any program is "protected from being harmed by participation in the program" with other guiding principles relating to the animals' health to reduce the transmission of zoonotic diseases and that the animal is "behaviorally appropriate for the program."⁶³ Among other issues, the AVMA guidelines provide that the person responsible for the animal should make certain that the animals are "provided regular opportunities for play, quiet time, and rest" that is separate from the animal's activities in therapy or as a residential pet.⁶⁴ Of course, service animals generally are not able to perform the tasks

agreement with the handler, the organization may reclaim the animal or "de-certify" the animal. Scott Wyland, *Blind Couple Lose Use of Guide Dogs: School for Companion Animals Decertifies Them After Abuse Allegations*, DAYTONA NEWS J., Aug. 19, 2007, at 03C (discussing the decertification of two guide dogs by the Leader Dogs for the Blind after officials had received complaints that the handlers abused the dogs and did not have proper control over them).

60. Lane et al., *supra* note 59, at 50. Cf. Dorit Karla Haubenhofner & Sylvia Kirchengast, *Physiological Arousal for Companion Dogs Working with Their Owners in Animal-Assisted Activities and Animal-Assisted Therapy*, 9 J. APPLIED ANIMAL WELFARE SCI. 165 (2006). This study found that dogs used in animal assisted therapy work were physiologically aroused when they engaged in therapy work. Haubenhofner & Kirchengast, *supra*, at 168–71. The study measured cortisol to determine the level of arousal and found that the concentration was significantly higher on therapy days than control days and higher if the therapy session occurred before 2:00 P.M. *Id.* at 168–69. The concentration of cortisol was also higher if the therapy session was shorter. *Id.* at 169. The researchers could not determine whether the arousal indicated positive excitement or negative stress related to the activity. *Id.* at 171.

61. Lane et al., *supra* note 59, at 58.

62. American Veterinary Medical Association, *Wellness Guidelines for Animals in Animal-Assisted Activity, Animal-Assisted Therapy and Resident Animal Programs*, http://www.avma.org/issues/policy/animal_assisted_activity.asp (last visited Feb. 15, 2010) [hereinafter AVMA Guidelines]. The Delta Society, an organization that promotes the use of therapy and service animals, has a well-known program that trains and screens volunteers and their animals for visits to institutional environments. Delta Society, *Delta Society Programs*, <http://www.deltasociety.org/Page.aspx?pid=257> (last visited Feb. 15, 2010). Delta Society's Standards of Practice include provisions that require the handler to continually evaluate the effect of interactions with people on the animal's health and the animals are to be treated "with respect and in a responsible manner." DELTA SOCIETY, *STANDARDS OF PRACTICE FOR ANIMAL-ASSISTED ACTIVITIES AND ANIMAL-ASSISTED THERAPY* 43–44 (1996).

63. AVMA Guidelines, *supra* note 62 (articulating concerns over the bi-directional transfer of diseases among other issues).

64. *Id.* (including interventions consisting of a "vacation" for the animal, more breaks or discontinuing the activity).

needed by their handlers for the entire lifespan of the animal. It is important, therefore, to plan for the retirement of the animal.⁶⁵

By analogy, one professor has distinguished between different forms of AAT, arguing that some are morally unobjectionable and others should be abolished.⁶⁶ The liberationist perspective that Professor Zamir utilizes takes a broad view of the issue.⁶⁷ Professor Zamir breaks down the impact on various species that are used for AAT and raises concerns over some of the training methods used.⁶⁸ By considering the interests of the animals, Professor Zamir concludes that AAT programs that utilize horses and dogs are consistent with the welfare of those animals.⁶⁹ In contrast, he deems AAT programs that use aquarium-kept dolphins,⁷⁰ monkeys, snakes, reptiles, and birds exploitive regardless of whether any abuse of the animals takes place.⁷¹

One commentator has suggested that the following standards be used by programs training animals for all types of services:

- Therapy/service animals are only to be considered where other forms of therapy/assistance have failed, or when there is a particular reason for such animals (e.g. their socializing effects; a special

65. Cf. Wenthold & Savage, *supra* note 16, at 73–74.

66. Zamir, *supra* note 50, at 195.

67. *Id.* at 180. Professor Zamir states that the liberationist stance “ascribes value not only to the life of the animal but also to the quality of such a life—as well as to the value of the animal’s freedom. . . .” *Id.* Under the liberationist perspective the use of animals to treat humans is potentially immoral in several ways including limiting the animal’s freedom, training issues, depriving animals of the animal’s kin (focusing on simians) and injury. *Id.* at 181–82.

68. *Id.* at 181, 184–85, 189, 195. Professor Zamir cites to the prolonged period of training needed for dogs and monkeys and the necessity of “breaking” a horse for utilization in a hippotherapy program. *Id.* at 181.

69. *Id.* at 195. Professor Zamir argues that the welfare of dogs is promoted by the relationship and that horses “gain much” from the relationship they have with humans. *Id.* at 189. Although not stated in the conclusion, it appears that cats would also be included in this category. *Id.* at 183 (balancing what cats and dogs lose from their status as pets with the benefits they gain). Professor Zamir stated that there is a broad, moral vindication of forms of AAT that rely on horses and dogs as “[a] world in which practices like AAT exist is an overall better world for these beings than one that does not include them . . .” *Id.* at 195.

70. Professor Zamir distinguishes between programs where the dolphins are not removed from their natural habitat and no coercion is used and does not include such programs in his argument against the use of dolphin AAT. *Id.* at 198 n.17.

71. *Id.* at 189, 195. Professor Zamir focuses on the fact that these animals can exist in the wild, and by using them for therapy, their social needs and freedoms are seriously curtailed. *Id.* at 189; *see also* Serpell et al., *supra* note 53, at 457–58 (raising ethical concerns about the use of nondomestic species).

relationship of the patient or disabled person to companion animals; cost effectiveness).

- Only domesticated animals which have been trained using techniques of positive reinforcement, and which have been, and will continue to be, properly housed and cared for . . . will be used.
- Safeguards to prevent adverse effects of working are in place (e.g. stress prevention measures, suitable technical equipment etc.).⁷²

The discussion of the ethical issues relating to the use of service animals is in its incipient stage. Presumably as commentators continue their philosophical work on the more general issue of humans' use of animals, this discussion will move forward as well. Currently, from an ethical perspective, so long as the animals are well cared for, there appears widespread acceptance of the use of domesticated animals to assist humans with disabilities.

III. THE AMERICANS WITH DISABILITIES ACT—THE DOJ'S DEFINITION OF SERVICE ANIMAL

When the DOJ proposed the regulations for the ADA in June 2008, it stated that the amendments were intended to adopt changes "necessary to address issues that have arisen since the publication of the original regulations. . . ."⁷³ In addition, the proposed rules were intended to provide "greater consistency between the ADA Standards and other federal and state accessibility requirements."⁷⁴ The DOJ sent its revised regulations (i.e., the final rules under the process) to the Office of Management and Budget (one of the last steps in the rulemaking process), but withdrew them at the request of the new presidential administration.⁷⁵

72. Turner, *supra* note 53, at 28; *see also* Serpell et al., *supra* note 53, at 471–72 (setting forth ethical guidelines for the care and supervision of animals used in AAT or AAA programs).

73. DOJ Proposes New Rules, *supra* note 5.

74. *Id.* Currently, Title II of the ADA does not include any specific language regarding service animals. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,477 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 35). The proposed rules would add to the Title II regulations the same definition for service animals that is being proposed for the Title III regulations. *Id.* This Article focuses on the revisions to Title III, although the same arguments apply to the regulations for Title II.

75. DOJ Sends Revised ADA Title II, III Regs to OMB for Review, SECTION 504 COMPLIANCE ADVISOR, Feb. 1, 2009 (discussing the rulemaking process). The DOJ announced that on January 21, 2009, it notified the Office of Management and Budget (OMB) that it had withdrawn its draft final rules from the OMB review process in response to a memorandum from President Obama's Chief of Staff "directing the Executive Branch agencies to defer publication of any new regulations until the rules are reviewed and approved by officials appointed by President Obama." Department of Justice, Proposed ADA Regulations Withdrawn from OMB Review, <http://www.ada.gov/ADAregswithdraw09.htm> (last visited Feb. 15, 2010).

This Part will first analyze the proposed regulations. It will then set forth examples of recent case law that illustrate the need for further clarification of the law relating to service animals. Three significant issues arose during the rulemaking process. The first issue is the language relating to the training or purpose of service animals.⁷⁶ The second issue is the DOJ's clarification that "emotional support animals" are excluded from ADA coverage.⁷⁷ The final issue is the DOJ's proposal to restrict the species of service animals that would be covered under the ADA.⁷⁸

A. *Training and Purpose of Service Animals Under the Americans with Disabilities Act*

The regulations implementing the ADA state the following:

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection⁷⁹ or rescue work, pulling a wheelchair, or fetching dropped items.⁸⁰

Although the DOJ did not propose to change the language "individually trained," it received comments on this terminology.⁸¹ Some commentators have proposed that the DOJ adopt behavior or training standards to enable the public to differentiate between service animals and pets.⁸² These training comments would also be applicable to the issue of allowing for species other

76. See *infra* notes 79–93 and accompanying text.

77. See *infra* notes 94–106 and accompanying text.

78. See *infra* notes 107–174 and accompanying text.

79. The DOJ received many comments requesting that the "minimal protection" language be removed. NPRM Title III, *supra* note 5, at 34,521. The DOJ acknowledged that despite its efforts, the minimal protection language has been misinterpreted and, in response to such concern, would interpret the language to exclude attack dogs that pose a direct threat to others. *Id.*; see, e.g., Comment from Wells B. Jones, Chief Executive Officer, Guide Dog Found. for the Blind, Inc., on DOJ's NPRM for Title III (Aug. 18, 2008) [hereinafter Public Comment, GDFB], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2717.1) (stating that it is "strongly opposed to the retention of the words 'minimal protection' or any mention of 'protection' because that term has a very specific meaning within the dog training industry [namely] aggression training").

80. 28 C.F.R. § 36.104 (2008).

81. NPRM Title III, *supra* note 5, at 34,524.

82. *Id.*

than dogs to act as service animals.⁸³ The recommendation for training was often tied to the service animal performing a task.⁸⁴ The DOJ stated it was “not inclined to establish a standard that all service animals must meet” and “does not plan to change the current policy of no formal training or certification requirements”⁸⁵

The DOJ received many comments on the language relating to individual training to “do work or perform tasks”⁸⁶ that was in the existing regulations.⁸⁷ Some commentators recommended that the language “do work” be eliminated from this definition.⁸⁸ An example is the comment by the Guide Dog Foundation for the Blind, Inc. (GDFB) that cited to a prior DOJ interpretive guidance document that excluded the phrase from the definition of a service animal.⁸⁹ The GDFB focused on task training as being fundamental to the definition of a service animal.⁹⁰ The GDFB raised concerns that the interpretation of “work” could be a nonphysical form of

83. Comment from Joan Froling et al., Coalition of Assistance Dog Orgs., on DOJ’s NPRM for Title III (July 30, 2008) [hereinafter Public Comment, CADO], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-0467.1).

84. For example, the training that was suggested by CADO consists of the following:

TRAINING:

- * Animal is specifically trained to perform more than one task to mitigate (lessen) the effects of its partner’s disability; said disability being any condition as described by and covered under the ADA that substantially impairs one or more major life functions.
- * Animal obeys the commands of its handler.
- * Animal works calmly and quietly on a harness, leash or other tether.
- * Animal has been specifically trained to perform its duties in public and is accustomed to being out in public.
- * Animal must be able to lie quietly beside the handler without blocking aisles, doorways, etc.
- * Animal is trained to urinate or defecate on command.
- * Animal stays within 24” of its handler at all times unless the nature of a trained task requires it to be working at a greater distance.

Id. at app. A. CADO also set forth the following standards for service animals:

PUBLIC APPROPRIATENESS:

- * Animal is clean and does not have a foul odor.
- * Animal does not urinate or defecate in inappropriate locations.

BEHAVIOR:

- * Animal shall not make unsolicited contact with members of the general public.
- * Animal’s conduct does not disrupt the normal course of business.
- * Animal works without unnecessary vocalization.
- * Animal shows no aggression towards people or other animals.
- * Animal does not solicit or steal food or other items from the general public.

Id.

85. NPRM Title III, *supra* note 5, at 34,524.

86. 28 C.F.R. § 36.104 (2008).

87. NPRM Title III, *supra* note 5, at 34,521.

88. *Id.*

89. Public Comment, GDFB, *supra* note 79 (“[W]e urge the Department to reconsider the retention of ‘do work’ in the proposed new definition.”).

90. *Id.*

assistance and would “further confuse the distinction between service animals and pets.”⁹¹

In proposing that this language in the definition remain the same, the DOJ cited to psychiatric service dogs that can assist individuals with dissociative identity disorders to “remain grounded in time or place”⁹² and stated that it believed the current definition was “inclusive of the varied services provided by working animals on behalf of individuals.”⁹³

B. The Exclusion of “Emotional Support” Animals Under the Americans with Disabilities Act

Closely related to the language regarding the training and purpose of the service animal is the DOJ’s formalization of its position on “emotional support/comfort” animals.⁹⁴ The DOJ’s addition of the text stating that the term service animal “includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities” was intended to clarify its position that emotional support animals are excluded from ADA coverage.⁹⁵

The DOJ stated that “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.”⁹⁶ The DOJ recognized that other federal agency regulations, for example, in the areas of housing and air travel, may provide for increased access for animals that would not meet the DOJ’s definition of service animals.⁹⁷

91. *Id.* The GDFB began this section of its public comment by stating that “[t]o eliminate further confusion and abuse regarding service animals . . .” *Id.*

92. NPRM Title III, *supra* note 5, at 34,521. This “grounding” language was analyzed in the public comment by CADO, which raised concerns that the “grounding” language was ambiguous in that it was contradictory to the prior emphasis on tasks and stated that if “the DOJ persists in using grounding, CADO feels it will most certainly undo all the progress accomplished by the 2002 interpretative guidance document . . .” Public Comment, CADO, *supra* note 83; *see also* Comment from Melissa Winkle, Dogwood Therapy Servs., Inc., on DOJ’s NPRM for Title III [hereinafter Public Comment, DTS], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2828.1) (stating that the “[g]rounding” is not necessary within the current explanations, which have been provided to differentiate between psychiatric service dogs which are task trained and mere pets that provide comfort”).

93. NPRM Title III, *supra* note 5, at 34,521.

94. *Id.* at 34,516.

95. *Id.*

96. *Id.*

97. *Id.* at 34,516, 34,522; *see infra* notes 213–276 and accompanying text (discussing the rules relating to assistance animals under the FHA); *infra* notes 277–313 and accompanying text (discussing the rules relating to emotional support animals under the ACAA).

