# NACUA NOTES

National Association of College and University Attorneys January 10, 2019 | Vol. 17 No. 4

## TOPIC:

**Emotional Support Animals in Higher Education: Challenging Scenarios and Proposed Solutions**

## AUTHORS:

**Jeffrey J. Nolan, J.D.**[1], **Samantha Sears, J.D.**[2], **Kristopher Caudle, J.D.**[3]

## INTRODUCTION:

This NACUANOTE summarizes the state of the law and some of the public and scholarly discourse on emotional support animals ("ESAs"). It includes suggestions for colleges and universities, which generally have strict "no pets" policies, in their navigation of the issues posed by hosting ESAs on their campuses.[4]

## DISCUSSION:

### 1. Distinguishing Service Animals from ESAs

Before turning more specifically to the topic of ESAs, it is important to address and distinguish another category of animals that provides assistance to individuals with disabilities, which are designated by federal law and regulatory guidance as "service animals." The implementing regulations of the Americans with Disabilities Act of 1990[5] ("ADA") limit the scope of the "service animals" designation to dogs and miniature horses that are individually trained to do work or perform tasks for individuals with disabilities.[6] The work or task a service animal has been trained to perform must be directly related to the person's disability.[7] The implementing regulations require that campuses permit individuals with disabilities to be accompanied by their

service animals in all areas where other program participants or members of the public are allowed to go. The ADA regulations and applicable United States Department of Justice ("DOJ") guidance permit only two inquiries when it is not clear what service an animal provides: (1) is the animal a service animal required because of a disability? and (2) what work or task has the animal been trained to perform? Institutional representatives may not inquire regarding the handler's disability status, require proof of disability status, or require the animal to perform its trained tasks. They also cannot require removal of the service animal unless it "is out of control and the handler does not take effective action to control it" or it "is not housebroken."[8]

Thus, applicable law and guidance regarding *service animals* is very prescriptive, providing clear direction to campuses on their obligations to host service animals.[9] Specific guidance regarding the obligations of campuses to host *ESAs*, however, is more elusive. Colleges and universities have broader administrative discretion to determine whether to host ESAs. Because exercising that discretion can be complex, the remainder of this NACUANOTE clarifies the parameters of such discretion, highlights recurring challenges, and proposes approaches to exercise that discretion responsibly.

## 2. Legal Status of ESAs

The United States Department of Housing and Urban Development ("HUD"), which enforces The Fair Housing Act[10] ("FHA") defines an ESA[11] as an animal that provides emotional support or alleviates one or more of the identified symptoms or effects of a person's disability. ESAs do not have to be specially trained and are not restricted to dogs or miniature horses, but rather may span a broad range of species. When a housing-related issue involves an animal that does not meet the ADA's limited definition of a service animal, that issue is addressed primarily through the FHA, and not through the ADA.[12]

The most significant judicial analysis of ESAs in residence halls was provided in *U.S.A. v. University of Nebraska at Kearney*,[13] a case filed by the DOJ and HUD on behalf of a University of Nebraska at Kearney ("UNK") student after the university denied her request to keep an emotional support dog in her room. The threshold question in the case was whether a university residence hall is a "dwelling" covered by the FHA.[14] The university submitted a range of arguments as to why university residence halls should not be considered "dwellings" for FHA purposes,[15] but the court ruled that residence hall rooms do fit within the FHA's definition of "dwelling."[16] A settlement reached subsequently between the parties, which included an agreed-upon Assistance Animal Policy and Agreement,[17] remains a very instructive guide to what the DOJ and HUD found sufficient, and thus, casts light upon what they would be likely to approve and prohibit in the context of other campus ESA policies. Similarly instructive are a settlement and policy developed in a subsequent case, *U.S.A. v. Kent State University*.[18] Both are discussed in the Challenging Scenarios and Proposed Solutions section below.

