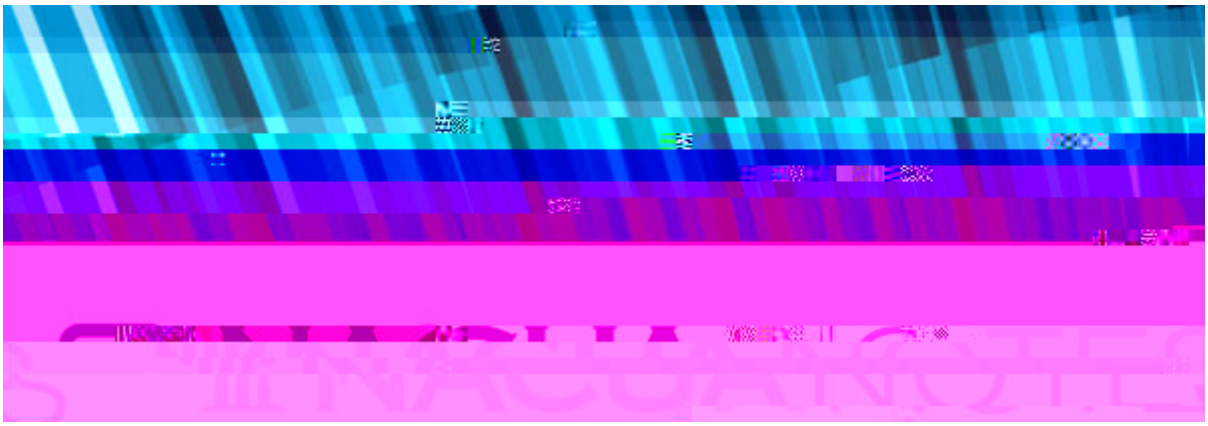

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TOPIC:

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

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INTRODUCTION:

This NACUANOTE summ by hosting [4] SAs on their campuses.

DISCUSSION:

another category of animals that provides sistance to indiv designated by federal law and regulatory guidance as service regulations of the Americans wh Disabilities Act of 10 5

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The work or task a service animal has been trained to perform must be directly related to the person's disability. The implementing regulations require that campuses permit individuals wh disabilities to be accompanied by their

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 an6 (n)10.5 (j1/Span -).rolocoTc 0.00e

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

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[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 Sers

[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, “Exam