As with the other changes that would effectively narrow the coverage of service animals under the rules, as illustrated by the public comments, many advocates for persons with disabilities disagree with the DOJ's position on emotional support animals.⁹⁸ Some of the public comments focused on the definition of "work," stating that "[t]he active provision of comfort and/or emotional support to a qualified individual with a disability whose disability results in an inability to self-soothe or de-escalate and control emotions is 'work' that benefits the individual with the disability and should be recognized as such."⁹⁹ Another comment focused on the connection between the animal and the therapeutic effect on a disability.¹⁰⁰

Another objection to the exclusion of emotional support animals focused on the lack of individualized inquiry that the ADA requires.¹⁰¹ In addition, several commentators articulated that the proposed exclusion would lead to increased discrimination against individuals with non-apparent disabilities because of the difficulty in distinguishing between psychiatric service animals and emotional support/comfort animals.¹⁰²

There were some public comments supporting the clarification to exclude emotional support animals. There is concern by some service

98. See, e.g., Comment from Mary Faithfull, Executive Dir., Advocacy, Inc., on DOJ's NPRM for Title III (Aug. 18, 2008), available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1579.1) (opposing strongly the exclusion of emotional support animals from coverage under the ADA).

99. Comment from Kenneth Shiotani, Nat'l Disability Rights Network, on DOJ's NPRM for Title III [hereinafter Public Comment, NDRN], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1644.1); see also Comment from Annaliese Dolph, Senior Att'y, Disability Rights N.C., on DOJ's NPRM for Title III (Sept. 11, 2008) [hereinafter Public Comment, DRNC], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1494.1) (using the same language).

100. Comment from Kevin Underhill, Shook, Hardy and Bacon, LLP, on DOJ's NPRM for Title III (Aug. 18, 2008) [hereinafter Public Comment, PAWS], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1546.1) (focusing on the "nature of a person's disability . . . and whether the requested accommodation would legitimately address those difficulties"); see also Comment from Michelle Krajewski et al., The Whole Person, Inc., on DOJ's NPRM for Title III (Aug. 18, 2008), available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1532.1) (discussing the use of animals by people with psychiatric disorders such as severe anxiety "who can only access public goods and services or government programs because their service animal allows them to venture into public without debilitating panic attacks").

101. Comment from Disability Policy Collaboration on DOJ's NPRM for Title III (Aug. 18, 2008) [hereinafter Public Comment, DPC], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1590.1) (stating that a blanket exclusion was "inconsistent with the basic tenets of the ADA"); see also Comment from Jennifer Mathis et al., Bazelon Ctr. for Mental Health Law, Nat'l Alliance on Mental Illness, Mental Health Am., on DOJ's NPRM for Title III (Aug. 18, 2008) [hereinafter Public Comment, Bazelon], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1458.1) (using the same language).

102. Public Comment, DRNC, *supra* note 99; see also Public Comment, DPC, *supra* note 101 (stating that the proposed exclusion "simply invites covered entities to disallow the use of legitimate service animals").

animal organizations that providing for emotional support animals to be covered under the ADA would undermine the right to more traditional service animals.¹⁰³ In this regard, some commentators focus on the distinction between task trained animals and animals that do not perform tasks.¹⁰⁴

Some organizations representing places of public accommodation, while supporting the exclusion of emotional support animals, remain concerned about the ability to distinguish between psychiatric service animals and emotional support animals.¹⁰⁵ The DOJ's response was to expressly incorporate its prior policy interpretation stating, "[A] public accommodation must not ask about the nature or extent of a person's disability, nor require proof of service animal certification or licensing, but . . . may ask (i) [i]f the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform."¹⁰⁶

103. See Public Comment, PAWS, *supra* note 100 (stating that "[i]t appears that the primary concern of the service-dog organizations that have recently submitted comments is to avoid undermining the right to more traditional service animals . . .").

104. See, e.g., Comment from Ed Eames, President, Int'l Ass'n of Assistance Dog Partners, on DOJ's NPRM for Title III [hereinafter Public Comment, IAADP], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-0341.1) (applauding the DOJ's statement on emotional support animals and encouraging the DOJ to consistently support the distinction between "task training to mitigate the effects of an individual's disability on the one hand, and [the] mere presence [of an animal] on the other"); Public Comment, GDFB, *supra* note 79 (discussing the issue in connection with the "do work" language in the definition and stating that "it is our position that such individuals [for example persons with psychiatric disabilities] . . . should not be lumped in with those who wrongfully claim that the ADA sanctions public access for them and their non-task trained pets").

105. See, e.g., Comment from Donna M. Garren, Vice President, Health and Safety Regulatory Affairs, Nat'l Rest. Ass'n, on DOJ's NPRM for Title III, available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2634.1) (stating "[l]eft unaddressed is precisely how a covered facility . . . is to distinguish between a psychiatric service animal . . . and a comfort animal"); Comment from Faith A. Cristol, Vice President, Retail Indus. Leaders Ass'n, on DOJ's NPRM for Title III (Aug. 18, 2008), available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2700.1) (requesting clarification on the permissible inquiries that can be made and actions that can be taken if the handler refuses to respond to permissible questions); Comment from Richard Block, Santa Barbara Zoo, on DOJ's NPRM for Title III (Aug. 15, 2008), available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2457.1) (supporting narrowing the definition, stating it is difficult to control the admission of animals, and that "more restrictive definitions would make our job easier and might help avoid stressful interactions with owners").

106. NPRM Title III, *supra* note 5, at 34,520.

C. *Acceptable Species of Service Animals Under the Americans with Disabilities Act*

The DOJ has proposed the following revisions to the current definition of service animal. It would add “other common domestic” animal¹⁰⁷ and that “service animal” does not include wild animals, reptiles, rabbits, farm animals, amphibians, or rodents.¹⁰⁸ The definition would further clarify that wild animals include “nonhuman primates born in captivity” and farm animals include “any breed of horse, pony, miniature horse, pig, and goat.”¹⁰⁹

1. Other Common Domestic Animals—Unless the Animal Is Too Big or Too Heavy?

One of the questions that the DOJ requested comments on was whether it should impose “a size or weight limitation for common domestic animals, even if the animal satisfies the ‘common domestic animal’ prong of the proposed definition.”¹¹⁰ The DOJ did not reference the response to this question in its report, but several groups advocating for the rights of persons with disabilities opposed any new restriction.¹¹¹ One public comment pointed to the “individualized inquiry into the reasonableness of using a service animal in a particular set of circumstances” that is already provided for under the ADA.¹¹² Another comment referenced the difficulty in implementing such a size or weight requirement.¹¹³

107. *Id.* at 34,477. A few commentators questioned how the language on “dogs and other common domesticated animals” and the individually trained language would be reconciled for cats. *See, e.g.*, Public Comment, PAWS, *supra* note 100 (questioning the applicability of the training test to cats that provide therapeutic benefits as dogs). *But see Scene: 911 Dialing Feline Proves You Can Train a Cat*, KAN. CITY STAR, Jan. 17, 2006, at E1 (discussing a cat that speed dialed 911 after the cat’s owner who is disabled fell from his wheelchair); *see also* Patty Fisher, *Believe It or Not, You Can Train a Cat*, SAN JOSE MERCURY NEWS, May 21, 2007, at 1B (discussing the use of clicker training to train cats to do particular tasks).

108. NPRM Title III, *supra* note 5, at 34,477–78.

109. *Id.*

110. *Id.* at 34,479.

111. *See, e.g.*, Comment from Consortium for Citizens with Disabilities on DOJ’s NPRM for Title III (Aug. 18, 2008) [hereinafter Public Comment, Consortium], *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1499.1) (citing to the individualized inquiry already allowed under the ADA); Public Comment, DTS, *supra* note 92 (“Individuals have varying degrees of disabilities and therefore, needs. Many breeds can perform tasks.”); Public Comment, IAADP, *supra* note 104 (stating that the “size of a common domestic animal like an assistance dog is a matter of individual choice/necessity and may be related to the nature of the disability”).

112. Public Comment, Bazelon, *supra* note 101. Although not specifically referencing the individualized inquiry allowed by the ADA, another comment responding to the DOJ’s question on size or weight restriction stated, “POSSIBLY. I think it would be appropriate to specify that any service animal is expected to be of a size that can be accommodated within the normal spaces

There were also commentators that believed the DOJ should impose a size or weight limitation, citing to safety and comfort problems for other patrons.¹¹⁴ In addition, one commentator recommended that the DOJ limit the number of service animals per individual to one, along with a size limitation for that animal.¹¹⁵

2. Other than Common Domesticated Animals

The DOJ articulated in the proposed rulemaking that when the regulations for the ADA were promulgated in 1991, there was not a definition of the parameters of acceptable animal species and that “few anticipated the variety of animals that would be used in the future.”¹¹⁶ The DOJ provided examples of pigs, miniature horses, snakes, and iguanas being used as service animals.¹¹⁷ The DOJ articulated that it had followed closely the issue of how many unusual animals were being claimed as service animals and believed that the regulations needed clarification.¹¹⁸

The public comments on the proposed rulemaking reinforce the controversy over limiting the species of animals that can be used as service animals. Some commentators to the proposed rulemaking asserted that

provided to one person in a public accommodation (restaurant seats, airline or bus seats, theatre, etc.)” Comment from Julie Nye, Chief Executive Officer, Dogs for Autism, on DOJ’s NPRM for Title III, *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2650.1).

113. Public Comment, GDFB, *supra* note 79 (referring to the difficulty in developing such a limitation and the burden on public entities trying to limit such a definition).

114. Comment from G. Kendrick Macdowell, Vice President, Gen. Counsel, Nat’l Ass’n of Theatre Owners, Inc., on DOJ’s NPRM for Title III (Aug. 18, 2008), *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2646.1) (reporting on an incident with a Bull Mastiff in a crowded theatre where the dog filled the floor space in front of the person with a disability and the floor space in front of the next seat); *see also* Comment from Fred Schwartz, President, Asian Am. Hotel Owners Ass’n, on DOJ’s NPRM for Title III, *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0015-2674.1) (stating it “believes it is advisable for the Department to impose a size or weight limitation for common domestic animals”).

115. Comment from Miami Dade Transit Office of Civil Rights and Labor Relations on DOJ’s NPRM for Title III (Aug. 18, 2008), *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1460.1) (recommending the DOJ restrict the size of service animals to fit a “32 inches by 48 inches envelope” and limiting one service animal per customer).

116. NPRM Title III, *supra* note 5, at 34,478.

117. *Id.*

118. *Id.* *But see infra* note 298 and accompanying text (discussing the DOT’s ACAA rulemaking process where the DOT finds that reports of unusual service animals have been disproportionate to the frequency that such animals have been an issue).

“limiting the number of allowable species would help stop erosion of the public’s trust, which results in reduced access for many individuals with disabilities”¹¹⁹ There appears to be little resistance to excluding from the definition of service animals certain species that cannot be trained to do work or perform tasks, such as reptiles, amphibians, and insects.¹²⁰ As discussed below, several commentators stated that the proposed definition was too narrow as it related to some other species of animals.¹²¹

3. When Is a Horse Not Just a Horse?

Of the category of animals considered “farm animals,” it appears likely that the most significant impact of the new restrictive definition will be on persons with disabilities who use miniature horses as service animals.¹²² The Guide Horse Foundation (GHF) reports a “strong demand for guide horses.”¹²³ The interest in miniature horses as service animals is due to several factors. Some of the reasons a person with a disability may prefer to use a horse rather than a dog include (a) several allergies to traditional guide animals, such as dogs, (b) a phobia of dogs, (c) longer lifespan of a horse (providing a longer working life of the horse compared to a dog),¹²⁴ and (d) other characteristics of horses, including the calm nature of a trained horse,

119. NPRM Title III, *supra* note 5, at 34,478.

120. *Id.* (referring to reptiles); *see also* Public Comment, NDRN, *supra* note 99 (referring to insects, rodents, and amphibians); Comment from Jamey George, Executive Dir., The Freedom Ctr., Inc., on DOJ’s NPRM for Title III (Aug. 15, 2008) [hereinafter Public Comment, Freedom Center], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1595.1) (referring to insects, rodents, and amphibians).

121. *See infra* notes 122–174 and accompanying text (discussing the use of horses and nonhuman primates).

122. Comment from Marilyn Golden, Policy Analyst, Disability Rights Educ. and Defense Fund, on DOJ’s NPRM for Title III [hereinafter Public Comment, DREDF], available at <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1594.1) (stating that “[m]iniature horses have been used as service animals by the disability community for some time, particularly the blind community”).

123. The Guide Horse Foundation, <http://www.guidehorse.org/> (last visited Feb. 15, 2010).

124. This factor is important as the cost of the training of a service animal can be substantial. The estimate for the cost of an organization training a service animal ranges considerably. For example, the Children’s Village estimates the cost of a service animal at \$10,000 to \$15,000. Assistance Dog Training Program, <http://www.childrensvillage.org/programs-dog-more.htm> (last visited Feb. 15, 2010). Texas Hearing and Service Dogs estimates the cost of training their assistance dogs at \$17,500. Texas Hearing & Service Dogs, What We Do, <http://www.servicedogs.org/whatwedo/public.html> (last visited Feb. 15, 2010). Another sample organization stated the cost of preparing a service dog was \$18,000. Wenthold & Savage, *supra* note 16, at 69. Susquehanna Service Animals estimated that the actual cost to train and place a service dog is \$20,000. Susquehanna Service Dogs, <http://www.keystonehumanservices.org/ssd/ssd.php> (last visited Feb. 15, 2010). Carolina Canines estimates the cost of its service dogs at more than \$40,000. Service Dog FAQ, <http://www.carolinacanines.org/index.php?c=17> (last visited Feb. 15, 2010). One recent article stated that the placement of a guide dog for the blind may cost up to \$60,000. Rebecca Skloot, *Creature Comforts*, N.Y. TIMES, Jan. 4, 2009, at 34.

and the vision, memory, focus, and stamina of horses.¹²⁵ For persons with physical disabilities, miniature horses have the strength to provide support and can pull wheelchairs.¹²⁶ Miniature horses can be housebroken, but also can be stabled outside the home if the handler prefers.¹²⁷ The GHF also states that guide horse users have reported that because horses are not generally associated as pets, guide horses are immediately recognized as working service animals, thus facilitating access to public places.¹²⁸

One example of the resistance to eliminating miniature horses from the definition of service animals is found in the comments to the proposed rulemaking by the Disability Rights Education and Defense Fund (DREDF), stating that it did not support the exclusion of miniature horses from the definition of service animal.¹²⁹

4. No “Monkeying” Around

Another species of animal frequently referenced in the public comments was the monkey.¹³⁰ As discussed above, the use of nonhuman primates as service animals is more controversial from an ethical perspective than the use of common domesticated species such as canines or equines.¹³¹

The DOJ stated that it believed it was necessary to eliminate from coverage all wild animals whether the animal was born or bred in captivity, or in the wild.¹³² The DOJ cited to the AVMA’s position statement against the use of monkeys as service animals that states, “The AVMA does not support the use of nonhuman primates as assistance animals because of

125. See The Guide Horse Foundation, <http://www.guidehorse.org/> (last visited Feb. 15, 2010). The GHF states that these horses are very clean, shedding only twice a year, and do not get fleas. The GHF also reports that one poll found that twenty-seven percent of “respondents would prefer a Guide Horse if they required a guide animal.” *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Public Comment, DREDF, *supra* note 122; Public Comment, Freedom Center, *supra* note 120 (opposing the specific exclusion of “farm animals,” citing to the use of miniature horses); Public Comment, NDRN, *supra* note 99 (opposing the specific exclusion of “farm animals,” citing to the use of miniature horses).