The 2013 HUD Guidance (which was coincidentally issued a few days after the court's decision in the *UNK* case) provides insight into how HUD would enforce the FHA in the college and university residence hall context.[19] For example, the guidance outlines the inquiries that housing providers may make as follows: (1) does the person seeking to use and live with the animal have a disability; and (2) "[d]oes the person making the request have a disability-related need for an assistance animal? In other words, does the animal [serve as a service animal] or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?"[20] According to HUD, housing providers may require

documentation of a resident's disability-related need for an assistance animal. Specifically, the 2013 HUD Guidance provides commentary on this point:

> Housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal. If the disability is readily apparent or known but the disability-related need for the assistance animal is not, the housing provider may ask the individual to provide documentation of the disability-related need for an assistance animal. For example, the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability. Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support.[21]

The 2013 HUD Guidance comments further on the assistance animal approval process by noting that a housing provider may deny an individual's request to live with and use the animal if: "(1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation."[22] The guidance also notes in this context, however, that "[b]reed, size and weight limitations may not be applied to an assistance animal," and that exclusion of an animal because of direct threat or property damage concerns must be based on "an individualized assessment that relied on objective evidence about the specific animal's actual conduct—not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused."[23]

The *UNK* decision appears to represent the only judicial treatment of FHA/ESA issues in the college and university residence hall context. In the condominium and apartment building contexts, however, many court decisions and DOJ/HUD enforcement-related documents provide insight into some of the finer legal points that are likely to arise.

For example, on the issue of documentation, the court in *Bhogaita v. Altamonte Heights Condo. Ass'n*[24] determined that under the FHA, the Association constructively denied the plaintiff's requested accommodation by failing to render a timely decision, despite possessing "all the information essential to its determination."[25] The court also noted that the Association had requested information that "exceeded that essential for [its] critical inquiries," by requiring information beyond what was necessary to establish a qualifying disability, including information regarding treatment, medications, and the number of counseling sessions the plaintiff attended every week.[26]

## 3. Challenging Scenarios and Proposed Solutions

### A. Scope of ESA Access

One challenging scenario institutions may encounter involves students bringing their ESAs into non-residential campus spaces, such as dining halls or classrooms. Reference to the UNK and Kent State University policies suggests, however, that institutional policies may require that ESAs be confined to a resident's individually assigned residence hall room, except when it is

necessary for the animal to go outside for natural relief. The FHA does not apply to other non-residential campus buildings, and it does not appear that the ADA or Section 504[27] is currently being interpreted to require that ESAs be allowed in buildings other than an individual's assigned residence hall. Nonetheless, it would be wise for institutions that receive requests for ESA access to non-residential areas to follow their generally applicable procedures, and consider on an individualized, case-by-case basis whether allowing such access would be a reasonable accommodation. If an equally effective alternative accommodation is available, or if allowing the animal in facilities other than the residence hall would impose an undue administrative or financial hardship, or would otherwise constitute a fundamental alteration of implicated institutional programs (such as by limiting access to other students who have allergies or who are afraid of the ESA), the request to allow the animal in other facilities can be denied.[28]

### B. Care and Feeding Issues

Neglect of ESAs by their owners can pose significant challenges. We often hear of situations where an owner leaves an ESA in their room alone for extended periods of time, or even leaves campus for the weekend without taking the animal. Roommates are then often left to care for the animal, with varying degrees of enthusiasm. Ideally, situations like this should be anticipated in the applicable policy, and students should be required to agree in advance that they will not create such situations. Fortunately, the UNK and Kent State policies have excellent model language on this issue.[29] Both policies require owners to agree that the ESA will be well cared for at all times, and that the ESA will not be left alone or cared for by others overnight in the residence halls. The policies provide that the institution can order the animal removed if owners fail to carry out those responsibilities. Again, if the DOJ approved such language in the context of litigation, it is reasonable to assume that other colleges and universities can safely adopt similar policy language. Having students agree in advance to fulfill such responsibilities and the other responsibilities outlined in the UNK and Kent State policies is clearly preferable to dealing with problematic situations on an ad hoc basis, because ad hoc approaches are more likely to give rise to failure to accommodate or discrimination claims.