130. See, e.g., Public Comment, Consortium, *supra* note 111 (citing to the use of monkeys by persons with spinal cord injuries); Public Comment, Bazelon, *supra* note 101 (stating that monkeys are frequently used as service animals).

131. Zamir, *supra* note 50, at 189, 195 (discussing the moral and ethical issues of using animals in therapy).

132. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,478 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

animal welfare concerns, the potential for serious injury, and zoonotic risks.”¹³³

a. The Arguments Allowing (Certain) Nonhuman Primates to Be Included in the Definition of Service Animal

One organization has been training Capuchin service monkeys for use by severely physically disabled individuals for nearly thirty years.¹³⁴ In response to the concerns raised by the DOJ, Helping Hands described, in its public comment, the type of monkey and training provided.¹³⁵ Capuchin monkeys are described as small, non-aggressive and natural tool-users in the wild.¹³⁶ Helping Hands places service monkeys with individuals who have physical disabilities that need assistance with tasks that service dogs cannot provide.¹³⁷ These tasks include pushing buttons on a phone and getting a drink of water.¹³⁸ Although Helping Hands acknowledged that their service monkeys “rarely leave the recipient’s home,” there are times that the monkeys would need access to places of public accommodation.¹³⁹

Helping Hands’ public comment directly addressed the AVMA’s position statement referenced by the DOJ. In response to the language in the AVMA’s position statement regarding “animal welfare concerns,” Helping Hands distinguished between the service monkeys in their program and the treatment of other nonhuman primates as pets.¹⁴⁰ Helping Hands set out the care the monkeys in their program receive during the two-to-four-year

133. American Veterinary Medical Association, Nonhuman Primates as Assistance Animals, http://www.avma.org/issues/policy/nonhuman_primates.asp (last visited Feb. 15, 2010); *see also* NPRM Title III, *supra* note 5, at 34,478.

134. Comment from Megan Talbert, Chief Operating Officer, Helping Hands: Monkey Helpers for the Disabled, Inc., on DOJ’s NPRM for Title III, at 3–5 (Aug. 15, 2008) [hereinafter Public Comment, Helping Hands], *available at* <http://www.regulations.gov/search/Regs/home.html#home> (Document ID: DOJ-CRT-2008-0016-1608.1) (providing background on Helping Hands Capuchin service monkeys). The public comment also states that the organization has placed 131 primates from the inception of the program. *Id.* at 14.

135. *Id.* at 4–5, 9.

136. *Id.* at 9. Helping Hands states that these monkeys are approximately six to eight pounds as adults. *Id.* Their natural tool using in the wild makes them “well-suited to the manual manipulation tasks that they are called upon to perform as service animals.” *Id.*

137. *Id.* at 4, 6. Service monkeys are also used by individuals with disabilities who, due to severe allergies, are unable to utilize assistance dogs. *Id.* at 6. Well cared for Capuchin monkeys can live to be between thirty and forty years old. *Id.* at 9. Helping Hands reports that some of its established placement pairs have been together for over twenty years. Helping Hands, Our History, <http://www.monkeyhelpers.org/ourhistory/> (last visited Feb. 15, 2010).

138. Public Comment, Helping Hands, *supra* note 134, at 4.

139. *Id.* at 7. Helping Hands also stated that if service monkeys were not covered under the ADA definition, it would impair its ability to obtain necessary state and local licenses. *Id.* at 6.

140. *Id.* at 8–9. Helping Hands referenced the problem of nonhuman primates becoming larger and more difficult to handle being those that are “relegated to crates in the owner’s home where they do not receive the socialization, exercise or enrichment they require.” *Id.* at 9.

training period and also stated that there is an extensive guide for the care of the monkey in a recipient's home.¹⁴¹ The monkeys are "individually trained using only positive reinforcement and affection."¹⁴² Helping Hands service monkeys "spend the majority of their time at the recipient's home outside their crates . . . actively engaged in assisting and performing tasks . . ."¹⁴³

Helping Hands also addressed the concern raised by the AMVA of having access to primate-knowledgeable veterinarians.¹⁴⁴ Helping Hands stated that it provides assistance and guidance to veterinarians to ensure that there is proper care available for the monkeys it places.¹⁴⁵ Helping Hands also stated that its monkeys are "provided with lifetime medical care . . . including all necessary care for chronic illnesses and geriatric care" and are "given all necessary respite and retirement care."¹⁴⁶

In response to concerns over human safety and zoonotic risks, Helping Hands distinguishes its service monkeys from other nonhuman primates.¹⁴⁷ Helping Hands points to the fact that in the nearly thirty years that it has placed service monkeys with persons with disabilities, "there has *never* been a serious human injury caused by a Helping Hands service monkey."¹⁴⁸ Regarding zoonotic risks, Helping Hands referenced the fact that its monkeys are born in captivity in the United States and have ongoing veterinary care and testing.¹⁴⁹ Helping Hands Veterinary Advisory

141. *Id.* at 10. A service monkey can be removed from a home if its animal welfare policies are not followed. *Id.* Helping Hands retains ownership of the monkeys in its program. *Id.* at 5.

142. *Id.* at 10. In its description of Capuchin monkeys' suitability for service animal work, the Helping Hands letter referenced the fact that, in their natural habitat, this type of monkey will leave its pack as an adult; thus, placement in a training center or recipient's home does not lead to "stress caused by separation from other troop members." *Id.* at 9.

143. *Id.* Helping Hands states that as a result of this activity, "Helping Hands service monkeys receive ample physical and mental stimulation and social interaction." *Id.*

144. *Id.* at 10.

145. *Id.*

146. Meet Our Monkeys, <http://www.monkeyhelpers.org/ourfamily/monkeys/> (last visited Feb. 15, 2010). In recent testimony before a U.S. House of Representatives subcommittee, a representative of the AVMA stated that out of its 76,000 members, approximately 170 work with or come into contact with nonhuman primates on a regular basis, with the majority of those veterinarians employed by zoos or research institutions. *H.R. 2964, Captive Primate Safety Act; and H.R. 5534, Bear Protection Act of 2008: Hearing Before the Subcomm. on Fisheries, Wildlife & Oceans of the H. Comm. on Natural Resources, 110th Cong. 8, 39 (2008)* [hereinafter *CPSA Legislative Hearing*] (statement of Gail Golab, Director, American Veterinary Medical Association), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhr11041235/pdf/CHRG-110hhr11041235.pdf>.

147. Public Comment, Helping Hands, *supra* note 134, at 9.

148. *Id.* at 11. Helping Hands reiterated that its Capuchin monkeys are small, docile, and highly trained. *Id.*

149. *Id.* at 11–12. The importance of a captive population is that the Helping Hands service

Committee stated that “[n]o recipient or care giver has been injured or contracted any infectious disease from these animals.”¹⁵⁰

b. Arguments Against Nonhuman Primates Being Used as Service Animals

The arguments against nonhuman primates being used as service animals generally are not directed specifically at the Helping Hands program or the type of monkey used in that program. Because there are media reports of other types of nonhuman primates being used as service animals, the more general concerns about having nonhuman primates interacting with humans must be addressed. The concerns relate to public health issues and the welfare of the nonhuman primates.

A source for information regarding issues relating to nonhuman primates can be found in recent testimony on the proposed legislation titled the Captive Primate Safety Act (CPSA).¹⁵¹ The CPSA would prohibit the interstate trade of nonhuman primates.¹⁵² During that testimony, the Director of the Animal Welfare Division of the AVMA (Dr. Golab) spoke in support of the CPSA.¹⁵³ Dr. Golab cited estimates that in the United States there are more than 15,000 nonhuman primates that are privately owned.¹⁵⁴

Dr. Golab reiterated the AVMA’s position that it does not support the use of nonhuman primates as service animals.¹⁵⁵ Dr. Golab stated that the

monkeys do not come in contact with other nonhuman primates—so they are not exposed to some of the diseases that capuchin monkeys in the wild may encounter. *Id.* According to the former head of viral pathology for the Centers for Disease Control and Prevention, there have been “a few cases of primate-lab workers contracting herpes B from macaques—mostly from being bitten—but no cases of people being infected by service monkeys, which are usually capuchins.” Skloot, *supra* note 124, at 34 (quoting Frederick Murphy). Note that the importation of nonhuman primates for the pet trade has been banned by federal regulation since 1975. *CPSA Legislative Hearing, supra* note 146, at 8.

150. Public Comment, Helping Hands, *supra* note 134, at 14; *see also CPSA Legislative Hearing, supra* note 146, at 14 (statement of Sian Evans, Director, DuMond Conservancy) (testifying that “[p]et primates are not a documented source of disease to humans”).

151. *See CPSA Legislative Hearing, supra* note 146. The Captive Primate Safety Act was reintroduced as H.R. 80, passed by the House of Representatives on February 24, 2009, and is currently awaiting action in the Senate. The Library of Congress, H.R. 80, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00080:@@L&summ2=m&/bss/111search.html> (last visited Feb. 15, 2010).

152. *CPSA Legislative Hearing, supra* note 146, at 1.

153. *Id.* at 6. Dr. Jane Goodall, Founder of the Jane Goodall Institute, testified to many of the same points that were raised by Dr. Golab, including the risk of disease transmission and injuries to humans from bites. *Id.* at 35 (statement of Dr. Jane Goodall, Founder, The Jane Goodall Institute).

154. *Id.* at 9. Another person testifying clarified that according to the Humane Society of the United States, the 15,000 figure references all privately owned primates, not just pet primates. Privately owned primates would include United States Department of Agriculture exhibitors and breeders. *Id.* at 16.

155. *Id.* at 9 (discussing the AVNA policy regarding the use of nonhuman primates as service animals and stating that the risk of “human injury and zoonotic disease are often greatest in the very

AVMA supports “limiting or prohibiting private ownership” of nonhuman primates.¹⁵⁶ In her written statement, Dr. Golab set forth the four categories of risks posed to and created by nonhuman primates that are privately owned.¹⁵⁷ These risks include “inadequate husbandry, physical injury to humans and other domestic animals, disease transmission, and ecosystem concerns.”¹⁵⁸

Regarding the risks of inadequate husbandry, Dr. Golab discussed the negative impact of taking infant primates from their mothers at an early age.¹⁵⁹ Dr. Golab also noted that as nonhuman primates age, their behavior can become unpredictable and aggressive, which may lead to more restrictive confinement.¹⁶⁰

In the ten-year period between 1995 and 2005, the Captive Wild Animal Protection Coalition reported 132 incidents of escapes of captive primates or injuries caused by captive primates.¹⁶¹ Reviews of the injuries that occurred from bites indicated that most occurred when nonhuman primates had contact with people other than their owners or trained caretakers and, in thirty-three percent of cases, severe lacerations, wound infections, or permanent complications resulted from the incident.¹⁶²

populations such animals serve”).

156. *Id.* at 7.

157. *Id.*

158. *Id.* at 9.

159. Dr. Golab stated that “baby primates may be taken away from their mothers when only hours or days old” to create suitable pets. *Id.*

160. *Id.* at 9. Dr. Golab stated that “[m]any nonhuman primates exhibit unpredictable behavior as they mature; males can become aggressive, and both males and females will strike, scratch, and bite to defend themselves and establish their place in the hierarchy of their peer group or surrogate human family.” *Id.* at 10. The Centers for Disease Control and Prevention (CDC) has studied the threat to public health from other types of monkeys. The CDC reports that both male and female macaque monkeys will bite, both to defend themselves and to establish dominance. Stephanie R. Ostrowski et al., *B-virus from Pet Macaque Monkeys: An Emerging Threat in the United States?*, 4 EMERGING INFECTIOUS DISEASES, Jan.–Mar. 1998, at 117–18; Skloot, *supra* note 124, at 34 (quoting Laura Kahn, a public health expert at the Woodrow Wilson School of Public and International Law at Princeton, who states that monkeys are “wild animals, and they’re dangerous”).

161. *CPSA Legislative Hearing, supra* note 146, at 10. In another statement, a member of Congress stated that “[d]uring the last decade there were 100 incidents reported of human injury by these animals, about 30 of which involved children.” *Id.* at 1 (statement of Hon. Madeleine Bordallo, Member, H. Comm. on Natural Resources); *see also* *Pruett v. Arizona*, 606 F. Supp. 2d 1065 (D. Ariz. 2009) (holding for the State of Arizona in a case where a woman argued that she was entitled to a reasonable accommodation to Arizona wildlife law in order to keep a chimpanzee in her home as a service animal). The *Pruett* case discussed the public safety concerns of helping the chimpanzee in a private home. *Id.*

162. *CPSA Legislative Hearing, supra* note 146, at 10.

Dr. Golab also discussed the risks of disease transmission, stating, “Each species of nonhuman primate has the capacity to introduce or spread illnesses that threaten human and domestic animal health.”¹⁶³ Dr. Golab discussed a lengthy list of viral, bacterial, fungal, and parasitic diseases that can be spread by nonhuman primates.¹⁶⁴ Included in this list were tuberculosis,¹⁶⁵ polio, yellow fever, and Hepatitis A.¹⁶⁶

The ecological risks that Dr. Golab discussed occur if a nonhuman primate escapes or is intentionally released in the wild.¹⁶⁷ These risks include contamination of water supplies and the possibility of becoming reservoirs of disease.¹⁶⁸

There was other testimony supporting the CPSA that often paralleled the issues raised by Dr. Golab.¹⁶⁹ The Chair of the Association of Zoos and Aquariums (AZA) Chimpanzee Species Survival Plan stated the AZA’s belief that “nonhuman primates cannot be properly maintained by individuals without the necessary resources or knowledge to care for them . . . [and] it presents significant health and safety risks to neighbors, children, and domestic pets in the community.”¹⁷⁰

Regardless of the potential risks, one legislator viewed the work of the Helping Hands organization as meriting an exception to the CPSA.¹⁷¹ In introducing an amendment to the language of the CPSA that would specifically exempt the Helping Hands organization from CPSA’s prohibition on interstate transport, Representative Young cited to Helping Hands’ work with disabled veterans.¹⁷²

163. *Id.*

164. *Id.*

165. Helping Hands states that it regularly tests for tuberculosis in the monkeys used in its program. Public Comment, Helping Hands, *supra* note 134, at 11.

166. *CPSA Legislative Hearing*, *supra* note 146, at 10–11. Other diseases that can be spread include poxviruses (including monkey pox and chicken pox), ringworm, and tapeworm. *Id.* at 10. Another possibility is the transmission of the “Herpes B” virus from macaque monkeys to humans. Ostrowski et al., *supra* note 160, at 117 (finding that seventy-three to one hundred percent of the captive adult macaque monkeys had seroprevalence of neutralizing antibodies to the B-virus).

167. Public Comment, Helping Hands, *supra* note 134, at 11.

168. *Id.*

169. *CPSA Legislative Hearing*, *supra* note 146, at 32–36 (focusing primarily on the welfare of the nonhuman primates but also raising public safety issues); *id.* at 52, 55–62 (statement of Wayne Pacelle, President and Chief Executive Officer, Humane Society of the United States) (discussing the threat to animal welfare, public safety, and public health and listing recent incidents involving primates injuring humans).

170. *CPSA Legislative Hearing*, *supra* note 146, at 64 (statement of Steve Ross, Supervisor of Behavioral and Cognitive Research, and Chair, Association of Zoos and Aquariums Chimpanzee Species Survival Plan, Lincoln Park Zoo).

171. Captive Wildlife Safety and Disabled Human Assistance Act, H.R. 6505, 110th Cong. (2008).

172. 154 CONG. REC. E1466 (daily ed. July 15, 2008) (statement of Rep. Young) (introducing the Captive Wildlife Safety and Disabled Human Assistance Act). The text of the bill passed by the

As seen above, there appears to be a split of authority as to the extent of the risks to public health and safety that may arise if nonhuman primates are kept by private individuals.¹⁷³ The DOJ's citation to the position of the AVMA indicates that it believes that the risks to broader public health and safety concerns may outweigh the benefits to individuals using nonhuman primates as service animals.

c. Is There an Appropriate Middle Ground on the Use of Nonhuman Primates as Service Animals?

Helping Hands does appear to recognize that there could be issues with some nonhuman primates acting as service animals. In its public comment, Helping Hands requested that the restrictions on wild animals be amended to provide an exception for "capuchin monkeys born in captivity and sourced from closed colonies that are individually trained for at least two years by an organization whose mission is to train capuchin monkeys to assist disabled individuals in day-to-day tasks."¹⁷⁴

D. Case Law Illustrates the Need for Clarification of the Regulations

As discussed above, one of the rationales for limiting the definition of service animals under the ADA is the continuing challenge of gaining access to public accommodations faced by persons with disabilities accompanied by dogs acting as service animals. Recent cases illustrate that there is still significant discrimination faced by persons with apparent disabilities accompanied by "traditional" service animals.

An example of a recent case, where a person who was blind and accompanied by his guide dog was denied accommodations, is *Hardesty v. CPRM Corp.*¹⁷⁵ In *Hardesty*, when the general manager of a hotel determined that the individuals renting the room had a dog, he told the men

House of Representatives provided for an exemption for the transportation of a "single primate of the genus *Cebus* that was obtained from and trained by a charitable organization to assist a permanently disabled individual with a severe mobility impairment." The Library of Congress, H.R. 80, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00080:@@L&summ2=m&/bss/111search.html> (last visited Feb. 15, 2010).

173. Compare *supra* note 150 and accompanying text (discussing Dr. Evan's testimony against the CPSA) with *supra* notes 151-170 and accompanying text (discussing the CDC's research and testimony for the CPSA).

174. Public Comment, Helping Hands, *supra* note 134, at 2. Obviously the service monkeys placed through the Helping Hands program would meet this definition.

175. 391 F. Supp. 2d 1067 (M.D. Ala. 2005).

that they could not have the dog in the room.¹⁷⁶ The individuals renting the room explained that the general manager could not refuse occupancy to them and showed him a book covering Alabama and federal laws on disability accommodation.¹⁷⁷ The individuals left the hotel but sued for discrimination and related claims, with the court granting summary judgment in favor of the defendant, but allowing the claims pursuant to the ADA to go to trial.¹⁷⁸

Some public accommodations continue to fail to appropriately train their employees.¹⁷⁹ In *Brown v. Lopez*, a legally blind individual assisted by his service dog was told that dogs were not allowed in a restaurant, even after the man had explained that he was blind and that his service animal accompanied him everywhere.¹⁸⁰ The appellate court emphasized that the “failure to accommodate constitutes discrimination and a violation of the ADA even when the failure to reasonably accommodate a disabled person is due only to neglect or indifference.”¹⁸¹

It is not surprising that there are also cases where there is an issue of whether an animal qualifies as a service animal.¹⁸² Many times these cases relate to an animal that does not appear to be a traditional guide dog, either because the person with the dog has a non-apparent disability or the type of dog is not typically used for that purpose.

The recent case of *Lentini v. California Center for the Arts, Escondido*, illustrates the difficulties that may be faced by persons using service animals other than as guide animals.¹⁸³ Lentini is a quadriplegic and uses a small Shih Tzu/Poodle mix (named Jazz) as a service animal.¹⁸⁴ Jazz would retrieve small dropped items and provide minimum protection¹⁸⁵ for

176. *Id.* at 1070.

177. *Id.* When the general manager was informed that he could be sued, he told one of the individuals to “go ahead and sue him.” *Id.*

178. *Id.* at 1075.

179. Appropriate training and policies are key to a public accommodation meeting its obligations under the ADA. An example is the *Stan v. Wal-Mart Stores, Inc.* case where a shopper sued alleging that challenges to her entry to stores with her service dog violated her rights under the ADA. 111 F. Supp. 2d 119 (N.D.N.Y. 2000). In the *Stan* case, although a shopper with a visual disability was questioned about her service animal when she entered into Wal-Mart and Sam’s Club stores, she was always able to complete her shopping. *Id.* at 121. The court found that the defendants in this case had the proper policies and had counseled their employees with respect to dealing with individuals with disabilities; thus the defendants’ motion for summary judgment was granted. *Id.* at 127.

180. *Brown v. Lopez*, No. 04-02-00664-CV, 2003 WL 21918587 (Tex. App. Aug. 13, 2003). It is not uncommon to find cases in which a person with a disability, accompanied by a service animal, alleges that he or she was denied service at a restaurant. *See, e.g., Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115 (9th Cir. 2000) (discussing attorneys’ fees following settlement of a suit based on a blind patron being refused entrance to a restaurant).

181. *Brown*, 2003 WL 21918587, at *2.

182. *See, e.g., Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004).

183. *Id.*

184. *Id.* at 839.

185. *See supra* note 79 (discussing the controversy over the issue of the inclusion of the term

Lentini.¹⁸⁶ Although the *Lentini* case focused primarily on the determination of what would be required as a reasonable accommodation,¹⁸⁷ it is noteworthy because of the facts that developed during the case relating to the perception of the role of the service animal.

An illustration of the challenges faced by Lentini is that she attended approximately ten or eleven events at the Center during one season and on each of those occasions was told she could not enter the Center with Jazz.¹⁸⁸ Only after she explained that Jazz was a service dog were they admitted to the Center.¹⁸⁹ In addition, the district court found that the House Manager at the Center told Lentini that “only seeing-eye dogs were allowed in the theater and that [he] refused to listen to Lentini’s explanation that Jazz was her service dog.”¹⁹⁰ Lentini prevailed on her claims against the Center.¹⁹¹

Whether an animal has been individually trained for the purpose of accommodating disabilities is also an issue illustrated by recent case law.¹⁹² In *Storms v. Fred Meyer Stores, Inc.*, a person with psychiatric conditions was using a Rottweiler as a service animal and alleged she was the subject of disparate treatment by employees at a store.¹⁹³ The *Storms* court found that the main issue was whether the Rottweiler (Brandy) was “an animal trained for the purpose of accommodating Storms’ disability.”¹⁹⁴ The court reviewed recent cases discussing the issue¹⁹⁵ and found that for the purpose of surviving a motion for a directed verdict, there was sufficient evidence of individual training to distinguish Brandy from a pet.¹⁹⁶ The court considered the behavior of Brandy during the incident in question—that of circling Storms when the area became crowded.¹⁹⁷ This is the type of physical task

“minimal protection” in the ADA regulations).

186. *Lentini*, 370 F.3d at 839.

187. *Id.* at 844.

188. *Id.* at 840. The court also discussed the Center’s unwritten policy that ticket takers were “to admit any ‘recognizable’ service animals without any questions; ‘recognizable’ animals were those wearing an outer garment or some other identifying device.” *Id.*

189. *Id.*

190. *Id.* at 841.

191. *Id.* at 851 (affirming the district court’s judgment in favor of Lentini).

192. *See, e.g.*, *Storms v. Fred Myers Stores, Inc.*, 120 P.3d 126 (Wash. Ct. App. 2005).

193. *Id.* Storms’ psychiatric conditions included post-traumatic stress disorder and recurrent depression. *Id.* at 126.

194. *Id.* at 128.

195. The court’s review included the *Prindable* case. For a discussion of *Prindable*, see *infra* notes 250–254 and accompanying text.

196. *Storms*, 120 P.3d at 129.

197. *Id.* Brandy’s training had consisted of a thirty-day in house boarding program, a four-week follow-up course, and an intermediate follow-up course. Brandy had also undergone a temperament

that some of the commentators to the DOJ rulemaking use to distinguish between a service animal and emotional support animal.¹⁹⁸

The Delaware Supreme Court recently considered the issue of a Delaware Human Relations Commission (DHRC) finding regarding the denial of access to a casino to a person with a disability.¹⁹⁹ The dog at issue was young (four months at the time of the incident), did not have a leash, and was wearing a vest affixed at the neck with a nylon cord, which stated that the dog was a support animal.²⁰⁰ The DHRC panel determined that the casino had “failed to show a legitimate, nondiscriminatory reason for denying Thompson access.”²⁰¹ The court reversed the decision and order of the DHRC, finding that the casino employees were entitled to ask Thompson what tasks the dog performs and that his failure to answer those questions allowed the casino to deny access to Thompson and his dog.²⁰²

The use of another young dog in training was the focus of the *Dilorenzo v. Costco Wholesale Corp.* case.²⁰³ The dog at issue was a Pug named Dilo who was being used by an individual with psychiatric disabilities.²⁰⁴ On the first occasion that Dilorenzo entered the store, she showed an employee a copy of a letter from her psychologist that described her disabilities and her suitability for utilizing a service animal.²⁰⁵ On the second occasion, Dilorenzo did not have issues entering the store but was approached by store managers at the time she was checking out and leaving the store, and a verbal altercation ensued.²⁰⁶ The case dealt primarily with whether the actions of store employees during and after Dilorenzo’s visit—a follow up letter was sent to Dilorenzo asking about Dilo’s training—violated the ADA.²⁰⁷ The court stated that Costco would not defeat Dilorenzo’s ADA

evaluation to determine whether she was gentle and patient enough to act as a service dog. *Id.*

198. *See supra* notes 86–93 and accompanying text (discussing “do work or perform task” language of the regulations); *see also* Joan Froling, Service Dog Tasks for Psychiatric Disabilities, http://www.iaadp.org/psd_tasks.html (last visited Feb. 15, 2010) (setting forth physical tasks that service dogs can perform for persons with psychiatric disabilities).

199. *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. 2005).

200. *Id.* at 459. The individual (Thompson) stated that the dog was a support animal and provided the casino employees with an identification card but refused to answer the employees’ questions about the dog’s training. *Id.*

201. *Id.* at 461.

202. *Id.* at 462.

203. *Dilorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187 (W.D. Wash. 2007). The facts that the court set out regarding the age of the dog were contradictory, stating in one reference that the dog was approximately twelve weeks old in April 2004, and later stating that Dilo was acquired as an eight-month-old puppy in March 2004. *Id.* at 1189–90.

204. *See id.* at 1189. Dilorenzo asserted that Dilo was the service animal that was trained “to assist her in resisting and responding to the difficulties raised by her condition.” *Id.*

205. *Id.* at 1190.

206. *Id.* During this visit to the store, Dilo was wearing a vest with the words “service dog in training.” *Id.* One Costco employee described the vest as, “at least in part, ‘homemade.’” *Id.*

207. *See id.* at 1192–93.

claim by “simply showing that Dilo was not a bona fide service animal at the time of the inquiry, since the manner in which it went about verifying such a fact could have violated the law.”²⁰⁸

Another example of the issue of whether an animal met the definition of service animal can be found in the recent case of *Snyder v. Pend Oreille County Counseling Services*.²⁰⁹ In the *Snyder* case, two individuals claimed that their dog, Bucky, was a service animal and that the “Pend Oreille County Counseling Center failed to reasonably accommodate their disability pursuant to the ADA” and Washington State law.²¹⁰ One of the individuals had mental disabilities including agoraphobia and the other individual had physical disabilities relating to chronic pain.²¹¹ The court found that Bucky did not qualify as a service animal because, although he was a “beloved pet” to both individuals and could have a calming effect on them, he provided “nothing more than occasional services, mostly provided outside of a place of public accommodation.”²¹²

These cases illustrate the need for further clarification and education regarding the scope and coverage of the ADA. Another important source of law in this area, and one that has seen significant recent activity, is the FHA.

208. *Id.* at 1193. The court found it “highly questionable” whether Dilo was a service animal as of the time of the second visit to the store, given Dilorenzo’s statements in her deposition that it took six or seven months before Dilo was able to recognize and alert her to a panic attack on his own. *Id.* at 1193 n.2. Ultimately, the court ruled in favor of Costco on its motion for summary judgment. *Id.* at 1198. Another example of a court finding that an animal did not meet the definition of service animal is found in the case of *Baughner v. City of Ellensburg*, No. CV-06-3026-RHW, 2007 WL 858627 (E.D. Wash. March 19, 2007). In the *Baughner* case, the plaintiff asserted that Bun, the dog at issue, assisted her in her daily life. *Id.* at *5. The court rejected the defendant’s position that there must be documented evidence of individual training and stated that the issue was “whether Bun was trained to do work or perform tasks for the benefit of an individual with a disability.” *Id.* The court found that although it did not doubt that Bun provided the plaintiff with “a sense of security and comfort and helped her cope with her disability,” Bun did not meet the definition of a service animal given that the plaintiff did not provide any admissible evidence that distinguished Bun from an ordinary pet. *Id.*

209. *Snyder v. Pend Oreille County Counseling Servs.*, No. CV-07-0230-LRS, 2008 U.S. Dist. LEXIS 100685, at *1 (E.D. Wash. Dec. 12, 2008).

210. *Id.* at *1.

211. *Id.* at *4–5. The court stated that both individuals were disabled. *Id.* at *4.