### C. Length of Stay Issues

It is also possible that ESAs can overstay their welcome. Both the UNK and Kent State policies provide that an ESA is only allowed to stay in a residence hall for as long as the owner has a disability-related need for the animal, and that owners are required to notify the university if the animal is no longer necessary or no longer in residence. We believe that other institutions could, and should, adopt policy language to this effect.

### D. Competing Interests

Competing allergy and phobia issues can also create significant challenges. We often hear concerns from clients that they will not be able to house a student with an ESA because other residential students will be allergic to the ESA. We would encourage institutions to anticipate such issues by providing in their residential contracts that the institution has discretion as to exactly where students will be housed, to require students seeking to live with an ESA to provide reasonable advance notice of their intent to do so (such as 60 days, as provided in the UNK agreement), and to require students to give consent for the institution to disclose to other students living nearby that an animal will be present, so that an inquiry can be made about potential allergy-related (or other) conflicts. Good policy language to this effect should allow institutions adequate time to identify and resolve potential conflicts between students.

We also often hear concerns that some ESAs will have conflicts with other ESAs (such as: dogs will chase cats, cats will chase birds, birds will chase snakes or vice versa).[30] We suggest that institutions review and consider adopting language found in the UNK and Kent State policies that was apparently designed to address such concerns. Both policies provide that an ESA must be under the owner's control at all times, that it must be properly contained or restrained when the owner is not present during the day, and that the owner must remove the animal if it poses a direct threat to the health or safety of others, causes substantial property damage, or creates an unmanageable disturbance or interference with the university community. If an institution finds that an ESA is engaging in behavior that actually causes such problems (and not merely causing speculation or fear that an animal might misbehave), it can take action to remove the animal. Policy language like that used in the UNK and Kent State policies could therefore help address concerns about conflicts between animals.

Further, we would encourage institutions that have good policy language to not be timid about enforcing it. Institutions have, for example, grown accustomed to enforcing reasonable conduct standards on students both with and without disabilities, and with the increasing numbers of ESAs on campus, institutions should similarly enforce reasonable ESA-related rules. Institutions that fail to do so risk losing control of their residence halls and permitting environments that could negatively impact other students.

### E. Institutional Property Damage Issues

Residence hall damage issues can be handled through policy language as well. Given the UNK policy language to the effect that UNK would not require individuals with disabilities to pay a surcharge or fee to have an ESA, it seems likely that the DOJ would object to an institution's requiring a prospective "animal deposit" from an individual who uses a service animal. This would be consistent with HUD guidance applicable to service animals and ESAs, which provides that requests to use such animals as reasonable accommodations may not be conditioned on payment of a fee or deposit. However, there should be no barrier to charging an owner reasonably for damage actually caused by an ESA (or a service animal), on the same basis as charges would be levied for damage caused by a human. The UNK and Kent State policies both require that owners must agree in advance to be responsible if such damages occur, and also must agree to a range of other responsibilities. We recommend that institutions review the UNK and Kent State policies closely and consider adopting their terms on these points because, again, they provide means for the institutions to recover costs associated with damage and pest control issues caused by ESAs in ways that are, apparently, acceptable to the DOJ and HUD.

### F. Potential Institutional Liability for Damages Caused by ESAs

As noted above, the FHA recognizes that a landlord may lawfully solicit information from tenants to evaluate whether a requested ESA is a reasonable accommodation for a tenant with a disability. Further, landlords may lawfully deny a request for ESAs if they pose a "direct threat to the safety and health of others," or if they would cause "substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation."[31] The additional discretion afforded to landlords under the ESA framework, calls into question the extent to which colleges and universities may be liable, under a negligence theory, for subsequent injury to other residents, visitors, or their property by an approved ESA, or for the failure to remove an ESA after a college or university becomes aware of any such damage or injury.