212. *Id.* at *7–8. The individuals admitted that “they share Bucky between the two of them and that they do not always take Bucky with them.” *Id.* at *8. All of the plaintiffs’ ADA claims were dismissed by the court. *Id.*

IV. FAIR HOUSING AMENDMENTS ACT—HUD'S DEFINITION OF SERVICE ANIMAL

A. *Applicability to Disabled Persons and Service Animals*

The FHA was originally passed as part of the Civil Rights Act of 1968.²¹³ It provided protection from discrimination in housing on the basis of race, color, national origin, or gender.²¹⁴ In 1988 the Fair Housing Act Amendments were passed, expanding the FHA to include handicapped persons in the enumerated classes protected from housing discrimination.²¹⁵ The Department of Housing and Urban Development (HUD) is responsible for the administration of the FHA.²¹⁶ Just as the ADA covers a broad spectrum of public accommodations, the FHA covers a wide range of housing.²¹⁷ It is not uncommon for a lawsuit that is brought alleging violations of the FHA to also include claims based on the Federal Rehabilitation Act²¹⁸ and the ADA, which of course complicates the analysis used in the cases.

A plaintiff may prove discrimination under the FHA by showing the failure to provide a reasonable accommodation.²¹⁹ Specifically, the FHA definition of housing discrimination includes refusing to make “reasonable accommodations in rules, policies, practices, or services, when such

213. 42 U.S.C. §§ 3601–3631 (2000); *see also* H.R. REP. NO. 100-711, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176, *available at* 1988 WL 169871, at *14–15 (discussing the background and need for the Fair Housing Act).

214. 42 U.S.C. § 3601–3619.

215. *Id.*; *see also* H.R. REP. NO. 100-711, at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, *available at* 1988 WL 169871, at *18 (discussing the need for an amendment to Fair Housing Act to protect the handicap). The FHA is sometimes referred to as the Fair Housing Amendments Act. In this Article, references to the FHA include the FHA as amended by the Fair Housing Amendments Act. Handicap is defined as someone with “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment.” 42 U.S.C. § 3602(h). The term handicap does not include “the current, illegal use of or addiction to a controlled substance.” *Id.* This Article will use the terms “handicap” and “disability” interchangeably as many of the court decisions do in this area. *See, e.g.,* *Giebeler v. M&B Assocs., L.P.*, 343 F.3d 1143, 1146 (9th Cir. 2003) (discussing the use of the terms “handicap” and “disability”).

216. 42 U.S.C. § 3608. The Attorney General or private persons may enforce the FHA. *Id.* §§ 3613–3614.

217. Although many of the cases discussing the applicability of the FHA deal with multifamily dwellings, under many circumstances single family homes are also included under the purview of the statute. *Id.* § 3603(b)(1).

218. 29 U.S.C. §§ 791–794. The Rehabilitation Act of 1973 provides that agencies and organizations that receive federal funds or contracts (in excess of certain dollar amounts) may not discriminate against qualified individuals with disabilities. *Id.*

219. *See infra* notes 225–262 and accompanying text (discussing FHA cases involving service animals).

accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”²²⁰

Examples in federal regulations²²¹ and case law have made it clear that a reasonable accommodation may include a waiver of a no-pet rule to allow for a service animal.²²² The federal regulations implementing the FHA do not, however, provide a definition of service animal.²²³ HUD has provided guidance for determining when animals must be accommodated. In one of its handbooks, HUD has provided the following definition of “assistance animals”:

Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability. . . . Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, no special training is required. The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.²²⁴

HUD’s position allowing an expansive definition of assistance animal has been supported by its administrative decisions in this area.²²⁵ In many situations, tenants have been successful in arguing that there should be a waiver of a no-pet rule in order for the tenant to be able to retain an

220. 42 U.S.C. § 3604(f)(3)(B). Note that although the FHA requires that the public and common use portions of multifamily dwellings constructed after January 1, 1991 must be handicapped accessible, and any reasonable modifications within the unit are at the expense of the disabled person. 24 C.F.R. § 100.203 (2008). This is in contrast to the Americans with Disabilities Act provision that requires the person with the public accommodation to pay for any reasonable accommodations. 42 U.S.C. § 12111(9), 12111(10)(B).

221. 24 C.F.R. § 100.204(b)(1) (providing an example of a blind applicant with a seeing eye dog).

222. See *infra* notes 225–262 and accompanying text (cases discussing waivers of no-pet rules).

223. See 24 C.F.R. § 100.201.

224. U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 4 (2009) [hereinafter HUD HANDBOOK], available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/index.cfm>. The language of the Handbook addressing whether an assistance animal is a reasonable accommodation states the “question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.” *Id.* at 2-44.

225. Note that in states that have laws that are at least as protective as the federal law protecting against discrimination, at HUD’s discretion, the cases are referred to the applicable state division of human rights. 42 U.S.C. § 3610(f).

assistance animal—even if the animal does not appear to have been trained to perform specific tasks.²²⁶

The case law in this area is complicated by the fact that the language of the ADA regulations is often used and state courts are asked to interpret federal law. This leads to inconsistency in the decisions and confusion over what standard should be applied.

B. The Status of the Animal Is Key to the Analysis

The cases applying the FHA relating to the status of the animal have resulted in mixed results for plaintiffs. As with the cases interpreting the ADA, cases in this area frequently focus on the issue of the training the animal has received.

An oft-cited case discussing this issue is the Seventh Circuit case of *Bronk v. Ineichen*.²²⁷ In *Bronk*, deaf tenants alleged that a landlord had discriminated against them in violation of the FHA by refusing to allow them to keep a dog in a rented townhouse.²²⁸ The court found that in this case, the skill level of the dog (i.e. whether the dog was really a hearing dog) was in dispute.²²⁹

The *Bronk* court set out two standards that a disabled person must meet in arguing that an accommodation must be made.²³⁰ First, the

226. See, e.g., *HUD v. Raczkowski*, No. 02-99-0830-8, 2002 WL 1264012, at *2 (H.U.D.A.L.J. May 23, 2002) (providing in a settlement where a payment was made to a tenant who argued that he suffered from a psychiatric disability and that the dog was of “great emotional and social support” for him); *HUD v. Bayberry Condo Ass’n*, No. 02-00-0504-8, 2002 WL 475240, at *1–2 (H.U.D.A.L.J. Mar. 21, 2002) (providing in an initial decision and consent order that a resident of a condominium suffering from depression, generalized anxiety and panic disorder be granted a waiver of a no-pet policy as a reasonable accommodation of her handicap with such animal being referred to as an “emotional support pet”); *HUD v. Meridian Group, Inc.*, No. 05-98-1418-8, 2001 WL 865717 (H.U.D.A.L.J. July 18, 2001) (providing in a consent order that a tenant who stated she was handicapped because of manic depression would be given permission to have a cat in her unit); *HUD v. Glenwood Mgmt. Corp.*, No. 02-99-0442-8, 2000 WL 394074, at *2 (H.U.D.A.L.J. Apr. 14, 2000) (providing in an initial decision and consent order that a tenant suffering from anxiety would be able to retain her dog or have a replacement dog of a similar size upon proof of the alleged handicap in the form of a reasonably descriptive letter from tenant’s physician, psychologist or social worker); *HUD v. N. Waterside Redevelopment Co. Ltd. P’ship.*, No. 02-98-0179-8, 2000 WL 46116, at *3 (H.U.D.A.L.J. Jan. 14, 2000) (providing in an initial decision and consent order that a prospective tenant suffering from anxiety, depression, renal cancer, pulmonary disease and angina pectoris who obtained a pet dog on the advice of his physician to abate symptoms of anxiety and depression would be offered an apartment in a building with a no-pet rule upon receipt of a reasonably descriptive letter from the prospective tenant’s physician). But see *HUD v. Blue Meadows Ltd. P’ship*, No. 10-99-0200-8, 2000 WL 898733, at *9–11 (H.U.D.A.L.J. July 5, 2000) (finding for a landlord who had requested verification that a dog was trained or certified in a case where the dog was used by a prospective tenant to pull his wheelchair).

227. *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995).

228. *Id.* at 426–27.

229. *Id.*

230. *Id.* at 431.

accommodation—in this case, waiver of a no-pets clause—must facilitate a disabled individual’s ability to function.²³¹ The court found that to determine this, it is possible to look in part at whether the animal has met any professional credentials, essentially the level of schooling of the animal.²³² The court specifically stated that the federal statute does not require that the animal have professional training.²³³ In addition, the court included a “nexus” requirement in its analysis and stated “the concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.”²³⁴

A subsequent hearing dog case that cited to *Bronk* was *Green v. Housing Authority of Clackamas Co.*²³⁵ The *Green* court reviewed federal law and cited to *Bronk* in finding that there was no federal certification process or requirements for service animals.²³⁶ The court stated that the housing authority’s “requirement that an assistance animal be trained by a certified trainer of assistance animals, or at least by a highly skilled individual, has no basis in law or fact.”²³⁷ In addition, the *Green* court found that the housing authority could not impose any policy that limits the participation of a handicapped tenant, such as requiring “certification or third-party verification of an assistance animal’s abilities.”²³⁸

231. *Id.*

232. *Id.*

233. *Id.* at 430.

234. *Id.* at 429. After setting forth the standards for determining whether an accommodation is reasonable, the *Bronk* court found that a new trial was necessary due to jury instructions that may have confused jury members. *Id.* at 431–32. Another case that focused on the nexus between the animal and the disability is the case of *Nason v. Stone Hill Realty Ass’n*, No. 961591, 1996 WL 1186942, at *1 (Mass. Super. Ct. May 6, 1996). Nason, who had multiple sclerosis, submitted a letter from her physician that “suggested . . . serious negative consequences for her health if she was compelled to remove . . . [a] cat.” *Id.* at *1. The court found that Nason did not show “a substantial likelihood of proving that maintaining possession of the cat is necessary due to her handicap.” *Id.* at 3. Specifically, although the affidavit provided by Nason’s doctor indicated that removal of the cat would result in “increased symptoms of depression, weakness, spasticity and fatigue,” it did not “demonstrate that such symptoms are treatable solely by maintaining the cat or whether another more reasonable accommodation is available.” *Id.* The court continued by stating that the affidavit failed to “illustrate how the presence of the cat, as opposed to some other therapeutic method such as chemical therapy, is essential or necessary to treating her symptoms.” *Id.* Thus the motion for a preliminary injunction was denied because the court found that the record “fail[ed] to clearly demonstrate the nexus between keeping the cat and her handicap.” *Id.*

235. *Green v. Hous. Auth. of Clackamas Co.*, 994 F. Supp. 1253 (D. Or. 1998).

236. *Id.* at 1255–56.

237. *Id.* at 1256.

238. *Id.* The plaintiff tenants’ summary judgment motion was granted as the court found that the housing authority did not accommodate plaintiffs by modifying its no-pets policy. *Id.* at 1257. In

In contrast, a West Virginia state court found that some type of certification process for a service animal may be allowed under federal law.²³⁹ In *In re Kenna Homes Cooperative Corp.*, the stockholders voted to request that the board of directors enact a rule phasing out animals on the property.²⁴⁰ The Jessups' small dog had died after the rule was enacted and they obtained two new dogs.²⁴¹ The Jessups had various medical problems including arthritis, depression, and problems with blood pressure.²⁴² The Jessups presented evidence of these problems when they applied for permission to keep the newly acquired dogs in their apartment, arguing that a waiver of the no-pets policy would be a reasonable accommodation for their disabilities.²⁴³

The *Kenna* court stated that it believed "a requirement that a service dog be 'properly trained' does not conflict with federal or state law."²⁴⁴ As to the certification requirement, the court found that unless such requirement was applied in a flexible manner, it would violate the FHA.²⁴⁵ The court set forth guidelines to govern the issue of certification.²⁴⁶ Specifically, the *Kenna* court found that a landlord could require a tenant seeking to keep an animal under the FHA to:

Demonstrate that he or she made a bona fide effort to locate a certifying authority and, if such authority is located, to subject the service animal to the specialized training necessary for such certification If neither the tenant nor the landlord . . . can locate a certifying authority after reasonable attempts to do so, it is reasonable for the landlord . . . to require that a recognized training facility or person certify that the service animal has that degree of training and temperament which would enable the service animal to ameliorate the effects of its owners disability and to live in its owner's household without disturbing the peace of mind of a person of ordinary sensibilities regarding animals.²⁴⁷

addition, the *Green* court found that an Oregon state law that required a hearing ear dog to be kept on an orange leash was preempted by federal law. *Id.*

239. *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787, 799 (W. Va. 2001).

240. *Id.* at 791-92.

241. *Id.* at 792.

242. *Id.*

243. *Id.* The cooperative corporation's policy included an exception for dogs that were "properly trained and certified for the particular disability." *Id.*

244. *Id.* at 797.

245. *Id.* The court did consider the fact that there are no uniform standards or credentialing criteria for service animals. *Id.*

246. *Id.*

247. *Id.* at 798.

The court found that the rule, as it applied to the Jessups, did not violate the FHA or the West Virginia Fair Housing Act.²⁴⁸ The court found that “[p]alliative care and the ordinary comfort of a pet are not sufficient to justify a request for a service animal.”²⁴⁹

The requirement that an animal be individually trained was supported by a subsequent federal district court case.²⁵⁰ The court, in *Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua*, emphasized that where the primary handicap was mental and emotional in nature, an animal must be “peculiarly suited to ameliorate the unique problems of the mentally disabled.”²⁵¹ The *Prindable* court rejected plaintiffs’ counsel’s suggestion that “canines (as a species) possess the ability to give unconditional love, which simply makes people feel better.”²⁵² The court stated that to allow this reasoning permitted no identifiable stopping point and would change the test from “‘individually trained to do work or perform tasks’ to ‘of some comfort.’”²⁵³ In the *Prindable* case the court found that there was nothing in the record that would lead a reasonable jury to conclude that the dog at issue was an individually trained service animal.²⁵⁴

Notwithstanding the holdings in *Kenna* and *Prindable*, other cases make it clear that no distinction should be made between physical and mental disabilities and an animal is not required to be task trained when applying the FHA.²⁵⁵ In fact, a 2009 district court case in Ohio that declined to follow

248. *Id.* at 800.

249. *Id.* at 787, 800.

250. *Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245 (D. Haw. 2003), *aff’d sub nom.* *DuBois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006).

251. *Id.* at 1256.

252. *Id.* at 1257 n.25.

253. *Id.* Note that the ADA’s definition of service animal was used by analogy in this case. One argument that has been made by tenants’ attorneys is that the “only requirements for an emotional support animal are that it be well-socialized and able to accompany [the tenant] to public places.” *Zatopa v. Lowe*, No. C 02-02543, slip op. at 14 (N.D. Cal. Aug. 7, 2002) (order granting preliminary injunction and requiring bond).