In general, in order to prevail on a negligence claim, an injured party would have to prove that (1) the college or university owed her a duty of reasonable care, (2) it breached that duty, (3) damage resulted, and (4) there was a causal relationship between the breach and the damage or injury suffered. It is generally difficult to establish that non-owners who are not exercising direct control over animals owe injured parties a duty to protect them from damage caused by the animals. As courts have recognized, "we do not [generally] owe others a duty to take action to rescue or protect them from conditions we have not created."[32] Some courts, however, have concluded that colleges and universities foster expectations, "at least for their residential students, that reasonable care will be exercised to protect them from harm."[33] In other words, it may be possible to establish a "special relationship" giving rise to "a duty of reasonable care with regard to the risks that arise within the scope of that relationship" between post-secondary institutions and students who live on campus.[34]

In most cases that we reviewed, the owner of the animal, and not the landowner, was held liable for any damages caused by their animal's actions. In those instances where landlords did face liability, some individualized knowledge about the danger of the animal or some level of control over the animal was required.[35] However, those cases did not involve college or university housing, and, therefore, did not address the heightened scrutiny that may befall post-secondary institutions in similar contexts, particularly in a jurisdiction that has concluded that there is a "special relationship" between the institutions and their residential students.

Even in cases not involving colleges or universities, however, courts consistently conclude that landlords are responsible for maintaining common areas of leased space in a safe condition, which may include implementing controls to account for the presence of animals in the landlord's facilities.[36] Hallways, stairwells, bathrooms, and study rooms are just *some* of the numerous common areas that students share in on-campus housing. In some circumstances, a landlord may also be held liable for animal-related injuries that occur *off* of leased premises.[37] Unlike other multi-resident facilities (such as apartment complexes), colleges and universities typically maintain control over a wide range of real estate on campus outside of residence halls, such as parking lots, sidewalks, and athletic fields.

The potential vulnerability of colleges and universities in these contexts counsels in favor of implementing a thoughtful process for evaluating requests for ESAs. This should include soliciting and evaluating information about each specific ESA's background, including, for example, whether the requested ESA has ever injured another person or animal.[38] This potential vulnerability also highlights the importance of requiring that any damage or injury be timely reported to an appropriately designated institutional office, and of responding in a timely and appropriate manner to reports of damage or injury caused by ESAs. An informal survey of university websites suggests that a number of institutions have already adopted this approach, and there are many models available for campuses implementing these protocols.[39]

## 4. Developing an Assistance Animal Advisory Group and Policy

Given the complex regulatory issues surrounding both service animals and ESAs, it is advisable to, at a minimum, invite campus partners who may have a role in your campus's compliance with relevant law and policy to join a formal or informal multi-disciplinary advisory group, to ensure that they are appropriately trained and that their expertise is utilized appropriately. We recommend including individuals who receive and evaluate requests for ESAs as well as those charged with receiving and responding to complaints about animals on campus. While there is no one-size-fits-all approach, common participants in this group include: (1) Disability Services Representatives, (2) Housing Administrators, (3) Campus Police and Public Safety, (4) Campus

Veterinarians, (5) Mental Health Professionals, and (6) Legal Counsel and Risk Management Professionals.

Disability Services Representatives generally play a vital role in evaluating requests for ESAs, including, but not limited to, evaluating whether individuals should be required to submit documentation establishing they have a disability and whether approval of an ESA would constitute a reasonable accommodation for an established disability in the relevant circumstances. In order to effectively evaluate the reasonableness of a particular ESA in campus housing, the Disability Services Representative should independently develop sufficient familiarity with the affected living space or collaborate with campus partners who already have that familiarity in advance of issuing a response. Failure to do so in advance of approving a request could give rise to health or safety concerns by, for example, permitting students to house animals in spaces that are not large enough to accommodate the animals, or by unwittingly approving incompatible animals in spaces that are proximate to each other.

Housing Administrators should also be involved in the evaluation of the reasonableness of a requested ESA, given the administrators' greater familiarity with the relevant facilities, including both the private living spaces and common areas that may be impacted. Involving Housing Administrators in the decision-making process also provides them with notice of the need to implement protocols for accommodating approved animals, which is particularly important if the facility has historically maintained a "no-pets" policy. Such protocols might include:

> (1) maintaining a chart identifying rooms where approved animals reside in order to allow timely evaluation of complaints regarding violations of any no-pet policy, to avoid placing incompatible animals proximate to each other, and to serve as a guide for housekeeping and other staff members who may have to access the rooms to do their jobs;
> (2) providing staff with proposed responses to inquiries or complaints about approved animals that do not disclose the affected students' disability status; and
> (3) identifying campus contacts for responding to health and safety concerns caused by assistance animals or for responding to students' failure to adhere to mandatory health and safety expectations.