254. *Prindable*, 304 F. Supp. 2d at 1257. The court granted the defendants’ motion for judgment as a matter of law as to plaintiffs’ claim under the FHA for failure to make a reasonable accommodation. *Id.* at 1262. In *State ex rel. Henderson v. Des Moines Municipal Hous. Agency*, a court found that a dog that was trained to assist an individual with post-traumatic stress disorder by preceding her into rooms, switching on lights and bringing her cell phone may meet the standard set by the *Prindable* case. No. 06-1144, 2007 WL 4553350, at *6 (Iowa Ct. App. Dec. 28, 2007) (unpublished table decision).

255. *E.g.*, *Hous. Auth. of New London v. Tarrant*, No. 12480, 1997 WL 30320 (Conn. Super. Ct. Jan. 14, 1997). In *Tarrant*, the defendant alleged that her son was mentally challenged and needed the companionship of a dog kept in their apartment in violation of a Housing Authority regulation.

the reasoning in the *Kenna* case reported that the DOJ, along with HUD, brought an action against the Kenna Homes Cooperative Corporation regarding the cooperative's restrictive policy, resulting in a consent decree whereby the cooperative would adopt an exception to the no-pets rule that would permit disabled residents to have service animals or emotional support animals.²⁵⁶ Emotional support animal was defined as an animal "the presence of which ameliorates the effects of a mental or emotional disability."²⁵⁷ In *Crossroads Apartments Ass'n v. LeBoo*,²⁵⁸ summary judgment was precluded on the issue of whether keeping a cat was necessary to assist a tenant in coping with a mental illness, specifically panic disorder with agoraphobia, mixed personality disorder, as well as chronic anxiety with a history of episodic alcohol abuse.²⁵⁹ The court stated that, utilizing both the Rehabilitation Act and the FHA, the plaintiff "must demonstrate that he has an emotional and psychological dependence on the cat which requires him to keep the cat in the apartment."²⁶⁰

In the case of *Janush v. Charities Housing Development Corp.*, the court found a genuine issue of material fact existed as to whether it was a reasonable accommodation to allow a mentally disabled tenant to keep two cats and two birds in violation of a no-pets policy.²⁶¹ Testimony in this case established that the pets lessened the effects of the tenant's disability by providing her companionship and were necessary to her mental health.²⁶²

As illustrated by the cases above and the controversy over the proposed ADA regulations, it appears that disputes are continuing to arise over "emotional support animals."²⁶³ In the past, one attorney's experience with

Id. at *1–2. Although there was evidence that the son's school performance seriously deteriorated after commencement of the eviction proceeding, the court did not find evidence linking this deterioration with the prospect of losing the dog. *Id.* at *2. The court reiterated that "given an appropriate factual predicate, mental handicap may warrant reasonable accommodations, including the keeping of an animal in a public housing complex" but found that the factual predicate was missing in this case. *Id.* The court reversed and remanded the case to determine the existence of the handicap, if any such handicap required the companionship of a dog and if so, whether a reasonable accommodation could be made. *Id.*

256. *Overlook Mutual Homes, Inc. v. Spencer*, No. 3:07-CV-398, 2009 WL 3486364, at *9–10 (S.D. Ohio July 16, 2009).

257. *United States v. Kenna Homes Coop. Corp.*, No. 2:04-CV-00783, at *2–3 (S.D. W. Va. Aug. 10, 2004) (consent decree and dismissal order).

258. 578 N.Y.S.2d 1004 (Rochester City Ct. 1991).

259. *Id.* at 1005. In addition, a determination of whether a reasonable accommodation could be made was an issue in this case. *Id.* at 1007.

260. *Id.* at 1007. As there was conflicting testimony, summary judgment was denied. *Id.*

261. 169 F. Supp. 2d 1133, 1134–36 (N.D. Cal. 2000).

262. *Id.* at 1134.

263. Telephone Interview with Maddy Tarnofsky, Esq., Law Offices of Maddy Tarnofsky (Jan. 18, 2009). Ms. Tarnofsky practices in New York and has seen a growing number of cases involving emotional support animals. *Id.*; see also Motoko Rich, *Pet Therapy Sets Landlords Howling*, N.Y. TIMES, June 26, 2003, at F1 (discussing cases of emotional support animals).

these cases was that once a state human rights commission or HUD established probable cause supporting a tenant, the landlord frequently would drop the assertion of a no-pets clause.²⁶⁴ That attorney has found that landlords have become savvier about the process and are now frequently electing to continue the action in court.²⁶⁵ In contrast, another attorney has found a different outcome, at least in cases involving condominiums. Once the legal representative of the condominium is educated about the coverage of the law, persons with disabilities usually have been able to retain their emotional support animals in their units without further legal action.²⁶⁶

It is especially noteworthy that for a tenant to proceed with one of these actions, he or she is required to provide sensitive medical information to the landlord, co-op board or other entity.²⁶⁷ Unlike the ADA regulations that make it clear that a person cannot be asked about his or her disability—only what tasks an animal performs—a person requesting accommodation under the FHA may be required to provide documentation of the disability and the need for the animal from a third party.²⁶⁸

The *Prindable* and *Kenna* courts ignore studies that show a direct benefit to individuals, specifically those with these types of disorders that are ameliorated due to the companionship of an animal.²⁶⁹ In addition, these

264. Interview with Maddy Tarnofsky, *supra* note 263.

265. *Id.* In New York, that court would be the Supreme Court. The other option would be to continue the action through the administrative agency process. *Id.* In the few reported cases, the trend appears to be in favor of landlords with the courts focusing on the issue of how the animal assists a tenant in using and enjoying the premises. *Id.*; see, e.g., *105 Northgate Coop. v. Donaldson*, 863 N.Y.S.2d 469 (N.Y. App. Div. 2008) (annulling a determination by the State Division of Human Rights in favor of a tenant and finding that the tenant failed to demonstrate that she required a dog in order to use and enjoy her apartment).

266. Telephone Interview with Sharon Crege, Esq., O'Donnell, McDonald & Cregeen, L.L.C. (Feb. 10, 2009) (stating that she has found that the Connecticut Commission on Human Rights has been very supportive of persons with disabilities who use emotional support animals); see also *Frechtman v. Olive Executive Townhomes Homeowner's Ass'n*, No. CV-07-2888-DSF, 2007 U.S. Dist. LEXIS 81125 (C.D. Cal. Sept. 24, 2007) (providing in an entry of a preliminary injunction that a common interest development with a no-dog rule would allow a resident to keep a dog as an emotional support animal on the premises).

267. Interview with Maddy Tarnofsky, *supra* note 263.

268. HUD HANDBOOK, *supra* note 224, at 3-29 (allowing for an owner of property to require a tenant or applicant to provide documentation “from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates one or more of the identified symptoms or effects of an existing disability.” *Id.* Some of Ms. Tarnofsky’s clients have been required to submit to an examination by a physician of the landlord’s choice to establish their disabilities and the need for an assistance animal. Interview with Maddy Tarnofsky, *supra* note 263. Ms. Tarnofsky has never had a client abandon a claim because of the need to disclose medical information. *Id.*

269. See *supra* notes 34–36 and accompanying text (describing studies on the benefits of

cases appear to dismiss other cases involving mentally and emotionally disabled tenants that set forth standards (that precluded summary judgment) focusing on whether there was emotional or physical dependence on an animal,²⁷⁰ or whether an animal lessens the effects of a disability by providing companionship.²⁷¹ Furthermore, these cases fail to consider the position of HUD, which supports the accommodation of emotional support animals based on HUD consent orders and one of its handbooks.²⁷²

C. *No Species Restriction but Only a Reasonable Accommodation Is Required*

It is clearly established that the disabled persons are not restricted to using only dogs and cats as service animals.²⁷³ As discussed above, prior to the recent proposed ADA regulations, federal regulations have not attempted to define the animals that can be used as a service animal.²⁷⁴ Notwithstanding the general rule that no particular type or breed of service animal is valid, one district court has ruled, in a motion for a preliminary injunction, that in the case of an emotional support animal, a landlord would not be required to allow a particular breed of dog.²⁷⁵ Of course, just as reasonable accommodation is interpreted under the ADA, under the FHA, if a person cannot control an animal, a landlord has the ability to refuse to accommodate such a service animal.²⁷⁶

companion animals on human health).

270. See *supra* notes 258–260 and accompanying text (discussing the *LeBoo* case).

271. See *supra* notes 261–262 and accompanying text (discussing the *Janush* case).

272. See generally HUD HANDBOOK, *supra* note 224.

273. See *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000) (discussing tenant with birds); see also *LaFore v. Hous. Auth. of Portland*, No. CIV. 99-827-JO, 1999 WL 1058992 (D. Or. Nov. 19, 1999). In *LaFore*, the plaintiff alleged claims for housing and disability discrimination and that her disabilities required her to have an opossum as an assistance animal in addition to a dog as a service animal. *LaFore*, 1999 WL 1058992, at *1. The Housing Authority denied plaintiff's claim for modification of the pet policy to permit her to keep the opossum allegedly on the ground that "[o]possums are not domesticated animals and can present some issues because they are not normally inoculated, spayed/neutered and licensed." *Id.* The court dismissed the federal claims due to the running of the two-year statute of limitations, but remanded the state claims to state court for further proceedings. *Id.* at *3–4. In another case, a tenant claimed that his snakes were service animals. *Assenberg v. Anacortes Hous. Auth.*, 268 Fed. Appx. 643 (2008) (finding that the court did not have to address the claim that his snakes qualified as service animals).

274. See *supra* notes 107–173 and accompanying text (discussing proposed regulations).

275. *Zatopa v. Lowe*, No. C 02-02543, slip op. at 15 (N.D. Cal. Aug. 7, 2002) (order granting preliminary injunction and requiring bond) (finding that a landlord was not required to allow a tenant to have a dog described as a pit bull terrier or pit bull mix in an apartment).

276. See, e.g., *Woodside Village v. Herzmark*, No. SPH9204-65092, 1993 WL 268293, at *1, *6 (Conn. Super. Ct. June 22, 1993), *appeal dismissed*, 36 Conn. App. 73 (App. Ct. 1994) (allowing an apartment complex to regain possession of an apartment when a tenant with a disability could not adhere to reasonable pet rules).

V. AIR CARRIER ACCESS ACT—THE DOT’S DEFINITION OF
SERVICE ANIMALS

Air transportation is excluded from the ADA;²⁷⁷ however, the Air Carrier Access Act (ACAA)²⁷⁸ prevents discrimination against individuals with disabilities by air carriers.²⁷⁹ As with the regulations implementing the ADA, the ACAA regulations have been the subject of recent revision and, thus, are analyzed in this Article. The new regulations reorganizing and updating the rules became effective on May 13, 2009.²⁸⁰ The Department of Transportation (DOT) issued a guidance document concerning the transportation of service animals in May 2003,²⁸¹ and many of the comments on the proposed rulemaking related to concerns raised by that document.²⁸²

The ACAA regulations provide a significant amount of specificity on how air carriers should deal with issues relating to service animals.²⁸³ The

277. 42 U.S.C. § 12141 (2000). Access to air terminal facilities is covered by Title III of the ADA. 14 C.F.R. § 382.51 (2009) (setting out the rules applicable to air terminal facilities). The Department of Transportation’s ADA rules are applicable to intra-terminal and inter-terminal transportation, such as shuttle vehicles and moving sidewalks. *Id.* (citing 49 C.F.R. pts. 37 & 38). The Supreme Court held in 1986 that Section 504 of the Rehabilitation Act would not apply to commercial airlines because they were not the intended recipients of federal financial assistance. *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 610–13 (1986). The Air Carrier Access Act was passed later that year as a reaction to that case. *See, e.g., Thomas v. Nw. Airlines Corp.*, No. 08-11580, 2008 U.S. Dist. LEXIS 66864, at *11 (E.D. Mich. Sept. 2, 2008) (discussing the passage of the Air Carrier Access Act).

278. 49 U.S.C. § 41705.

279. *Id.*

280. *See, e.g.*, 14 C.F.R. § 382.1 (discussing the effective date of the new regulations in the Notes section of the provision); *see also* 73 Fed. Reg. 27,614 (May 13, 2008) [hereinafter ACAA Final Rule] (setting forth the Final Rule by the Department of Transportation amending its ACAA rules and stating that the effective date for the rule is effective on May 13, 2009).

281. Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24,874 (May 9, 2003) [hereinafter Guidance Document]. The provision in this document relating to emotional support animals has been cited as leading to abuses and has come under criticism by some groups representing service animals that perform physical tasks for individuals with disabilities. Beth Landman, *Waggin the Dog, and a Finger*, N.Y. TIMES, May 14, 2006, at 91 (quoting Joan Froling of the International Association of Assistance Dog Partners, who stated that the DOT guidance document “was an outrageous decision” and “[i]nstead of clarifying the difference between emotional support animals who provide comfort by their mere presence and animals trained to perform specific services for the disabled, they decided that support animals were service animals”).

282. ACAA Final Rule, *supra* note 280, at 27,634 (stating that the subject that attracted the most comments was service animals and the May 2003 guidance document).

283. Among other issues, the ACAA provides that an air carrier cannot require a passenger with a disability to sign a waiver of liability for the “loss of, death of or injury to service animals.” 14 C.F.R. § 382.35. The air carrier must provide, at the passenger’s request, either a bulkhead seat or not a bulkhead seat if such passenger is traveling with a service animal. *Id.* § 382.81. The seating of passengers with service animals was the basis for the most comments for the new regulations

regulations provide that carriers “must permit a service animal to accompany a passenger with a disability.”²⁸⁴ Carriers are not allowed to “deny transportation to a service animal on the basis that its carriage may offend or annoy carrier personnel or persons traveling on the aircraft.”²⁸⁵ Although commentators raised the issue of passengers with allergies, the DOT reiterated that it was a long-standing principle that “[o]nly if a safety problem amounting to a direct threat can be shown is restricting access . . . justifiable.”²⁸⁶

In determining whether an animal is a service animal, carriers may accept “identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability”²⁸⁷ Although some concerns were raised by a number of commentators that “credible verbal assurances” are sufficient for a carrier to accept a service animal, the DOT reiterated that 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.”²⁸⁸ In the guidance document published by the DOT in May 2003, the DOT “urges carriers not to require documentation as a condition for permitting an individual to travel with his or her service animal . . . unless a passenger’s verbal assurance is not credible.”²⁸⁹

The ACAA distinguishes among service animals by the purpose of such animals. The DOT’s final rule acknowledged the concern by some service animal advocacy groups that allowing for emotional support animals in the cabin may provide an opportunity for abuse by passengers that want to travel with pets.²⁹⁰ The DOT added safeguards to reduce the likelihood of abuse, but “believes that there can be some circumstances in which a passenger may legitimately travel with an emotional support animal.”²⁹¹ The rules require that persons with disabilities using emotional support or psychiatric service animals may be required to provide current documentation²⁹² on the

relating to service animals. ACAA Final Rule, *supra* note 280, at 27,634.

284. 14 C.F.R. § 382.117(a).

285. *Id.* § 382.117(a)(1).

286. ACAA Final Rule, *supra* note 280, at 27,635. The DOT’s service animal guidance document does address how a carrier can handle situations where airline personnel or other passengers state that they have allergies or animal aversions. See Guidance Document, *supra* note 281, at 24,877.

287. 14 C.F.R. § 382.117(d).

288. ACAA Final Rule, *supra* note 280, at 27,635.

289. Guidance Document, *supra* note 281, at 24,876. If the verbal assurance is not credible, the airline may request documentation. *Id.*

290. See ACAA Final Rule, *supra* note 280, at 27,636.

291. *Id.*

292. Current documentation is defined as “no older than one year from the date of the passenger’s scheduled initial flight.” 14 C.F.R. § 382.117(e). The DOT sought comments in response to a request by a group of users of psychiatric service animals to reconsider the current requirements of notice and documentation for psychiatric service animals. Nondiscrimination on the Basis of

letterhead of a licensed mental health professional,²⁹³ stating the following information:

- (1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM IV);
- (2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger's destination;
- (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and
- (4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.²⁹⁴

It is acceptable to require that advance notice be provided to the air carrier if there will be transportation of an emotional support or psychiatric service animal in the cabin.²⁹⁵ The DOT recognized that there could be differences in how emotional support animals could be treated under the DOJ rules implementing the ADA with regard to places of public accommodation in airports.²⁹⁶

Similar to the proposed ADA regulations that specify which species are allocable as service animals, the ACAA regulations specifically allow a carrier to exclude certain species of animals.²⁹⁷ The ACAA final rule states that the new rule was put into place to allay concerns by carriers that they will have the obligation to accommodate unusual service animals, although the ACAA final rule also states that “accounts of unusual service animals have received publicity wholly disproportionate to their frequency or importance” and some “have become the stuff of urban legends.”²⁹⁸

Disability in Air Travel, 74 Fed. Reg. 47,902, 47,902 (Sept. 18, 2009) (to be codified 14 C.F.R. pt. 382) (notice of proposed rulemaking). The notice specifically stated that the DOT was not initiating rulemaking at this time, and would publish a document regarding the determination of the petition, with the comment period ending on December 17, 2009. *Id.* at 47,902–03.

293. Examples of licensed mental health professionals are psychiatrists, psychologists, or licensed clinical social workers. 14 C.F.R. § 382.117(e).

294. *Id.* § 382.117(e).

295. *Id.* § 382.27(c)(8). If a person wants to have a service animal on a flight segment scheduled to take more than eight hours advance notice may also be required. *Id.*

296. ACAA Final Rule, *supra* note 280, at 27,636.

297. 14 C.F.R. § 382.117(f).

298. ACAA Final Rule, *supra* note 280, at 27,636. There have been at least two instances where airlines have been presented with emotional support goats and at least one emotional support duck

Examples of unusual service animals that may be excluded include snakes and other reptiles, ferrets, rodents, and spiders.²⁹⁹ For some other species of animals such as miniature horses, pigs,³⁰⁰ and monkeys, U.S. carriers must determine whether factors such as the weight or size of the animal would preclude the animal traveling in the cabin as a service animal.³⁰¹ If there are no such factors that would preclude the animal from traveling in the cabin, a U.S. carrier must permit the animal to do so.³⁰²

The DOT's guidance document distinguishes between "service animals" and "service animals in training."³⁰³ It reiterates that carriers are not required to carry animals, except for service animals and may set their own policy regarding the transportation of any other animals.³⁰⁴ Although the DOT recognized that "service animals in training" are not the same as pets, because those animals are still in training, such animals would not meet the definition of service animal and may be refused carriage.³⁰⁵

In order to ensure compliance with the act and its regulations, the ACAA requires that carriers provide training to their employees.³⁰⁶ There are only a few reported court decisions that reference issues with service animals.³⁰⁷ These reported cases occurred prior to the publication of the

has been accommodated. Landman, *supra* note 281, at 91 (reporting on the increasing numbers of cases relating to emotional support animals).

299. 42 C.F.R. § 382.117(f).

300. An unruly pig on a flight in 2000 generated a significant amount of media coverage. *See, e.g.,* Frank Dougherty, *FAA: Unruly Pig Was OK US Airways Was Right to Allow Sow*, PHIL. DAILY NEWS, Nov. 29, 2000, at 10; *First-Class Pig Raises Stink on Flight*, DETROIT FREE PRESS, Oct. 28, 2000, at 8A; *FAA Sees Nothing Wrong with 300-Pound Pet Pig Aboard 757*, CHI. TRIB., Nov. 30, 2000, at N8. The pig's flight also appeared to be the inspiration of at least the titles for two scholarly articles. Curtis D. Edmonds, *When Pigs Fly: Litigation Under the Air Carrier Access Act*, 78 N.D. L. REV. 687 (2002), Susan D. Semmel, Comment, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 BARRY L. REV. 39 (2002).

301. 14 C.F.R. § 382.117(f). Other factors to consider are whether such animal would "pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country that is the flight's destination." *Id.* Foreign carriers are not required to carry service animals other than dogs. *Id.*

302. *Id.*

303. Guidance Document, *supra* note 281, at 24,876.

304. *See id.*

305. *Id.* The DOT referenced the fact that some airlines permit qualified trainers to bring service animals in training onto an aircraft as part of the animals' training. *Id.*

306. 14 C.F.R. § 382.141 (providing for carriers operating aircraft of nineteen or more passenger seats to train their personnel dealing with the traveling public with the requirements of the ACAA).

307. None of these cases dealt with the interpretation of whether an animal would qualify as a "service animal." *See, e.g.,* Christoph v. Nw. Airlines, No. 95-30811, 1996 WL 335549 (5th Cir. May 17, 1996). Christoph alleged that Northwest Airlines violated its own service animal regulations in a negligence suit for damages incurred by the pressure of her service animal against her legs. *Id.* at *1. The Christoph court rejected Northwest Airlines' argument that such claims were pre-empted by the ACAA and affirmed the lower courts award of damages to Ms. Christoph. *Id.* at *2. In *McGeorge v. Continental Airlines*, the blind passenger refused to move to a seat other than assigned to her and brought battery and other claims arising from the dispute. 871 F.2d 952,

DOT's publication of the *Guidance Concerning Service Animals in Transportation*.

The rules also provide for a new reporting mechanism for complaints that require the carriers to categorize the problem areas.³⁰⁸ Issues with service animals are included as one of the categories, so it is possible to determine the extent to which there are problems with accessibility to air transportation for persons who are accompanied by service animals.³⁰⁹

The reports for the last four years indicate that, as a percentage of the total complaints received by the DOT relating to ACAA, the problems relating to service animals are quite low.³¹⁰ For example, in the 14,006 complaints reported in 2008, only 208 (approximately one and a half percent) were categorized as relating to service animals.³¹¹ Similar, or lower, percentages were reported in the preceding four years.³¹² Given the

952 (10th Cir. 1989). The discussion in *McGeorge* focused on jurisdictional issues and the state law claims. *Id.* at 952–55. The cause of the dispute in this case—whether Ms. McGeorge should be required to sit in a bulkhead seat—has been clarified both in the DOT's Guidance Document and in the regulations interpreting the ACAA. *See supra* note 283. Similarly in the *Hingson v. Pacific Sw. Airlines* case, an individual who was blind, accompanied by a guide dog, sued after a dispute regarding the seating of that passenger in the front row of the passenger section. 743 F.2d. 1408, 1411 (9th Cir. 1984). Note that the facts of this case arose in 1980, prior to the passage of the ACAA.

308. Information about complaints is available online with the U.S. Department of Transportation. *See* Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, Annual Report on Disability-Related Air Travel Complaints, <http://airconsumer.ost.dot.gov/publications/gateway1.htm> (last visited Feb. 15, 2010).

309. This assumes that persons with disabilities will complete the complaint process. Note that the prior reporting process included a category for service animal issues as well. Office of Aviation Enforcement Proceedings, U.S. Department of Transportation, 2009 Report on Complaints Received by Airlines in 2008, <http://airconsumer.ost.dot.gov/publications/Gateway1-2008.htm> (last visited Feb. 15, 2010) (detailing the complaints by airline).

310. *See id.*

311. *Id.* (follow “Summary totals for all carriers” hyperlink).

312. The total number of complaints in 2007 was 15,290, with 154 (approximately one percent) categorized as relating to service animals. Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 2008 Report on Complaints Received by Airlines in 2007, <http://airconsumer.ost.dot.gov/publications/Gateway1-2007.htm> (last visited Feb. 15, 2010) (follow “Summary totals for all carriers” hyperlink). The total number of complaints in 2006 was 13,766, with 146 (approximately one percent) categorized as service animals. Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 2007 Report on Complaints Received by Airlines in 2006, <http://airconsumer.ost.dot.gov/publications/Gateway1-2006.htm> (last visited Feb. 15, 2010) (follow “Summary totals for all carriers” hyperlink). Of the 13,584 complaints received in 2005, only 83 (less than one percent) were related to service animals. Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 2006 Report on Disability-Related Air Travel Complaints (Complaints Received in 2005), <http://airconsumer.ost.dot.gov/publications/Gateway1-2005.htm> (last visited Feb. 15, 2010) (follow “Summary totals for all carriers” hyperlink). Of the 11,518 complaints received in 2004, only 71

foregoing, at least with respect to passengers accompanied by service animals, the ACAA's rules appear to be reasonably effectively implemented by air carriers.³¹³

VI. STATE LAWS DEFINING SERVICE ANIMALS

Complicating the analysis of when an animal must be allowed in public accommodations (or in housing, etc.) is the fact that many state laws do not directly parallel the federal laws discussed above. Of course, definitions vary among the states as well. This Part will provide examples of some of the definitions that are being used in state laws and administrative codes highlighting recent trends.

A. General Definitions

Some states choose to use general language defining service animals. The terms used to describe the animals vary from state to state. For example, Minnesota law uses the term "support animal."³¹⁴ Maryland law uses the term "service animal."³¹⁵ Nevada uses both support animal and service animal.³¹⁶ California provides an example of a state law that references the federal law to set the criteria for its definition.³¹⁷

The focus of the definitions may be on the impact of having the animal for the person with the disability. An example would be the language in Minnesota law that states that the animal "accompanies a person with a disability to assist in managing the disability and enables the person to perform functions that the person would otherwise be unable to perform."³¹⁸

(less than one percent) were related to service animals. Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 2005 Report on Disability-Related Air Travel Complaints (Complaints Received in 2004), <http://airconsumer.dot.gov/publications/Gateway1-2004.htm> (last visited Feb. 15, 2010) (follow "Summary totals for all carriers" hyperlink).

313. Of course, given the extensive information available to the carriers on these regulations, even fewer issues should arise than what is reported.

314. MINN. R. 4626.0020 subpt. 86 (2010).

315. MD. CODE REGS. 14.03.02.02(13)(a) (2010) ("Service animal" means a guide dog, signal dog, or other animal, individually trained to do work or perform tasks for the benefit of an individual with a disability . . .").

316. NEV. REV. STAT. § 426.097 (2007) (defining "service animal"). *But see* NEV. ADMIN. CODE § 446.036 (2009) (using the term "support animal").

317. CAL. CODE REGS. tit. 13, § 1866(b)(1) (2010) (providing an exemption to the general prohibition on dogs in state buildings and grounds if such dogs meet the criteria defined under the federal regulations implementing Title III of the ADA).

318. MINN. R. 4626.0020 subpt. 86; *see also* 6 COLO. CODE REGS. § 1010-2(65) (2009) (using parallel language to the Minnesota rules); NEV. REV. STAT. § 426.097 (defining service animal as an animal "that has been trained to assist or accommodate a person with a disability").

Alternatively, the focus of the definition may be on the tasks that the animal performs.³¹⁹

Generally, the state law definitions include some reference to training, although the language can vary. In Indiana, a service animal is a “professionally trained animal.”³²⁰ The Alaska definition states that the animal must be “certified by a school or training facility for service animals as having completed that training.”³²¹ Illinois uses the language that an animal is “trained in obedience and task skills.”³²² Other states utilize the “individually trained to do work or perform tasks” language of the ADA definition.³²³

B. Guide and Hearing Assistance Dogs

It is not surprising that dogs performing tasks for individuals with apparent disabilities are clearly covered in state statutes. Of these apparent disabilities, dogs used for individuals with visual or aural impairments are frequently specified in state statutes.³²⁴

C. Animals Used for Other Physical Disabilities

Animals used for other physical disabilities, such as mobility impairment, are also specifically referenced in some state laws. Examples are animals that are used for pulling a wheelchair or retrieving items.³²⁵

D. Signal Animals

Persons with non-apparent disabilities using service animals also have specific protection under some state statutes. Animals that are used to alert

319. See, e.g., MD. CODE REG. 14.03.02.02 (providing examples of the type of tasks that a service animal can perform).

320. 410 IND. ADMIN. CODE § 7-24-84 (2009).

321. ALASKA ADMIN. CODE tit. 7, § 43.795(12) (2010).

322. 510 ILL. COMP. STAT. 70/2.01c (2009).

323. See, e.g., KAN. ADMIN. REGS. § 21-70-1(e) (2009).

324. KAN. STAT. ANN. § 39-1113(b)–(c) (2007). The Kansas statute defines guide dog as “a dog which has been specially selected, trained and tested for the purpose of guiding a person who is legally blind.” *Id.* § 39-1113(b). A hearing assistance dog is defined as “a dog which is specially selected, trained and tested to alert or warn individuals who are deaf or hard of hearing to specific sounds.” *Id.* § 39-1113(c).

325. See, e.g., MD. CODE REGS. 14.03.02.02(13)(e)–(f) (2009); N.J. ADMIN. CODE § 13:13-4.2 (2010) (including pulling a wheelchair or retrieving dropped items in its definition of service animal).

an individual to the onset of a seizure are included in some states' definitions either as an example of the type of tasks the animal performs or as a separate section.³²⁶

E. Psychiatric Service Animals

Although many state laws focus on physical disabilities or do not specify mental disabilities in their laws, the State of Washington's definition of service animal includes animals "trained for the purpose of assisting or accommodating a person's sensory, mental, or physical disability."³²⁷

F. Emotional Support Animals

State laws deal with emotional support animals in various ways. An example is the prior Utah law that allowed for emotional support animals to be used by persons with disabilities in certain specified locations if the person has "specific documentation from a mental health therapist that the animal is needed in a particular location . . . by the person to address a mental health condition . . ."³²⁸ This definition allowed for "true" emotional support animals in the sense that there is no requirement that the animal must be individually trained to do work or perform tasks.³²⁹ The requirement that the mental health therapist be specific about the locations in which the animal is needed provides safeguards against the inappropriate use of these animals by persons without disabilities. The definition also specifically provides that a permissible location in which the emotional support animal is needed excludes restaurants, restricting the applicability of the term further. The definition of service animal in New York specifically exempts an "animal used for emotional support."³³⁰ North Dakota law also excludes from the definition of assistance dog, a dog "that is not trained to

326. See, e.g., MD. CODE REGS. 14.03.02.02(13)(c) (using, as an example of the tasks for service animals, "[a]lerting an individual with seizures to the onset of a seizure").