Institutions should consider including Campus Police or Public Safety Officers in the conversation as well, to ensure that the officers are advised about the lawful exceptions to campus policies that may otherwise restrict the presence of animals on campus. They should be trained regarding the limits on inquiries that can be made regarding service animals and also should be provided guidance regarding whether and under what circumstances campuses may lawfully require removal of approved assistance animals that pose a health or safety threat. Campus Police and Public Safety Offices may also be able to facilitate verification of the licensed status[40] of ESAs, as appropriate.

Many campuses also include campus veterinarians in the ESA evaluation process, given the expertise they can lend to the evaluation of whether it is reasonable to allow a requested animal in the affected living space. Although most campuses do not have veterinary medicine programs, many have veterinarians on staff or on contract to facilitate compliance with federal animal welfare regulations that apply to scientific research conducted on campus. These individuals may have the availability to support review of requested assistance animals; if not, contracting with local veterinarians for this purpose may be a useful alternative.

Mental health professionals[41] also provide valuable contributions to these conversations, given their familiarity with the mental health issues that may underlie and be ameliorated by

ESAs. They may also provide critical insight regarding how to effectively evaluate the legitimacy of documentation provided by students in support of ESA requests, particularly in light of the increasing prevalence of certifications from online vendors. Involving mental health professionals in these conversations will also facilitate development of lawful and ethically sound inquiries regarding whether the ESA requested will ameliorate a substantiated disability.

Finally, Legal Counsel and Risk Management Professionals should be available to provide support and counsel to the group regarding the myriad federal and state laws and institutional policies that may apply to hosting assistance animals on campus. Ultimately, legal counsel should provide guidance regarding whether the campus should adopt an Assistance Animal Policy and what that policy should provide, and should ensure that clients are appropriately informed regarding the legality and advisability of existing institutional assistance animal policies and practices.

## CONCLUSION:

There is no question that hosting ESAs on campus can pose challenges for colleges and universities. Nonetheless, if reliable documentation establishes that an ESA is necessary to allow an individual with a disability access to our residential programs, we must accept that and work with the individual in good faith. At the same time, we can maintain control over our residence halls and promote other residents' safety and enjoyment of the halls by requiring individuals with ESAs to agree to reasonable control and care policies like those referenced above, and enforcing those policies diligently where necessary. Finally, our handling of ESA-related issues can be enhanced if we work with a multi-disciplinary group of colleagues to ensure a coordinated, well-informed response when our campus residents request the opportunity to live with an ESA.

## RESOURCES:


Kent State University, *Policy on Reasonable Accommodations and Assistance Animals in University Housing* (last visited Jan. 4, 2019).

University of Nebraska at Kearney, *Assistance Animal Policy and Agreement* (Sept. 2015).

U.S. DEP'T OF HOUS. AND URBAN DEV., NOTICE: SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS, 1 (2013).


## END NOTES:

[1] Jeffrey J. Nolan, J.D. is an attorney with Dinse, P.C., where he is Chair of the firm's Education Practice Group. Mr. Nolan advises, trains, and represents clients and conducts investigations nationally on matters that involve Title IX, the Clery Act, threat assessment and management, the ADA, FERPA, applicable employment laws, and/or other laws that apply in the higher education context.

[2] Sam Sears is Deputy General Counsel at the University of North Carolina at Charlotte.

[3] Kris Caudle is an education attorney who has advised K-12 public school districts on First Amendment issues, employment disputes, and special education litigation. Mr. Caudle is the current Legal Fellow at the University of North Carolina at Charlotte.

[4] The authors would like to thank the NACUA peer reviewers for their careful review and thoughtful suggestions, which were much appreciated.

[5] 42 U.S.C. § 12131 (2010) *et seq.* (Title II, applicable to public entities such as public colleges and universities); 42 U.S.C. § 12182 (2010) *et seq.* (Title III, applicable to private places of public accommodation, such as private colleges and universities).

[6] 28 C.F.R. § 35.104 (2010) (Title II); 28 C.F.R. § 36.104 (2010) (Title III).

[7] *Id*.

[8] *Id*.

[9] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, SERVICE ANIMALS: ADA 2010 REVISED REQUIREMENTS (2011).

[10] 42 U.S.C. § 3601 (1988) *et seq*.

[11] HUD often uses the term "assistance animal" to refer to animals that would qualify as service animals under the ADA and to animals that would not qualify as service animals but that provide emotional and other support to individuals with disabilities. To promote clarity, we will refer to the latter as ESAs wherever possible throughout the remainder of this NACUANOTE.

[12] *See* U.S. DEP'T OF HOUS. AND URBAN DEV., NOTICE: SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS, 1 (2013) (noting that ADA's limitation of service animals to dogs and its exclusion of ESAs "does not limit housing providers' obligations to make reasonable accommodations for assistance animals under the FHAct or Section 504."); Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 FR 51203, 51211, 51211 n.12 (Aug. 11, 2016) (in responding to commenter's "concern that there has been an increase in requests for 'exotic or untrained animals as service or 'emotional support animals' in student housing provided by postsecondary institutions," the DOJ noted that "neither 'exotic animals' nor 'emotional support animals' qualify as service animals" under ADA regulations. The DOJ also noted, however, that "[a]s in other types of housing environments, students who wish to have emotional support animals in housing provided by their place of education may make those requests under the Fair Housing Act, 42 U.S.C. 3601 *et seq*., and not the ADA.").

[13] 940 F.Supp.2d 974 (D. Neb. 2013).

[14] Under the FHA, "'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families...." 42 U.S.C. § 3602(b) (2016).

[15] For example, UNK argued that its students were "transient" visitors who do not have an "intent to return" to university housing, that most identify permanent residences elsewhere, that university housing serves distinctly pedagogical ends, and that subjecting university housing to the FHA would alter how colleges and universities operate. *United States v. Univ. of Neb. at Kearney*, 940 F.Supp.2d at 977-983.

[16] The Court reasoned that dormitory rooms were "residential" and "dwellings" because students "eat their meals, wash their laundry, do their schoolwork, socialize, and sleep there, just as people do in the places they call home," *id*. at 978 (citing cases holding that boarding schools are dwellings covered by the FHA), that students are not "transient" just because they intend, at some point, to leave, *id*. at 978-979

(citing cases holding that housing for migrant farm workers and halfway houses for recovering substance abusers are dwellings covered by the FHA), that while there may be educational features to university housing its fundamental character is still to serve as a dwelling, and that a HUD regulation, which was entitled to "considerable deference," included "dormitory rooms" in a list of covered dwellings. *Id*. at 981 (citing 24 C.F.R. § 100.201).

[17] University of Nebraska at Kearney, *Assistance Animal Policy and Agreement* (Sept. 2015).

[18] *See* Consent Decree, *United States v. Kent State Univ.*, No. 5:14-cv-1992-JRA (N.D. Ohio 2016); Kent State University, *Policy on Reasonable Accommodations and Assistance Animals in University Housing* (last visited Jan. 4, 2019).

[19] Significantly, the guidance matter-of-factly states HUD's position that the FHA and Section 504 require public and private educational institutions to allow individuals with disabilities to use service and non-service assistance animals in their housing. U.S. Dep't of Hous. and Urban Dev., *supra* note 12, at 1, 1 n.2.

[20] *Id.* at 3.

[21] *Id.* at 3-4.

[22] *Id*. at 3 (emphasis in original).

[23] *Id*. (emphasis in original). *See Castellano v. Access Premier Realty*, 181 F.Supp.3d 798 (E.D. Ca. 2016) (finding that an apartment community failed to conduct individualized assessment of a tenant's emotional support cat when it relied on general concerns about health and safety and produced no objective evidence of a specific harm to contradict the tenant's assertions that her cat was "neutered, vaccinated, and housebroken."). The vaccination and licensing rules applicable to service animals also apply to ESAs. Since ESAs do not need to be trained in any particular task, there would be no basis for asking about their training. Again, the relevant question for ESAs is whether they provide emotional support or alleviate one or more of the identified symptoms or effects of a person's disability.