327. WASH. ADMIN. CODE § 162-26-040 (2009).

328. UTAH CODE ANN. § 62A-5b-102 (2007) (referencing the list of locations in § 62A-5b-102). Note that this law was amended in 2009 to delete the emotional support animal provision in Utah law. S.B. 173, 2009 Leg., Gen. Sess. (Utah 2009). Current Utah law has no reference to emotional support animals in its definition of disability. See UTAH CODE ANN. § 62A-5b-102 (2009).

329. See UTAH CODE ANN. § 62A-5b-102(7) (2007) (including a clause for emotional support animals under the definition of service animal).

330. N.Y. COMP. CODES R. & REGS. tit. 21, § 1040.2 (2009). Texas recently removed the definition of therapy dog from its administrative code provision relating to rabies. Previously therapy dog was defined as a "dog that helps a person with a diagnosed emotional disorder [to] whom a letter has been issued by a physician stating that the removal of the animal would be detrimental to the person's emotional health." 25 TEX. ADMIN. CODE § 169.22 (2006). Although using the terminology of therapy dog, the Texas definition appears to really be about emotional support animals. The current definition section in the Texas Administrative Code does not contain the terms therapy dog or emotional support dog. See 25 TEX. ADMIN. CODE § 169.22 (2008).

mitigate an individual's disability, but the presence of which is to provide for the comfort, protection, or personal defense of an individual."³³¹

G. Service Animals in Training

Unlike federal laws, several states have specifically provided that service animals in training should be accommodated in the same manner as service animals being used by a person with a disability.³³² One way states have accomplished this is by including service animals in training in the definition of service animal.³³³ Alternatively, states may have a separate statutory section that provides for trainers to have the same rights and privileges with respect to access to public facilities as a person with a disability.³³⁴ The ability to have public access with a service dog in training may be conditional on the handler's status—such as being from an accredited school for training service animals—and identification of the dog as being from an accredited school.³³⁵

H. Therapy Animals

A state may also extend the privileges of access to animals used for therapy.³³⁶ An example is Rhode Island, which allows for “family therapy pets” to have the access and transportation privileges that are provided to personal assistance animals.³³⁷ In order to qualify under the statute, the family therapy pet facilitator must meet a list of criteria, including successfully completing, or being in the process of completing, an accepted pet assisted therapy program³³⁸ and working in a predetermined medical or

331. N.D. CENT. CODE § 25-13-01.1 (2007).

332. *Clark County Sch. Dist. v. Buchanan*, 924 P.2d 716, 719 (Nev. 1996) (finding that a school would be considered a place for public accommodation and upholding an injunction against a school district that refused to allow a teacher who was training a service dog to have the dog in her classroom).

333. *See, e.g.*, UTAH CODE ANN. § 62A-5b-102(3) (2009) (including in the definition of service animal “an animal in training to become an animal described [above]”); MO. ANN. STAT. § 209.200(2) (West 2007) (defining service dog as a dog “that is being or has been specially trained . . .”).

334. *See, e.g.*, N.J. STAT. ANN. § 10:5-29.3 (West 2009) (providing that the trainer must be “engaged in the actual training process and activities of service dogs” and has “the same responsibilities as are applicable to a person with a disability”).

335. GA. CODE ANN. § 30-4-2(b)(3) (2007).

336. *See infra* notes 353–360.

337. R.I. GEN. LAWS § 40-9.1-5 (2009).

338. What is “accepted” is not defined in the statute. *Id.* § 40-9.1-5(f).

educational setting.³³⁹ The family therapy pet must have a current certificate of good health issued by a veterinarian, and must meet “temperament criteria” consisting of a certificate of good temperament for the animal and training criteria relating to the interaction.³⁴⁰ The privileges of access and transportation only apply “while the family therapy pet is on the way to or actively participating in a program.”³⁴¹ The approach in Rhode Island supports the state’s interest in encouraging pet therapy with appropriate safeguards to prevent abuse by persons who are not engaged in true pet therapy.

Utah law previously encouraged, but did not require, owners and operators of places of public accommodation to permit mental health therapists to be accompanied by a psychiatric therapy animal that is engaged in providing mental health therapy to a person with a disability.³⁴² State administrative code provisions permitting “pet therapy” or “animal assisted therapy” under certain conditions are quite common.³⁴³

VII. CONCLUSION: THE DIFFERING DEFINITIONS

In summary, service animal is defined under various laws as follows. The ADA’s regulations, both current and proposed, focus on individual training and a clear implication that the language of “perform work or do tasks” generally requires a service animal to perform physical tasks. The proposed regulations clarify that “emotional support animals”—which also could be described as animals that just do not meet the qualifications above, even if used to assist a person with a psychiatric disability that would meet the ADA’s definition of disability—do not need to be accommodated. The current and proposed ADA regulations continue to leave the proprietors of public accommodations with little guidance on how to deal with situations where an individual without an apparent disability purports to be accompanied by a service animal. Given that there are still cases occurring where individuals *with* apparent disabilities using service animals are refused service, it is clear that continuing education is necessary to ensure

339. *Id.* § 40-9.1-5(b).

340. *Id.* § 40-9.1-5(d). There is no definition of “current” in the statute. The certificate of good temperament must be issued by a certified or practicing dog trainer or animal behaviorist, and the training criteria must be “accepted in the field, specifically other pet assisted animal facilitators, veterinarians, dog trainers, animal behaviorists and the state of Rhode Island.” *Id.*

341. *Id.* § 40-9.1-5(e).

342. UTAH CODE ANN. § 62A-5b-104(5) (2007). This language in the Utah law was deleted in 2009. S.B. 173, 2009 Leg., Gen. Sess. (Utah 2009). The current provision does not reference psychiatric therapy animals in the course of providing mental health therapy. UTAH CODE ANN. § 62A-5b-104 (2009).

343. *See, e.g.*, ILL. ADMIN. CODE tit. 77, § 250.890 (2008); UTAH ADMIN. CODE r. 432-100-30 (2008) (setting forth rules if a hospital utilizes pet therapy).

that all individuals with disabilities, apparent or not, have the ability to benefit from the protections of the law.

Of course, the language in the proposed regulations limiting the species of animals that must be accommodated is a significant change in policy. Although a bright-line rule makes it easier to determine whether a service animal should be accommodated, it seems that society should be better able to meet the needs of individuals with disabilities that cannot use dogs as service animals.

In theory, the FHA allows for the broad definition of assistance animals that would include animals used to assist persons with psychiatric disabilities without the need to prove that the animal must perform specific physical tasks for the individual. There is not a specified process for determining whether such an animal should be allowed, without the possibility of considerable (likely acrimonious) exchanges between the individual and landlord. Although some courts have found that animals who do not perform specific physical tasks are not required to be allowed in housing as a reasonable accommodation, these courts, by applying the ADA definitions by analogy, have narrowed the FHA's definition to an inappropriate degree given HUD's guidance document and administrative actions.

The ACAA regulations benefit from more clarity on the use of psychiatric service animals and emotional support animals. The structure of allowing carriers to require current documentation with information in order to accommodate emotional support or psychiatric service animals allows for a straightforward application of the rule. The flexibility of the ACAA regulations on the species of animals would allow for a case-by-case analysis on the requirement of accommodation.

Finally, there are the state laws dealing with service animals. Of course, the application of the federal laws will control in the sense that a state cannot be more restrictive in its definitions if a federal law is applicable. In addition, many states have broadened the definition to allow for service animals in training or other specific extensions of coverage.

The proposed rules under the ADA specifically reflect that the term "service animal" under the ADA can be distinguished between the term "assistance animal" as used by HUD.³⁴⁴ The DOJ rejected commentators that suggested the term "service animal" be changed to "assistance animal" because it believed that, if it changed the term under the ADA, it would create confusion given the broader parameters for coverage under the

344. NPRM Title III, *supra* note 5, at 34,479.

FHA.³⁴⁵ This illustrates the fact that the DOJ distinguishes between the term “service animal” under the ADA and “assistance animal” used in a person’s residence under the FHA.³⁴⁶ The DOJ also distinguishes the term “psychiatric service animal” under the ADA, contrasting it with “emotional support” animals covered under the ACA.³⁴⁷ Clearly, the proposed regulations do not meet one of the DOJ’s stated goals—that of providing “greater consistency between the ADA standards and other federal and state accessibility requirements.”³⁴⁸

As illustrated above, it is controversial to narrow the scope of the definition of service animal under the ADA. The lack of clarity under the proposed and existing regulations will provide fodder for future disputes over access to public accommodations by persons with disabilities that are not apparent. In addition, the proposal to limit the species of animals that are covered under the ADA will certainly cause hardship to those currently using such animals. The proposal also limits the option of having a service animal to persons whose lifestyle and disability is compatible with the use of a dog.

If the DOJ restricts the species covered under the ADA, states may continue to provide protection for persons using service animals other than those covered by federal law. At a minimum, a lengthy phase-in period should be put in place to allow persons using miniature horses as service animals to continue to have access to public accommodations until a transition, if possible, can be made to a canine service animal.

There is some logic to using a restrictive definition of service animal under the ADA. Given that persons with apparent disabilities using guide dogs continue to have issues gaining access to public accommodations,³⁴⁹ perhaps our society is not ready to truly accept the premise of the ADA, that all types of disabilities³⁵⁰ should be accommodated. The opposite argument is that these types of cases just reinforce the need for further education about the role of service animals in our society.

There is obviously continuing concern by some places of public accommodation that individuals are bringing in personal companion animals and purporting that such animals are service animals. Even if such activity is on the rise, the response should not be to make it more difficult for persons with disabilities to be accompanied by their service animals, but, instead, to legislate for penalties against persons who are acting in a

345. *Id.*

346. *Id.*

347. *Id.*

348. DOJ Proposes New Rules, *supra* note 5.

349. *See supra* notes 175–212 and accompanying text.

350. *See supra* note 84. This presumes that such disability meets the standard of limiting a major life activity pursuant to the coverage of the ADA.

fraudulent manner. Ultimately, *any* service animal can be excluded from public accommodation if the animal is disruptive, allowing a business to exclude animals that cannot behave appropriately.

Even if the ADA has a restrictive definition of service animal,³⁵¹ it is appropriate to continue to provide more expansive coverage in other circumstances. In the area of housing, there has been a trend supporting the ability of persons to have companion animals in their homes.³⁵² Supported by studies showing the benefits of animal companionship, federal housing providers for the elderly and disabled, as well as public housing providers, are required to allow for companion animals in their units.³⁵³

The impact on other humans is also minimal when an animal, including an emotional support animal, is allowed into housing.³⁵⁴ Although most dogs require access to outdoor areas for toileting purposes, the ability of landlords to have reasonable rules mitigates any concerns over the impact on other tenants. In the case of other animals, the fact that other tenants may not even be aware that the animal is in the building weighs in favor of a tenant arguing for an exemption to the no-pets rule.

As to the ACAA, a strong argument can be made that the air carriers' own rules allowing other animals in the cabin supports broader coverage for service animals in this environment. Many airlines allow for passengers without disabilities to travel with their companion animals in the cabin of the aircraft.³⁵⁵ Generally, the types of animals that are allowed to travel in the aircraft's cabin are limited to cats and dogs,³⁵⁶ but some airlines also allow birds³⁵⁷ and rabbits.³⁵⁸ Airlines may put limits on the number of animals

351. See DOJ Proposes New Rules, *supra* note 5; *supra* notes 73–174 and accompanying text.

352. See *supra* notes 213–276 and accompanying text.

353. See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 90–97 (2005) (discussing the federal rule titled, Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped, the Pet Ownership in Public Housing Act, and similar state laws).

354. See *supra* notes 33–49 and accompanying text.

355. Not all airlines allow companion animals to travel in the cabin. Southwest Airlines previously only allowed “fully trained assistance animals accompanying a person with a disability or being delivered to a person with a disability.” Southwest Airlines Travel Policies, Animals and Pets, http://www.southwest.com/travel_center/animals.html (last visited Feb. 15, 2010). Southwest Airlines' current policy allows small cats and dogs. *Id.*

356. See, e.g., American Airlines, Traveling with Pets, <http://www.aa.com/aa/i18nForward.do?p=/travelInformation/specialAssistance/travelingWithPets.jsp> (last visited Feb. 15, 2010) (allowing only cats and dogs).

357. Air Tran, Traveling with a Pet, http://www.airtran.com/policies/pets.aspx?nav_id=220 (last visited Feb. 15, 2010) (allowing birds as well as dogs and cats).

358. Continental Airlines, In-cabin Pets, http://www.continental.com/web/en-US/content/travel/animals/in_cabin.aspx (last visited Feb. 15, 2010) (allowing cats, dogs, pet rabbits, and household birds).

traveling on each flight³⁵⁹ and on the weight of the animals.³⁶⁰ Of course, companion animals must be confined to a pet carrier with specified dimensions.³⁶¹

Given the air carriers' own rules, it would be inexplicable to narrow the definition of service animals in this context. Furthermore, the ACAA's current process, with its clear rules, appears to be working to a large degree and should not be altered to make it more difficult for persons with disabilities to be accompanied by their service animals.

There continue to be issues with public access for persons with disabilities. The government should consider the impact on persons with all types of disabilities prior to narrowing the coverage of service animals under the law. Given the growing number of Americans defined as disabled, as a society we should be working towards further accommodation of persons with disabilities rather than making it more difficult for them to navigate the world.

359. *See, e.g.*, American Airlines, Traveling with Pets, <http://www.aa.com/aa/i18nForward.do?p=/travelInformation/specialAssistance/travelingWithPets.jsp> (last visited Feb. 15, 2010) (setting a limit of seven pets on board each flight, two in the first-class cabin and five in coach and/or business class, with service animals excluded from the maximum number of animals allowed in the cabin).

360. Jet Blue Airlines, Traveling with Pets, [http://help.jetblue.com/SRVS/CGI-BIN/webisapi.dll?New,Kb=askBlue,case=obj\(2032\)](http://help.jetblue.com/SRVS/CGI-BIN/webisapi.dll?New,Kb=askBlue,case=obj(2032)) (last visited Feb. 15, 2010) (providing for a twenty pound weight limit for the animal and the animal's carrier).

361. *See, e.g.*, American Airlines, Traveling with Pets, <http://www.aa.com/aa/i18nForward.do?p=/travelInformation/specialAssistance/travelingWithPets.jsp> (last visited Feb. 15, 2010) (discussing the carrier restrictions and requiring that the "[a]nimal must be able to stand up, turn around and lie down in a natural position in the kennel").