[24] 765 F.3d 1277 (11th Cir. 2014).

[25] *Id.* at 1287.

[26] *Id*.

[27] *See* Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (2015).

[28] *See* U.S. Dep't of Hous. and Urban Dev., *supra* note 12, at 3 (summarizing considerations for housing policies).

[29] University of Nebraska at Kearney, *supra* note 17; Kent State University, *supra* note 18.

[30] Conversely, individuals often make requests that they be allowed to live with more than one ESA, based on the rationale that the type of animal they prefer as an ESA, such as a sugar glider or a mouse, is "social" in nature and "requires" another ESA in order for it to thrive. The legal status of this sort of request is relatively clear: absent differential treatment of some sort, humans with disabilities living in institutional housing are entitled to ESAs; ESAs *themselves* are not protected by the FHA. This does not mean, of course, that an institution could not decide to grant such a request, if they determine that the particular request, and similar requests likely to be received in the future, can be managed without undue disruption. And an individual who requires different animals to address different disabilities or to alleviate different symptoms of the same disability may be reasonable in requesting multiple ESAs.

[31] U.S. Dep't of Hous. and Urban Dev., *supra* note 12, at 3.

[32] *Cermins v. Clancy*, 415 Mass. 289, 296 (1993).

[33] *Nguyen v. Mass. Inst. of Tech.,* 479 Mass. 436, 455, 96 N.E.3d 128, 144 (2018) (citing *Mullins v. Pine Manor Coll.,* 389 Mass. 47, 52, 54, 449 N.E.2d 331 (1983)). *See also Regents of Univ. of Cal. v. Superior Court*, 4 Cal. 5th 607, 413 P.3d 656 (2018) (holding that a university had a duty of care to protect the student from foreseeable violence during her on-campus chemistry lab).

[34]*See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(a) (2012).

[35] *See e.g. Stokes v. Lyddy*, 75 Conn. App. 252 (2002) (concluding that Defendant landlords were not "owners, keepers or harborers of the dog that bit Plaintiff under a 'recognized' keeper duty."); *Georgianna v. Gizzy*, 483 N.Y.S. 2d 892 (1984).

[36] *See e.g., Barrwood Homeowners Ass'n, Inc. v. Maser*, 675 So. 2d 983, 984 (Fla. Dist. Ct. App. 1996) (holding that a homeowner's association could be held liable for a dog attack occurring in a "common area" if the homeowner's association had knowledge of the dog's "vicious propensities."); *Vasques v. Lopez*, 509 So. 2d 1241 (Fla. Dist. Ct. App. 1987) (holding that there was "sufficient evidence for a jury to infer that a landlord had knowledge of a vicious dog's presence and that the landlord had the ability to control of the premises.").

[37] For example, in *Park v. Hoffard*, 847 P.2d 853 (1993), a tenant's dog attacked a child in a parking lot adjacent to the leased property and a parent sued the landlord of the leased property for physical injuries to his child. Plaintiff claimed that the landlord knew the tenant's dog had previously been quarantined for biting other children, that the tenant allowed the dog to roam the premises without a leash and that the dog was able to jump over the fenced-in portion of the leased property. The court held that a landlord (not just the tenant dog owner) may be liable for physical injuries caused by a tenant's animal where, as here, the landlord consented to a tenant's activity and knew that it involved an unreasonable risk of harm to other persons off the rental property.

[38] It may be tempting, for administrative efficiency and to mitigate risks, to deny requests for assistance animals that are associated with "dangerous breeds." According to one resource, there are currently over 900 cities in the United States that have ordinances which identify certain breeds of dogs as "dangerous breeds" and either prohibit ownership of the animals or set very strict parameters around ownership of the animals. *See* DogsBite.org, Breed-Specific Laws State-by-State (last visited Jan. 7, 2018). Miami-Dade County in Florida, for example, has required that "[n]o pit bull dogs …be sold, purchased, obtained, brought into Miami-Dade County, or otherwise acquired by residents of Miami-Dade County," since the ordinance originally took effect in 1990. The basis for the restriction is detailed in the ordinance, which refers to "the severe harm and injury which is likely to result from a pit bull dog attack." HUD guidance, however, instructs that disallowing assistance animals based on breed or "mere speculation" about the types of damage a particular breed may cause is not appropriate, and further instructs that landlords, instead, make determinations using *objective* evidence about the *actual conduct* of the *specific* animal in question. While HUD does not speak specifically to the impact of a breed restriction ordinance on this guidance, at least one federal district court has concluded that a landlord who relies on any such ordinance to deny a request for an assistance animal may run afoul of the FHA. *See Warren v. Delvista Towers Condominium Association, Inc*., 49 F.Supp.3d 1082 (S.D. Fla 2014). In *Warren*, the court concluded that a landlord's reliance on the Miami-Dade County ordinance referenced above to deny a tenant's request to house a pit bull in her condominium presented "'an obstacle' to the objectives of Congress in enacting the FHA, by allowing a condominium complex to prevent equal opportunities in housing based on the breed of a dog." *Id*.

[39] A good starting point for model policies are the UNK and Kent State policies, referenced earlier in this Note.

[40] DOJ guidance clarifies that service animals are subject to state and local licensing and vaccination laws, suggesting that institutions can and should ensure ESAs comply with such requirements as well. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA (2015). In fact, the DOJ-vetted UNK assistance animal policy

referenced above includes a provision requiring that assistance animal owners “abide by current city, county, and state ordinances, laws, and/or regulations pertaining to licensing, vaccinations, and other requirements for animals” and reserves an institutional “right to require documentation of compliance with such ordinances, laws, and/or regulations” including a “vaccination certificate.” *See supra* note 17, at 17.

[41] Your campus mental health professionals may receive requests from students to certify their need for an ESA. It is, therefore, important that they understand that ESAs only enjoy protection under the FHA if they service a “disability,” which, per applicable legal definitions, is limited to impairments that “substantially limit one or more major life activity.” An article published in *Professional Psychology: Research and Practice* notes that the requirement of a substantial limitation would exclude requests based on “discomfort, attachment to, or just wanting to be with an animal.” Jeffrey N. Younggren, et al, “Examining Emotional Support Animals and Role Conflicts in Professional Psychology,” *Professional Psychology: Research and Practice* (August 2016). The same article calls into question the ethics of a treating professional, who is ethically obligated to serve as a patient advocate, objectively evaluating the merits of the patient’s ESA certification request. The article suggests referring patients to a neutral third party for that purpose, in order to ensure that the treating professional’s role as advocate does not cloud the neutrality required to evaluate the merits of an ESA certification. The article also warns of potential legal or ethical implications for fraudulently certifying that an animal is a service animal or ESA. In a *Counseling Today* article, psychologist Cynthia Chandler advises against identifying a specific animal in ESA certifications, referencing the absence of federal laws requiring the animals to be trained or certified and the potential “for some of these animals to be unpredictable and cause harm.” Cynthia Chandler, “Confirming the Benefits of Emotional Support Animals,” *Counseling Today* (April 2015). The author suggests recommending that “clients [independently] have their pets evaluated by a qualified evaluator before designating the pets to serve as ESAs.” Such evaluations may also assist campus decision-makers in their determination regarding the suitability of the ESA for the affected living space.

**NACUANOTES Issues | Contact Us | NACUA Home Page**

**NACUANOTES Copyright Notice and Disclaimer**

Copyright 2019 by Jeffrey J. Nolan, J.D., Samantha Sears, J.D., Kristopher Caudle, J.D. NACUA members may reproduce and distribute copies of NACUANOTES to other members in their offices, in their law firms, or at the institutions of higher education they represent if they provide appropriate attribution, including any credits, acknowledgments, copyright notice, or other such information contained in the NACUANOTE.

Disclaimer: This NACUANOTE expresses the viewpoints of the authors and is not approved or endorsed by NACUA. This NACUANOTE should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.